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Contents

Federal Register

Vol. 82, No. 11

Wednesday, January 18, 2017

Agricultural Marketing Service

PROPOSED RULES

National Organic Program:

Sunset 2017 Amendments to National List, 5431–5438
Organic Research, Promotion, and Information Orders,
5438–5445, 5746–5788

Agriculture Department

See Agricultural Marketing Service

See Animal and Plant Health Inspection Service

See Rural Housing Service

Animal and Plant Health Inspection Service

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals:

Cooperative Agricultural Pest Survey, 5530

Federally Recognized State Managed Phytosanitary
Program, 5530–5531

Importation of Avocados From Continental Spain, 5528–
5529

Importation of Emerald Ash Borer Host Material From
Canada, 5526–5527

Importation of Fresh Apricots From Continental Spain,
5529–5530

Importation of Fresh Beans, Shelled or in Pods, From
Jordan Into the Continental United States, 5527–5528

Interstate Movement of Fruit From Hawaii, 5524–5525

Biotechnology Regulatory Services BQMS Program;
Updates, 5523–5524

Determinations of Nonregulated Status:

Scotts Co. and Monsanto Co., Creeping Bentgrass
Genetically Engineered for Resistance to Glyphosate,
5525–5526

Environmental Assessments; Availability, etc.:

Field Testing Vaccine for Use Against Infectious Bursal
Disease, Marek's Disease, and Newcastle Disease,
5522–5523

Finding of No Significant Impact for Biological Control
Agent for Giant Reed, 5522

Architectural and Transportation Barriers Compliance Board

RULES

Information and Communication Technology Standards and
Guidelines, 5790–5841

Army Department

NOTICES

Environmental Impact Statements; Availability, etc.:

Dakota Access, LLC's Request for Easement to Cross Lake
Oahe, ND, 5543–5544

Bureau of Consumer Financial Protection

NOTICES

Compliance Bulletins:

Detecting and Preventing Consumer Harm From
Production Incentives, 5541–5543

Census Bureau

NOTICES

Requests for Nominations:

2020 Advisory Committee, 5532–5533

Centers for Disease Control and Prevention

NOTICES

Environmental Assessments; Availability, etc.:

Mosquito Control Activities Funded by HHS/CDC To
Combat Zika Virus Transmission in United States,
5577–5578

Centers for Medicare & Medicaid Services

RULES

Medicaid Program:

Use of New or Increased Pass-Through Payments in
Medicaid Managed Care Delivery Systems, 5415–
5429

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals, 5578

Coast Guard

PROPOSED RULES

Safety Zones:

San Francisco, CA, 5482–5485

Special Local Regulations:

Pago Pago Harbor, American Samoa, 5480–5482

Commerce Department

See Census Bureau

See Economic Development Administration

See National Institute of Standards and Technology

See National Oceanic and Atmospheric Administration

Comptroller of the Currency

RULES

Community Reinvestment Act Regulations, 5354–5356

Defense Department

See Army Department

PROPOSED RULES

Federal Acquisition Regulations:

Sustainable Acquisition, 5490–5499

NOTICES

Meetings:

Defense Science Board, 5544–5545

Economic Development Administration

NOTICES

Meetings:

National Advisory Council on Innovation and
Entrepreneurship, 5533

Education Department

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals:

Evaluation of Comprehensive Technical Assistance
Centers, 5547

General Education Provisions Act Section 427 Guidance
for All Grant Applications, 5546–5547

Integrated Postsecondary Education Data System 2017–18 Through 2019–20, 5547–5548
Principal Follow-Up Survey to National Teacher and Principal Survey, 5545–5546

Employee Benefits Security Administration

RULES

Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 5373–5387

Employment and Training Administration

RULES

Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 5373–5387

Energy Department

See Energy Efficiency and Renewable Energy Office
See Federal Energy Regulatory Commission

RULES

Energy Conservation Programs:
Standards for Dedicated-Purpose Pool Pumps, 5650–5743

PROPOSED RULES

Energy Conservation Programs:
Standards for Dedicated-Purpose Pool Pumps, 5446–5454

NOTICES

Export Electric Energy; Applications:
BP Energy Co., 5548–5549

Energy Efficiency and Renewable Energy Office

NOTICES

Requests for Information:
Challenges and Opportunities for Sustainable Development of Hydropower in Undeveloped Stream Reaches of the United States, 5549–5550

Environmental Protection Agency

RULES

National Emission Standards for Hazardous Air Pollutants:
Ferroalloys Production, 5401–5409
Pesticide Tolerances:
Acequinocyl, 5409–5415

Farm Credit Administration

NOTICES

Market Access Agreements, 5565–5576

Federal Aviation Administration

RULES

Airworthiness Directives:
Airbus Airplanes, 5362–5365
Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.) Airplanes, 5356–5359
Diamond Aircraft Industries GmbH Airplanes, 5359–5362
Fokker Services B.V. Airplanes, 5365–5367

PROPOSED RULES

Airworthiness Directives:
GROB Aircraft AG Gliders, 5456–5458
Rolls-Royce plc Turbofan Engines, 5454–5456

Federal Deposit Insurance Corporation

RULES

Community Reinvestment Act Regulations, 5354–5356

Federal Energy Regulatory Commission

NOTICES

Applications:

Sabine River Authority of Texas; Sabine River Authority, State of Louisiana, 5555–5556

Certificates of Public Convenience and Necessity:

Eastern Shore Natural Gas Co., 5564–5565
Combined Filings, 5551–5553, 5557–5559, 5561

Complaints:

American Municipal Power, Inc. v. PJM Interconnection, LLC, 5556

Calpine Corp., Dynegy Inc.; Eastern Generation, LLC; Homer City Generation, LP; et al. v. PJM Interconnection, LLC, 5560–5561

Declaratory Orders; Petitions:

Stakeholder Midstream Crude Oil Pipeline, LLC, 5561–5562

Environmental Assessments; Availability, etc.:

Columbia Gas Transmission, LLC, 5556–5557
National Fuel Gas Supply Corp., 5562–5563

Filings:

Western Area Power Administration, 5559–5560
Wheatridge Wind Energy, LLC, 5557

Initial Market-Based Rate Filings Including Requests for

Blanket Section 204 Authorizations:

Appleton Coated, LLC, 5560
Stream Energy Connecticut, LLC, 5551–5552
Stream Energy Delaware, LLC, 5550–5551
Stream Energy Illinois, LLC, 5560
Stream Energy Indiana, LLC, 5550
Stream Energy Massachusetts, LLC, 5563
Stream Ohio Gas and Electric, LLC, 5556

Meetings:

Dominion Cove Point LNG, LP; Technical Conference, 5562

Meetings; Sunshine Act, 5553–5555

Records Governing Off-the-Record Communications, 5559

Revocations of Market-Based Rate Tariffs:

Bargain Energy, LLC; CES Placerita, Inc.; DES Wholesale, LLC; et al., 5562

Staff Attendances, 5563–5564

Federal Highway Administration

RULES

National Performance Management Measures:

Assessing Pavement Condition for National Highway Performance Program and Bridge Condition for National Highway Performance Program, 5886–5970
Assessing Performance of National Highway System, Freight Movement on Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 5970–6050

Federal Reserve System

RULES

Community Reinvestment Act Regulations, 5354–5356

NOTICES

Changes in Bank Control:

Acquisitions of Shares of a Bank or Bank Holding Company, 5577

Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 5576–5577

Federal Transit Administration

NOTICES

National Public Transportation Safety Plan, 5628–5636
Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects, 5636–5638

Fish and Wildlife Service**NOTICES**

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Import of Sport-Hunted African Elephant Trophies, 5596–5597
- Charter Renewals:
Trinity River Adaptive Management Working Group, 5595–5596
- Environmental Assessments; Availability, etc.:
National Bison Range, Moiese, MT, Comprehensive Conservation Plan, 5597–5598

Food and Drug Administration**NOTICES**

- Determinations That Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness:
SYMMETREL (Amantadine Hydrochloride), Syrup, 50 milligrams/5 Milliliters, 5580–5581
- Guidance:
Assessment of Abuse Potential of Drugs, 5581–5583
Considerations in Demonstrating Interchangeability With Reference Product, 5579–5580
Prohibition of Distributing Free Samples of Tobacco Products, 5583–5584

Foreign Assets Control Office**NOTICES**

- Blocking or Unblocking of Persons and Properties, 5646–5647

General Services Administration**PROPOSED RULES**

- Federal Acquisition Regulations:
Sustainable Acquisition, 5490–5499

Government Accountability Office**NOTICES**

- Request for Nominations:
Medicare Payment Advisory Commission, 5577

Health and Human Services Department

- See* Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Food and Drug Administration
See Health Resources and Services Administration
See Indian Health Service
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration

RULES

- Confidentiality of Substance Use Disorder Patient Records, 6052–6127

PROPOSED RULES

- Confidentiality of Substance Use Disorder Patient Records, 5485–5490

Health Resources and Services Administration**NOTICES**

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
NURSE Corps Loan Repayment Program, 5584–5585

Homeland Security Department

- See* Coast Guard
See U.S. Citizenship and Immigration Services

Housing and Urban Development Department**PROPOSED RULES**

- Housing Opportunity Through Modernization Act:
Implementation of Various Section 8 Voucher Provisions, 5458–5473

NOTICES

- Community Development Block Grant Disaster Recovery Grantees:
Allocations, Common Application, Waivers, and Alternative Requirements, 5591–5595

Indian Affairs Bureau**PROPOSED RULES**

- Membership of Bureau of Indian Education Accountability Negotiated Rulemaking Committee, 5473–5476

Indian Health Service**NOTICES**

- Reimbursement Rates for Calendar Year 2017, 5585

Institute of Museum and Library Services**NOTICES**

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Museums Empowered: Professional Development and Capacity Building Opportunities for Museums—
Museums for America Special Initiative, 5609–5610
Museums for All Program Evaluation, 5608–5609

Interior Department

- See* Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
See Ocean Energy Management Bureau
See Reclamation Bureau

Internal Revenue Service**RULES**

- Certain Transfers of Property to Regulated Investment Companies and Real Estate Investment Trusts, 5387–5388

Inversions and Related Transactions:

- Guidance for Determining Stock Ownership, 5388–5401

PROPOSED RULES

- Definitions of Qualified Matching Contributions and Qualified Nonelective Contributions, 5477–5480
Inversions and Related Transactions; Cross-Reference to Temporary Regulations, 5476–5477
Inversions and Related Transactions; Partial Withdrawal, 5476

Labor Department

- See* Employee Benefits Security Administration
See Employment and Training Administration
See Mine Safety and Health Administration
See Occupational Safety and Health Administration
See Wage and Hour Division
See Workers Compensation Programs Office

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Claim for Reimbursement of Benefit Payments and Claims Expense under War Hazards Compensation Act, 5607–5608

Land Management Bureau**NOTICES**

Environmental Impact Statements; Availability, etc.:

- Vantage to Pomona Heights 230 kV Transmission Line Project in Grant, Kittitas, and Yakima Counties, WA; Record of Decision, 5599–5600

Plats of Surveys:

- Arizona, 5599

Mine Safety and Health Administration**RULES**

Department of Labor Federal Civil Penalties Inflation

- Adjustment Act Annual Adjustments for 2017, 5373–5387

National Aeronautics and Space Administration**PROPOSED RULES**

Federal Acquisition Regulations:

- Sustainable Acquisition, 5490–5499

National Foundation on the Arts and the Humanities

See Institute of Museum and Library Services

National Highway Traffic Safety Administration**NOTICES**

Federal Motor Vehicle Theft Prevention Standard;

Exemption Approvals:

- General Motors, LLC, 5642–5644

Petitions for Inconsequential Noncompliance; Approvals:

- General Motors, LLC, 5644–5645

- Mercedes-Benz USA, LLC, 5640–5641

Petitions for Inconsequential Noncompliance; Denials:

- BMW Group of America, LLC, 5641–5642

- PACCAR, Inc., 5638–5639

National Institute of Standards and Technology**NOTICES**

Requests for Nominations:

- National Institute of Standards and Technology Federal Advisory Committees, 5533

National Institutes of Health**NOTICES**

Charter Renewals:

- National Toxicology Program Special Emphasis Panel, 5588

Meetings:

- National Institute of Dental and Craniofacial Research, 5586

- National Institute of Diabetes and Digestive and Kidney Diseases, 5586–5587

- National Institute of Mental Health, 5587–5588

National Mediation Board**NOTICES**

Agency Information Collection Activities; Proposals,

- Submissions, and Approvals, 5610–5611

National Oceanic and Atmospheric Administration**RULES**

Pacific Island Fisheries:

- Main Hawaiian Islands Deep 7 Bottomfish; Annual Catch Limit and Accountability Measures, 5429–5430

PROPOSED RULES

Fisheries of Caribbean, Gulf of Mexico, and South Atlantic:

- Snapper-Grouper Fishery of South Atlantic Region; Amendment 36, 5512–5517

International Fisheries:

- 2017 and 2018 Commercial Fishing Restrictions for Pacific Bluefin Tuna in Eastern Pacific Ocean, 5508–5512

Pacific Island Fisheries:

- 2016 Annual Catch Limits and Accountability Measures, 5517–5521

NOTICES

Applications:

- Marine Mammals; File No. 20294, 5538–5539

Fisheries of Exclusive Economic Zones Off Alaska:

- Exempted Fishing Permit Applications, 5539–5541

Fisheries of Exclusive Economic Zones Off Alaska:

- Groundfish of Gulf of Alaska; Central Gulf of Alaska Rockfish Program; Standard Prices and Fee Percentage, 5533–5535

Meetings:

- Coral Reef Conservation Program, 5535–5536

- Fisheries of Gulf of Mexico and South Atlantic; Southeast

- Data, Assessment, and Review; Pre-Workshop

- Webinar for Southeastern U. S. Black Grouper, 5536

Permits:

- Endangered Species; File Nos. 19641, 17861, 20314, 20340, 20347, 20351, 20528, 20548, and 20651, 5536–5538

National Park Service**PROPOSED RULES**

General Provisions; Electronic Cigarettes; Withdrawal, 5485

Neighborhood Reinvestment Corporation**NOTICES**

Meetings; Sunshine Act, 5611

Nuclear Regulatory Commission**PROPOSED RULES**

Certificate of Compliance Corrections and Revisions;

- Regulatory Issue Summary, 5445–5446

NOTICES

Combined License Applications:

- Duke Energy Progress; Shearon Harris Nuclear Power Plant Units 2 and 3, 5611–5613

Occupational Safety and Health Administration**RULES**

Department of Labor Federal Civil Penalties Inflation

- Adjustment Act Annual Adjustments for 2017, 5373–5387

Ocean Energy Management Bureau**NOTICES**

Atlantic Wind Lease Sales:

- Commercial Leasing for Wind Power on Outer Continental Shelf Offshore Kitty Hawk, NC, 5600–5606

Personnel Management Office**RULES**

Medical Qualification Determinations, 5340–5354

Recruitment and Selection Through Competitive

- Examination, 5335–5340

Pipeline and Hazardous Materials Safety Administration**PROPOSED RULES**

Hazardous Materials:

- Volatility of Unrefined Petroleum Products and Class 3 Materials, 5499–5508

Presidential Documents**PROCLAMATIONS**

Birmingham Civil Rights National Monument; Establishment (Proc. 9565), 6151–6157
California Coastal National Monument; Boundary Enlargement (Proc. 9563), 6129–6144
Cascade-Siskiyou National Monument; Boundary Enlargement (Proc. 9564), 6145–6150
Freedom Riders National Monument; Establishment (Proc. 9566), 6159–6163

EXECUTIVE ORDERS

Sudan: Recognizing Positive Government Actions and Revoking Certain Sanctions (EO 13761), 5331–5333

ADMINISTRATIVE ORDERS

Middle East Peace Process, Terrorists Who Threaten To Disrupt; Continuation of National Emergency (Notice of January 13, 2017), 6165

Railroad Retirement Board**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 5613–5615

Reclamation Bureau**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 5606–5607

Rural Housing Service**NOTICES**

Meetings:
Section 538 Guaranteed Rural Rental Housing Program 2017 Industry Forums, 5531–5532

Securities and Exchange Commission**RULES**

Adjustments to Civil Monetary Penalty Amounts, 5367–5373

NOTICES

Applications:
Owl Rock Capital Corp., et al., 5623–5627
Meetings; Sunshine Act, 5615
Self-Regulatory Organizations; Proposed Rule Changes:
Bats EDGA Exchange, Inc., 5619–5622
Bats EDGX Exchange, Inc., 5615–5619

Small Business Administration**NOTICES**

Interest Rates, 5627

Meetings:

Interagency Task Force on Veterans Small Business Development, 5627

Social Security Administration**RULES**

Evaluation of Medical Evidence, 5844–5884

State Department**NOTICES**

Culturally Significant Objects Imported for Exhibition: Medici's Painter: Carlo Dolci and 17th-Century Florence, 5627–5628
Designations and Determinations Pursuant to Foreign Missions Act, 5628

Substance Abuse and Mental Health Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 5588–5590

Transportation Department

See Federal Aviation Administration

See Federal Highway Administration

See Federal Transit Administration

See National Highway Traffic Safety Administration

See Pipeline and Hazardous Materials Safety Administration

NOTICES

Contracting Initiative, 5645–5646

Treasury Department

See Comptroller of the Currency

See Foreign Assets Control Office

See Internal Revenue Service

U.S. Citizenship and Immigration Services**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Refugee/Asylee Relative Petition, 5590–5591

U.S.-China Economic and Security Review Commission**NOTICES**

Public Hearings, 5647

Wage and Hour Division**RULES**

Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 5373–5387

Workers Compensation Programs Office**RULES**

Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 5373–5387

Separate Parts in This Issue**Part II**

Energy Department, 5650–5743

Part III

Agriculture Department, Agricultural Marketing Service, 5746–5788

Part IV

Architectural and Transportation Barriers Compliance Board, 5790–5841

Part V

Social Security Administration, 5844–5884

Part VI

Transportation Department, Federal Highway Administration, 5886–6050

Part VII

Health and Human Services Department, 6052–6127

Part VIII

Presidential Documents, 6131–6165

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR	578.....5373
Proclamations:	579.....5373
9563.....6131	801.....5373
9564.....6145	825.....5373
9565.....6151	1903.....5373
9566.....6159	2560.....5373
Executive Orders:	2575.....5373
13067 (Revoked in	2590.....5373
part by 13761).....5331	30 CFR
13412 (Revoked by	100.....5373
13761).....5331	33 CFR
Administrative Orders:	Proposed Rules:
Notices:	100.....5480
Notice of January 13,	165.....5482
2017 .....6165	36 CFR
5 CFR	1193.....5790
330.....5335	1194.....5790
332.....5335	Proposed Rules:
337.....5335	1.....5485
339.....5340	2.....5485
7 CFR	40 CFR
Proposed Rules:	63.....5401
205.....5431	180.....5409
1255 (2 documents) .....5438,	42 CFR
5746	2.....6052
10 CFR	438.....5415
431.....5650	Proposed Rules:
Proposed Rules:	2.....5485
72.....5445	48 CFR
431.....5446	Proposed Rules:
12 CFR	2 (3 documents) .....5490
25.....5354	4 (3 documents) .....5490
195.....5354	7 (3 documents) .....5490
228.....5354	11 (3 documents) .....5490
345.....5354	23 (3 documents) .....5490
14 CFR	36 (3 documents) .....5490
39 (4 documents) ...5356, 5359,	39 (3 documents) .....5490
5362, 5365	42 (3 documents) .....5490
Proposed Rules:	52 (3 documents) .....5490
39 (2 documents) ....5454, 5456	49 CFR
17 CFR	Proposed Rules:
201.....5367	171.....5499
20 CFR	172.....5499
404.....5844	173.....5499
416.....5844	174.....5499
655.....5373	177.....5499
702.....5373	178.....5499
725.....5373	179.....5499
726.....5373	180.....5499
23 CFR	50 CFR
490 (2 documents) .....5886,	665.....5429
5970	Proposed Rules:
24 CFR	300.....5508
Proposed Rules:	622.....5512
982.....5458	665.....5517
983.....5458	
25 CFR	
Proposed Rules:	
30.....5473	
26 CFR	
1 (2 documents) .....5387, 5388	
Proposed Rules:	
1 (3 documents) .....5476, 5477	
29 CFR	
500.....5373	
501.....5373	
530.....5373	
570.....5373	

Presidential Documents

Title 3—**Executive Order 13761 of January 13, 2017****The President****Recognizing Positive Actions by the Government of Sudan and Providing for the Revocation of Certain Sudan-Related Sanctions**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. 7201–7211) (TSRA), the Comprehensive Peace in Sudan Act of 2004, as amended (Public Law 108–497) (CPSA), the Darfur Peace and Accountability Act of 2006 (Public Law 109–344) (DPAA), and section 301 of title 3, United States Code,

I, BARACK OBAMA, President of the United States of America, find that the situation that gave rise to the actions taken in Executive Order 13067 of November 3, 1997, and Executive Order 13412 of October 13, 2006, related to the policies and actions of the Government of Sudan has been altered by Sudan's positive actions over the past 6 months. These actions include a marked reduction in offensive military activity, culminating in a pledge to maintain a cessation of hostilities in conflict areas in Sudan, and steps toward the improvement of humanitarian access throughout Sudan, as well as cooperation with the United States on addressing regional conflicts and the threat of terrorism. Given these developments, and in order to see these efforts sustained and enhanced by the Government of Sudan, I hereby order:

Section 1. Effective July 12, 2017 and provided the criteria in section 12(b) of this order are met, sections 1 and 2 of Executive Order 13067 of November 3, 1997, are revoked, and Executive Order 13412 of October 13, 2006, is revoked in its entirety. The revocation of those provisions of Executive Order 13067 and of Executive Order 13412 shall not affect any violation of any rules, regulations, orders, licenses, or other forms of administrative action under those orders during the period that those provisions were in effect.

Sec. 2. Pursuant to section 908(a)(3) of TSRA, I hereby determine that it is in the national security interest of the United States to waive, and hereby waive, the application of section 908(a)(1) of TSRA with respect to Sudan.

Sec. 3. Pursuant to section 6(d) of CPSA, I hereby determine and certify that it is in the national interest of the United States to waive, and hereby waive, the application of sections 6(a) and (b) of CPSA.

Sec. 4. The function of the President under section 6(c)(1) of CPSA is assigned to the Secretary of the Treasury.

Sec. 5. The functions of the President under section 6(c)(2) and the last sentence of section 6(d) of CPSA are assigned to the Secretary of State, except that the function of denial of entry is assigned to the Secretary of Homeland Security.

Sec. 6. The function of the President under section 8 of DPAA is assigned to the Secretary of State.

Sec. 7. The Secretary of the Treasury and the Secretary of Commerce are authorized to issue regulations, licenses, and orders, and conduct such investigations as may be necessary, to implement the provisions of section 906 of TSRA.

Sec. 8. This order is not intended to, and does not, otherwise affect the national emergency declared in Executive Order 13067 of November 3, 1997, as expanded in scope by Executive Order 13400 of April 26, 2006, which shall remain in place.

Sec. 9. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

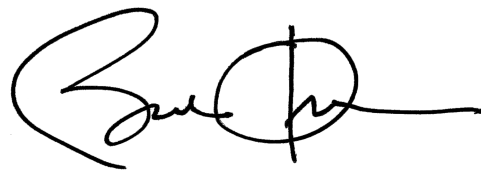
Sec. 10. On or before July 12, 2017, the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, and based on a consideration of relevant and credible information from available sources, including nongovernmental organizations, shall provide to the President a report on whether the Government of Sudan has sustained the positive actions that gave rise to this order, including carrying out its pledge to maintain a cessation of hostilities in conflict areas in Sudan; continued improvement of humanitarian access throughout Sudan; and maintaining its cooperation with the United States on addressing regional conflicts and the threat of terrorism. As much of the report as possible, consistent with sources and methods, shall be unclassified and made public.

Sec. 11. (a) The Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, and based on a consideration of relevant and credible information from available sources, including nongovernmental organizations, shall provide to the President an updated version of the report required in section 10 of this order annually thereafter. As much of the report as possible, consistent with sources and methods, shall be unclassified and made public. To the extent a report concludes that the Government of Sudan has or has not sustained the positive actions that gave rise to this order, the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, shall provide to the President recommendations on appropriate U.S. Government responses.

(b) Concurrent with the provision of the reports required in section 11(a) of this order, the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, shall publish a notice in the *Federal Register* stating whether the Government of Sudan has sustained the positive actions that gave rise to this order.

Sec. 12. (a) This order is effective on January 13, 2017, except for sections 1, 4, 5, 6, and 7 of this order;

(b) Sections 1, 4, 5, 6, and 7 of this order are effective on July 12, 2017, provided that the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, has published a notice in the *Federal Register* on or before that date, stating that the Government of Sudan has sustained the positive actions that gave rise to this order and that the Secretary of State has provided to the President the report described in section 10 of this order.

A handwritten signature in black ink, appearing to be "Donald Trump", with a large circular flourish and a horizontal line extending to the right.

THE WHITE HOUSE,
January 13, 2017.

Rules and Regulations

Federal Register

Vol. 82, No. 11

Wednesday, January 18, 2017

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 330, 332, and 337

RIN 3206-AN46

Recruitment and Selection Through Competitive Examination

AGENCY: U.S. Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing an interim rule to implement the Competitive Service Act of 2015 to allow an appointing authority (*i.e.*, the head of a Federal agency or department) to share a competitive certificate with one or more appointing authorities for the purpose of making selections of qualified candidates. The intended effect of this rule is to facilitate the hiring of top talent across Federal agencies.

DATES: Interim rule effective February 17, 2017; comments must be received on or before March 20, 2017.

ADDRESSES: You may submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this proposed rulemaking.

You may also send, deliver, or fax comments to Kimberly A. Holden, Deputy Associate Director for Recruitment and Hiring, Employee Services, U.S. Office of Personnel Management, Room 6500 AI, 1900 E Street NW., Washington, DC 20415-9700; email at employ@opm.gov or by fax at (202) 606-4430.

FOR FURTHER INFORMATION CONTACT: Roseanna Ciarlante by telephone on (267) 932-8640, by fax at (202) 606-

4430, by TTY at (202) 418-3134, or by email at Roseanna.Ciarlante@opm.gov.

SUPPLEMENTARY INFORMATION: On March 18, 2016, the Competitive Service Act of 2015 (the “Act”) was enacted as Public Law 114-137. The Act allows an “appointing authority” to share a competitive certificate issued under delegated examining procedures with one or more “appointing authorities” to make an appointment to a position that is in the same occupational series, grade level (or equivalent), and duty location during the 240-day period beginning on the date of issuance of the certificate of eligibles.

Under current rules, an appointing authority may share a certificate *within* the bureaus and components of his or her department or agency. The current practice allows an appointing authority to expedite hiring when multiple vacancies for the same position exist throughout his or her organization. For example, suppose that the Department of Treasury headquarters human resources (HQ HR) office recruits for a Financial Management Specialist, GS-501-12, and hires two highly qualified individuals from the certificate of eligibles. Treasury’s HQ HR office may currently share the certificate with its components, like the Bureau of the Fiscal Service and the Internal Revenue Service, that have identified Financial Management Specialist vacancies that need to be filled. This current practice allows these different components with the Department to leverage the recruitment efforts already undertaken by the Department.

While the Act does not define “appointing authority” for the purpose of shared certificates, its clear purpose is to expand current practice to allow an appointing authority to share his or her certificates with an appointing authority in *other* departments or agencies, not just within the same agency (*e.g.*, the Department of Treasury will now be able to share certificates with the Department of Energy). Consistent with this purpose, in this interim rule, OPM refers to the “original hiring agency” and the “receiving agency” with respect to shared certificates, rather than using the more generic term “appointing authority.”

Congress’s purpose in enacting the Act was to help facilitate faster hiring through the sharing of talent across the Government by permitting agencies to

share resumes and select from among candidates who have competed for similar positions at another hiring agency, were assessed, and were referred by that agency. The new process will benefit agencies who may make selections from among the top rated applicants readily available, as well as applicants who through one job application may now be considered for more public service opportunities in their desired Federal occupation.

The law specifies that an appointing official can select an applicant for appointment from the certificate of another agency provided that certain conditions are met.

- The hiring agency seeking to share the certificate may share the certificate with one or more hiring agencies only if the announcement of the original position stated that the resulting certificate may be used by one or more Federal agencies, and applicants “opt-in,” electing to have their applications shared with agencies other than the agency posting the job announcement.

- An agency seeking to use another agency’s certificate must provide advance notice of the available position to its own employees, give them up to 10 days to apply, and review their qualifications before it can make a selection from the certificate from the original hiring agency.

It is plain from the Act that only the original hiring agency may “share” a certificate with any other agency. But Congress did not define precisely what it means to “share” the certificate. One possible approach is that when the original hiring agency “shares” the certificate with other agencies they must simultaneously work the certificate in a coordinated fashion, accounting for declinations, failures to respond, selections, and so on as if they were integrated arms of the same employer. (This is how the process might work when a department shares a certificate among a number of its different components.) Another possible approach is that each of the other agencies may work the certificate independently, as if the certificates had been referred from the top of a register or inventory. Neither of these approaches is compelled by the text of the statute and as such OPM has determined that the most reasonable approach, and the one that best effectuates Congress’s apparent purpose,

is the latter of the two. A shared certificate of eligibles may be used by a receiving agency independently of other receiving agencies. Each receiving agency is responsible for establishing a unique instance of a case file to document that agency's use of the certificate. This will be helpful in the event a receiving agency must later reconstruct its hiring actions. Allowing multiple agencies to use certificates independently of one another also supports the timeliest and practical implementation of these provisions and minimizes the risk of error associated with multiple agencies simultaneously working the same certificate.

However, because of the added complexity of any "sharing" of certificates, the ability to track the distribution of certificates to receiving agencies must be a feature of these provisions. Thus, whenever the original agency shares a certificate, it must maintain a record of any agencies with whom the certificate was shared. This is important in the event any errors occur which require reconstruction of all hiring actions which flow from a certificate generated by the original agency. In this scenario, if an error occurs at the original agency, the original agency is responsible solely for notifying each succeeding receiving agency that received a shared certificate of the error. Any corrective actions or reconstructions subsequent to the original agency's would be the responsibility of each receiving agency that made a selection.

How It Will Work

The original hiring agency (*i.e.*, the agency sharing the certificate) must issue a certificate in accordance with competitive examining procedures for a position it is seeking to fill. This includes public notice, rating and ranking, the application of veterans' preference, etc. The 240-day window (during which other Federal agencies may use the certificate of eligibles to select an individual) begins on the date the certificate is issued by the original hiring agency. OPM notes that the Competitive Service Act includes this 240-day window in 5 U.S.C. 3318, related to rule-of-three hiring, but does not expressly repeat this requirement in 5 U.S.C. 3319, related to hiring through category rating. However, the legislative history expresses congressional intent to apply the 240-day limitation to both hiring methods. *See* H.R. Rep. No. 114–367 (Dec. 3, 2015); S. Rep. No. 114–143 (Sept. 15, 2015). Moreover, there is no logical reason to have different expiration periods for shared certificates depending on whether the original

hiring agency chooses to hire by the rule-of-three method or the category rating method, and having two different expiration periods for shared certificates could lead to confusion. For this reason we are applying the same 240-day expiration period to shared certificates under both hiring methods.

The original hiring agency can (1) make a selection and then share the certificate with one or more receiving agencies or (2) share the certificate with one or more receiving agencies after reviewing, and deciding not to hire from, its certificate of eligible applicants. OPM notes in this regard that when an agency announces a position, examines and rates applicants, and issues a certificate of eligibles, it must do so for its own hiring needs in the first instance. An agency may not generate a certificate solely for the purpose of sharing it with another agency. That would be misleading to applicants and contrary to competitive principles.

If the original hiring agency makes a selection and shares the certificate, any pass-overs of preference eligibles or objections to other eligible candidates must be resolved by that agency before the certificate may be shared with another agency. The 240-day window cannot be extended while the pass-over of a preference eligible or objection request is being resolved; the law does not permit extensions of shared certificates.

Once the above processes have been completed, the original hiring agency may share the certificate of eligibles with one or more Federal agencies. In order to share a certificate, the Delegated Examining Unit (DEU) of the original agency may transmit the certificate to a DEU of a receiving agency. The DEU of the original agency must audit the original agency's own use of the certificate in accordance with the procedures of the Delegated Examining Operations Handbook (DEOH) before the certificate is shared.

When sharing a certificate of eligibles, the original agency must include all documentation pertaining to the creation of that certificate (*e.g.*, the job analysis, a copy of job opportunity announcement, the rating schedule, job applications, etc.) and must safeguard (*i.e.*, redact) any personally identifiable information not required by the receiving agency to use the certificate for its intended purpose. The original agency shares the certificate of eligibles in its original form, with the names of those applicants who have been selected and those who have chosen not to "opt-in" redacted, in order to retain the

original ordering of the certificate subject to these appropriate deletions.

The original agency may share a certificate in one or both of two ways: (1) Simultaneous sharing with multiple agencies; and (2) serial sharing, *i.e.*, sharing with one agency at a time.

Simultaneous Sharing. The original agency may share the certificate with one or more agencies at the same time. Each receiving agency works the certificate independently. All selections from shared certificates must be made within 240 days of the date of the issuance of the certificate by the original agency. Each receiving agency creates its own case file for audit and reconstruction purposes, documenting its compliance with the DEOH and all applicable regulations.

Serial Sharing. Another option is for the original agency to share a certificate with just one agency at a time. Under this option, the original agency shares the certificate with the first receiving agency. The first receiving agency works the certificate and makes selections within 240 days of the date of issuance of the certificate by the original agency. After sharing the certificate with the first receiving agency, the original agency may share the certificate with a second receiving agency. The second receiving agency works the certificate and makes selections within 240 days of the date of issuance of the certificate by the original agency. Each receiving agency must create its own case file for audit and reconstruction purposes, documenting its compliance with the DEOH and all applicable regulations. This process may continue to additional receiving agencies as long as this procedure is followed and all selections are made within 240 days of the date of issuance of the certificate by the original agency.

As noted above, the processes are not exclusive, *i.e.*, an agency may start with simultaneous sharing and subsequently permit additional sharing through a serial sharing scenario.

In the event that the original agency determines that an error was made on the original certificate, the original agency must notify all receiving agencies of the details of the error; receiving agencies are responsible for taking appropriate action to address any erroneous actions that may have occurred due to the error by the original agency.

The Internal Application Process

Before using a shared certificate, a receiving agency must consider its own employees for the position under the agency's merit promotion procedures. This includes considering individuals

covered under the agency's Career Transition Assistance Program (CTAP) and the agency's reemployment priority list (RPL), where applicable, as well as other individuals for which consideration is required as part of the internal selection process. *See* 5 CFR part 330, subparts B and F.

The Competitive Service Act provides for notice to a receiving agency's own employees, an internal application period of no more than 10 days, and consideration of the internal applicants before a selection can be made from this shared certificate. The law does not permit an extension of this internal application period beyond 10 days.

The law also specifies that the internal application process is subject to applicable collective bargaining obligations (to the extent consistent with law). However, the Competitive Service Act does not affect the provision of the Federal Service Labor-Management Relations Statute under which management has the right to fill a position either from among properly ranked and certified candidates for promotion or from any other appropriate source, such as a competitive certificate. *See* 5 U.S.C. 7106(a)(2)(C); 5 CFR 330.102, 335.103(b)(4).

If a receiving agency makes a selection from among its own employees (*i.e.*, under merit promotion procedures) the process ends with respect to that agency. But if the agency wishes to make a selection from the shared certificate (after first considering its own employees), it must first provide selection priority, where applicable, to individuals eligible under the Interagency Career Transition Assistance Program (ICTAP) who applied to the original job announcement. *See* 5 CFR part 330, subpart G. The agency is not required to re-advertise the position for ICTAP eligibles because the original agency has already afforded an opportunity for ICTAP eligibles to apply and be considered. This allows the agency to use a ready-made certificate of eligibles while still adhering to the provisions of part 330, subpart G.

If there are no ICTAP eligibles, a receiving agency can make a selection from the shared certificate in accordance with veterans' preference rules and the provisions governing selections under competitive examining procedures. A receiving agency may not reassess the applicants for purposes of rating/ranking. A receiving agency may seek to pass over a preference eligible, and would follow the usual rules for doing so when filling positions under competitive examining procedures.

Authorized Appointment Types

OPM is proposing to limit use of shared certificates to delegated examining for permanent and term appointments. We are excluding temporary appointments, *i.e.*, those not to exceed one year, from these provisions because of the requirement that a receiving agency must first consider individuals from within its own workforce prior to making a selection from a shared certificate. We believe it would be inefficient to undergo this process for appointments of a very short duration.

Positions may be full-time or other than full-time (*i.e.*, part-time, seasonal, on-call, and intermittent). As noted above, the original hiring agency must complete all of its actions on the certificate before it may be shared. As also was previously observed, the original hiring agency does not have to make a selection in order for the certificate to be shared. The original agency may share the certificate with one or more agencies.

Requirement for Appointment at a "Similar Grade Level"

A receiving hiring agency may select an individual from a shared certificate only for a position of the same occupational series, grade level, and duty location as the position advertised by the original hiring agency. The Act states that the shared certificate may also be used to select for a "similar grade level" to that for which the original hiring agency issued its certificate. OPM interprets the term "similar grade level" in this context to mean a corresponding rate or level of pay under an alternative pay system for a position excluded from the General Schedule. We do not interpret the term "similar grade level" to mean a higher or lower General Schedule grade than that for which the original hiring agency issued its certificate. It would not be efficient for an agency to use a certificate for higher-graded positions to select for lower-graded positions, and it would violate competitive principles to use a certificate for lower-graded positions to select for higher-graded positions (as different applicants would have competed if they had been aware that the vacancy could be filled at a higher level than advertised). For the same reasons OPM is not permitting the use of shared certificates to fill vacancies for positions with higher full performance levels.

Qualification Requirements

A receiving agency must verify through its job analysis that the

minimum qualification requirements (including use of any selective placement factors) and competencies—or knowledge, skills, and abilities (KSAs)—assessed for the original position are appropriate for the position to be filled. This verification is necessary to establish the job-relatedness and relevance of the assessment method used, consistent with 5 CFR part 300, subpart A.

Time Limit for Applicant Selection

A receiving agency may make its selection from a shared certificate within the 240-day period beginning on the date the original hiring agency issued the certificate of eligibles (not on the date on which the original hiring agency provided the certificate to the receiving agency).

Public Notice by the Original Hiring Agency

The original hiring agency must provide public notice via a job opportunity announcement posted on www.USAJOB.gov for the position being filled, in accordance with public notice requirements for filling jobs under the competitive examining process. The original announcement must indicate that the resulting list of eligible candidates may be shared with one or more other hiring agencies. Therefore, we are amending 5 CFR part 330 to require that if an agency is sharing a certificate of eligibles under part 332, the original hiring agency must provide notice in the job opportunity announcement that the resulting list of eligible candidates may be used by one or more other hiring agencies. The original hiring agency must provide an opportunity for applicants to "opt-in" to have their applications and other personal information shared with one or more other hiring agencies under these provisions. This allows the applicant to furnish advance written consent for disclosure of the information under the Privacy Act. *See* 5 U.S.C. 552a(b).

The original hiring agency may not share a certificate containing the name and personal information of an applicant unless that applicant has chosen to "opt-in" for these purposes. If an applicant chooses not to "opt-in," his/her application materials will not be shared and the applicant will receive no further consideration when a certificate of eligibles is shared with one or more hiring agencies. His or her name will be redacted on the shared certificate.

The Receiving Agency's Notice to Internal Applicants

Before making a selection from a shared certificate, a receiving agency

must notify its employees of the opportunity to apply and be considered before a selection can be made from the shared certificate and of a period of up to 10 days to apply consistent with the provisions of part 335. If the agency has RPL eligibles or CTAP eligibles, the notice must provide information about their priority.

The Receiving Agency's Notice to Shared Certificate Applicants

Before using a shared certificate, a receiving agency must notify the list of candidates of its receipt of their names and application materials and its intention of considering them for a position. A receiving agency must also inform these individuals of its obligation to consider applicants from within its own workforce who apply during the required internal application period and any other individuals the agency is required to consider (*e.g.*, individuals eligible for consideration under the CTAP or from the RPL). The notification must include the agency, position title, series, grade level (or equivalent), and duty location.

The Receiving Agency's Selection Process

Before using a shared certificate, a receiving agency must consider its own employees for the position that the original hiring agency advertised. The receiving agency must consider individuals covered under the agency's RPL or CTAP where applicable. At this point, a receiving agency either makes a selection from among its own employees under merit promotion procedures, or it may consider applicants from the certificate of eligibles shared by the original hiring agency.

If, after considering its own employees, a receiving agency wishes to make a selection from the shared certificate, it must first provide selection priority to any external applicants who applied to the original job announcement who are ICTAP eligible. If there are no ICTAP eligibles who met the well-qualified definition, a receiving agency can make a selection from the shared certificate in accordance with veterans' preference rules and the provisions governing selections under competitive examining procedures. Upon completion of the process, a receiving agency must audit the certificate.

Objections/Pass Overs

Objections to a non-preference eligible applicant and requests to pass over an individual entitled to veterans' preference must be adjudicated on a

case-by-case basis. Each case must be reviewed on its own merits. Therefore, adjudications by the original hiring agency (or the Office of Personnel Management in the case of a 30 percent or more disabled veteran) sustaining objections or granting requests to pass over do not extend to the receiving agency if a certificate is shared. A receiving agency may object to an applicant or request to pass over an individual entitled to veterans' preference on a shared certificate in accordance with the procedures outlined in the DEOH and the provisions of part 332.

Likewise, if using numerical rating, the consideration of an applicant by the original hiring agency does not count as a consideration of the applicant by a receiving agency for purposes of the three-consideration rule, 5 CFR 332.405. The three-consideration rule does not apply when using category rating.

Documentation

When sharing a certificate of eligibles, the original hiring agency must share all documentation pertaining to the creation of that certificate, including but not limited to the job analysis, testing and examination materials, the job opportunity announcement, and applications, as relevant. The original agency must safeguard any personally identifiable information not needed for effective use of the certificate by the receiving agency.

The original hiring agency and any receiving agency using a shared certificate must each maintain case file documentation for that agency's selection or selections sufficient for each agency that used the certificate to make a selection to reconstruct its own hiring actions later, if necessary. Each time a certificate is shared, each receiving agency is responsible for creating a new instance of a case file to document its use.

In the event that the original agency determines that an error was made on the original certificate, the original agency must notify all receiving agencies of the details of the error. The original hiring agency must make available, to any receiving agency that needs it, all relevant case file documents concerning the selection or selections made by the original agency, as necessary, to make full reconstruction possible. Each receiving agency would be responsible for taking appropriate action to address any erroneous actions that it took due to the error by the original agency.

Each agency is responsible for the proper selection, audit, recordkeeping, etc., of delegated examining activities.

All actions taken on competitive certificates must be documented in accordance with the DEOH and all applicable regulations.

Request for Comments

OPM welcomes recommendations on rule changes to improve the administration of the Competitive Service Act of 2015 and on implementation guidance.

Technical Amendment

OPM is also amending § 337.304 to reflect the Act's renumbering of 5 U.S.C. 3319.

Waiver of Notice of Proposed Rulemaking

Section 2(d) of Public Law 114–137, the Competitive Service Act of 2015, directs the rulemaking procedure to be followed for this rule. It states that “the Director of the Office of Personnel Management shall issue an interim final rule with comment to carry out the amendments made by this section.” Therefore the general notice of proposed rulemaking typically required for rulemaking under 5 U.S.C. 553(b) is statutorily waived for this rule.

E.O. 13563 and E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that this regulation would not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million

annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

5 CFR Part 330

Armed forces reserves, District of Columbia, Government employees.

5 CFR Part 332

Government employees.

5 CFR Part 337

Government employees.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is amending parts 330, 332, and 337 of title 5, Code of Federal Regulations, as follows:

PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

■ 1. The authority citation for part 330 is revised to read as follows:

Authority: 5 U.S.C. 1104, 1302, 3301, 3302, 3304, and 3330; E.O. 10577, 3 CFR, 1954–58 Comp., p. 218; Section 330.103 also issued under 5 U.S.C. 3327; Section 330.104 also issued under sec. 2(d), Pub. L. 114–137, 130 Stat. 310; Subpart B also issued under 5 U.S.C. 3315 and 8151; Section 330.401 also issued under 5 U.S.C. 3310; Subparts F and G also issued under Presidential Memorandum on Career Transition Assistance for Federal Employees, September 12, 1995; Subpart G also issued under 5 U.S.C. 8337(h) and 8456(b).

■ 2. Add § 330.104(c) to read as follows:

§ 330.104 Requirements for vacancy announcements.

* * * * *

(c) If an agency is sharing a certificate of eligibles under part 332 of this chapter, the original hiring agency must provide notice in the job opportunity

announcement that the resulting list of eligible candidates may be used by one or more hiring agencies, and of how the applicant may opt-in to the disclosure of his or her applicant records to other hiring agencies.

PART 332—RECRUITMENT AND SELECTION THROUGH COMPETITIVE EXAMINATION

■ 3. The authority citation for part 332 is revised to read as follows:

Authority: 5 U.S.C. 1103, 1104, 1302, 2108, 3301, 3302, 3304, 3312, 3317, 3318, 3319; sec. 2(d), Pub. L. 114–137, 130 Stat. 310; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

■ 4. Add § 332.408 to read as follows:

§ 332.408 Shared use of a competitive certificate.

(a) *General authority.* (1) A hiring agency may share a competitive service certificate issued under its delegated examining authority with one or more hiring agencies for a position(s) to be filled on a permanent or term basis. Positions filled on a term basis are subject to the provisions of 5 CFR part 316, subpart C. Positions may be full-time or other than full-time (*i.e.*, part-time, seasonal, on-call, and intermittent).

(2) Another Federal agency may make a selection from a certificate shared with it under paragraph (b) of this section only after it has considered individuals it is required to consider when filling positions from within its own workforce and other internal applicants under paragraph (c) of this section.

(3) All actions taken on a shared certificate must be made within the 240-day period beginning on the date the original hiring agency issued the certificate of eligibles. This period cannot be extended.

(4) The original hiring agency and any receiving agency using a shared certificate must each maintain case file documentation sufficient for each agency to reconstruct its own use of the certificate in accordance with the *Delegated Examining Operations Handbook*, and must safeguard testing and examination materials, examination results, and the names of applicants from disclosure to other persons in accordance with § 300.201 of this chapter.

(5) All actions taken on competitive certificates must be done in accordance with the *Delegated Examining Operations Handbook* and all applicable regulations in this part and part 337 of this chapter.

(6) Agencies sharing certificates must keep records of the instances of sharing

certificates and/or using shared certificates.

(b) *Requirements for the original hiring agency.* (1) A hiring agency may share a competitive certificate it has issued under § 332.402 (for traditional rating and ranking) or under 5 CFR 337.303 (for category rating) with one or more hiring agencies for use in filling a position(s) if:

(i) The original hiring agency intends to use the certificate for its own hiring;

(ii) The original hiring agency has provided notice within the job opportunity announcement for the original vacancy that the resulting list of eligible candidates may be used by one or more hiring agencies;

(iii) The original hiring agency has provided an opportunity for applicants to opt-in to have their applications and other personal information shared with one or more hiring agencies;

(iv) The original hiring agency's objections to eligibles or requests to pass over preference eligibles on the certificate under § 332.406 or § 337.304 of this chapter have been resolved by that agency's Delegated Examining Unit;

(v) The original hiring agency has either made a selection from the certificate or has made no selection from the certificate, and has documented its reason for non-selection; and

(vi) The Delegated Examining Unit of the original hiring agency has closed and audited the certificate in accordance with the procedures in the *Delegated Examining Operations Handbook*.

(2) When sharing a certificate of eligibles, the original hiring agency must share all documentation pertaining to the creation of that certificate, including but not limited to the job analysis, testing and examination materials, the job opportunity announcement, and applications, as relevant, and must safeguard any personally identifiable information not needed for effective use of the certificate by the receiving agency. The original hiring agency must share the certificate of eligibles in its original form in order to retain the original ordering of the certificate; must safeguard any personally identifiable information from unauthorized access during the transmission process; and must redact the names of applicants who did not opt-in to the shared certificate, and who therefore may not be considered by the receiving agency.

(3) The original hiring agency may share a certificate of eligibles with one or more agencies.

(4) If the original hiring agency determines that it has made an error that may affect selections by a receiving

agency or agencies, it must notify each affected receiving agency.

(c) *Requirements for the receiving agency*—(1) *Vacancies that may be filled*. A receiving agency may use a shared certificate to fill a vacancy in the same occupational series, at the same grade level (or a corresponding rate or level of pay for a position excluded from the General Schedule), with the same full performance level, and in the same duty location as was listed on the original hiring agency's certificate. If the original hiring agency's certificate is for an interdisciplinary position as described in the *Delegated Examining Operations Handbook*, the receiving agency may use it to fill an interdisciplinary position. The receiving agency must verify through its job analysis that the minimum qualification requirements (including use of any selective placement factors) and the competencies, or knowledge, skills, and abilities, that were used for the original position are appropriate for the position to be filled.

(2) *Notification to individuals who applied to the original vacancy*. Before using a shared certificate, a receiving agency must notify the list of candidates of its receipt of their names and application materials and its intention of considering them for a position. The receiving agency must also inform these individuals of its requirement to consider its own employees as well as other individuals the agency is required to consider before consideration of anyone on the shared certificate. At a minimum, the notification must include the agency, position title, series, grade level or equivalent, and duty location.

(3) *Consideration of internal candidates*. Before making a selection from a shared certificate, a receiving agency must provide notice of its intent to fill the available position(s) to its own employees and other individuals the agency is required to consider, to provide these internal candidates the opportunity to apply consistent with the provisions of part 335 of this chapter, and to review the qualifications of the internal candidates.

(i) This notice and opportunity for internal candidates to apply is subject to applicable collective bargaining obligations (to the extent consistent with law). Nothing in this paragraph affects agencies' right to fill a position from any appropriate source under §§ 330.102 and 335.103 of this chapter.

(ii) Agencies are prohibited from providing an application period any longer than 10 days for internal candidates. This time limit cannot be waived or extended.

(iii) Before considering other candidates, a receiving agency must first provide for the consideration for selection required for individuals covered under its Career Transition Assistance Program and its Reemployment Priority List under part 330, subparts B and F, of this chapter.

(4) *Selection from the shared certificate*. After considering internal candidates, a receiving agency may consider candidates referred on the shared certificate.

(i) The receiving agency must consider candidates on a shared certificate independently of the actions of any other agency with which the certificate is simultaneously shared under paragraph (b)(3) of this section.

(ii) The receiving agency may not reassess the applicants for purposes of rating/ranking.

(iii) The receiving agency must provide selection priority to individuals eligible under the Interagency Career Transition Assistance Program under part 330, subpart G, of this chapter who applied to the original job announcement.

(5) *Time limit on selection from a shared certificate*. The receiving agency has 240 days from the date the certificate was issued (in the original hiring agency) to select individuals from the shared certificate.

(6) *Limit on further sharing by the receiving agency*. The receiving agency may not share or distribute the shared certificate to another Federal agency.

PART 337—EXAMINING SYSTEM

■ 5. The authority citation for part 337 is revised to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 1302, 2302, 3301, 3302, 3304, 3319, 5364; 116 Stat. 2290, sec. 1413, Pub. L. 108–136, 117 Stat. 1392, as amended by sec. 853 of Pub. L. 110–181, 122 Stat. 3; sec. 2(d), Pub. L. 114–137, 130 Stat. 310; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

■ 6. Revise § 337.304 to read as follows:

§ 337.304 Veterans' preference.

In this subpart:

(a) Veterans' preference must be applied as prescribed in 5 U.S.C. 3319(b) and (c)(7);

(b) Veterans' preference points as prescribed in § 337.101 are not applied in category rating; and

(c) Sections 3319(b) and 3319(c)(7) of title 5 U.S.C. constitute veterans' preference requirements for purposes of 5 U.S.C. 2302(b)(11)(A) and (B).

[FR Doc. 2017–00800 Filed 1–17–17; 8:45 am]

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 339

RIN 3206–AL14

Medical Qualification Determinations

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to revise its regulations for medical qualification determinations. The revised regulations update references and language; add and modify definitions; clarify coverage and applicability; address the need for medical documentation and medical examination and/or testing for an applicant or employee whose position may or may not have medical standards and/or physical requirements; and recommend the establishment of agency medical review boards. The final rule provides agencies guidance regarding medical evaluation procedures.

DATES: This rule is effective *February 17, 2017*.

FOR FURTHER INFORMATION CONTACT: Monica Butler, by telephone at (202) 606–4209; by email at employ@opm.gov; by fax at (202) 606–0864; or by TTY at (202) 418–3134.

SUPPLEMENTARY INFORMATION: On December 27, 2007, OPM issued a proposed rule at 72 FR 73282 to revise regulations on medical qualification determinations. The public comment period on the proposed rule ended February 25, 2008. OPM received written comments from four agencies, a union, and an individual pertinent to the proposed rule. A discussion of the comments is provided under the respective subpart below.

The final rule also replaces the verb “shall” with “must” for added clarity and readability. Any provisions in this part using the verb “must” have the same meaning and effect as previous provisions in this part using “shall.” The final rule also adds four authority citations to clarify the scope of applicability: (1) 5 U.S.C. 3312 Preference eligibles; physical qualifications; waiver; (2) 5 U.S.C. 3318 Competitive service; selection from certificates; (3) 5 U.S.C. 3320 Excepted service; government of the District of Columbia; selection; and (4) 5 U.S.C. 3504 Preference eligibles; retention; physical qualifications; waiver.

Summary

Background—Summary

The summary covers the basis for OPM issuance of the final rule and outlines the revisions that have been made to its regulations for medical qualification determinations.

Subpart A

Background—Subpart A

Subpart A covers general information. The proposed subpart A added wording to clarify applicability of this regulation to excepted service positions; updated references to the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and to portions of the Americans with Disabilities Act (ADA) of 1990, as amended by the ADA Amendments Act of 2008 (ADAAA), that are applicable to the Federal Government through the Rehabilitation Act; added examples to the definition in § 339.104 of “medical evaluation program”; added the definition of “medical restriction,” and separated and moved definitions of “subtle incapacitation” and “sudden incapacitation.”

In response to the comments on the proposed rule, which are discussed below, we have revised subpart A to—

(1) Retain an example regarding removal of a preference eligible in § 339.101.

(2) Replace the word “suitable” with “appropriate” in § 339.102(c) to more accurately reflect the proper administrative action that an agency may render when an individual fails to meet an established condition of employment and to avoid confusion with suitability determinations.

(3) Add language to § 339.102(c) that failure of an applicant to be examined, after a tentative job offer is extended, may result in an applicant not being considered further for the position.

(4) Add language to § 339.102(c) that failure of an applicant, who received a tentative offer of employment, to provide medical documentation requested by the agency medical review officer or related hiring agency medical or human resources personnel, following a pre-placement medical examination, may result in an applicant not being considered further for the position.

(5) Add the term “applicant” where appropriate in subpart A.

(6) Revise § 339.103 to remove the phrase “to the extent consistent with” from the section in the proposed rule on compliance with disability laws and regulations. The new language clarifies that the statutory provisions of the Rehabilitation Act and the ADA apply to actions under this section.

(7) Correct the reference to the definition of “qualified individual with a disability” in § 339.103.

(8) Clarify the definitions of “medical documentation” and “medical restriction” in § 339.104.

(9) Add the definition of “medical surveillance” in § 339.104.

(10) Clarify the definition of “physical requirement” in § 339.104.

Discussion of Comments—Subpart A

Section 339.101

One agency stated that § 339.101 of the current regulation provides an example, “removal of a preference eligible employee in the excepted service under part 752,” of a situation when medical issues arise in connection with an OPM regulation that governs a particular personnel decision. The agency stated the example did not appear in the proposed rule and recommended that it be retained because the example provides clarity. OPM agrees this example assists the reader in understanding the intent of the regulation and is retaining that example in the final § 339.101.

Section 339.102

One agency proposed adding the term “physical fitness standards or testing” to § 339.102(c). The agency rationale was that this change clarifies the applicability of this provision. OPM has decided not to accept this comment. As discussed below, OPM has decided to remove the terms “physical fitness standards” and “physical fitness testing” from the final rule at this time.

One agency proposed amending the language in proposed § 339.102(c) to delete the word “suitable” and replace it with the word “indicated.” The word “suitable” was contained in the portion of the proposed rule that read failure to meet properly established medical standards or physical requirement under this part means that the applicant or employee is not qualified for the position unless a waiver or reasonable accommodation is “suitable.” The rationale of the commenter was that the word “indicated” more accurately reflected the appropriate administrative action that an agency may render when an individual fails to meet an established condition of employment. OPM agrees with the agency that the word “suitable” could lead to confusion, especially in relation to the suitability function administered by OPM pursuant to part 731 of this title. Instead of the word “indicated,” however, OPM has revised the section with the word “appropriate.” The use of the word “appropriate” makes it clear

that a waiver or a reasonable accommodation under § 339.102(c) must meet certain conditions. OPM also revised the sentence to “reasonable accommodation or a waiver is appropriate” to track the order of the citations.

OPM included an additional clarification to § 339.102(c) by adding the phrase “which may include psychological” after “medical” to the sentence noting, when there are established medical standards and/or physical requirements for the position, the failure of an applicant to be examined may result in an applicant no longer being considered for the position. OPM receives frequent inquiries from agencies relative to proper handling of such instances. This clarification will enable Federal agencies to obtain applicants’ cooperation with examination requirements in appropriate circumstances. This additional language also informs the reader of the possible scope of an agency-offered examination as well as the consequences of refusal to report. The provision now clearly states that such failure may be a basis for the agency to determine the applicant is not qualified when there are established medical (which may include psychological) standards and/or, physical requirements for the position.

OPM included an additional clarification to § 339.102(c) that failure of an applicant to provide medical documentation requested by the hiring agency medical or human resources personnel as part of a pre-placement medical examination also may result in an applicant not being considered further for the position. OPM receives inquiries from agencies relative to proper handling of such instances, and this clarification will enable Federal agencies to obtain applicant cooperation with appropriate examination requirements and prevent delays in filling critical vacancies. In addition, after a tentative job offer, agencies may request relevant documentation to determine whether there is a medical condition that will affect safe and efficient performance of the essential duties of the position. The clarifying language in this provision informs the reader of the consequences of failure to submit requested medical documentation.

Section 339.103

One agency requested that the definition of “qualified individual with a disability” in proposed § 339.103 be corrected, noting that the section misquoted 29 CFR 1630.2(r), which relates to the definition of direct threat.

OPM agrees that the proposed rule inadvertently referenced 29 CFR 1630.2(r). OPM also notes that citing to specific regulations of other agencies within this part poses a risk of future ambiguity because the text of the cited regulations are subject to change, as has occurred with the existing provisions. The final rule has been revised to reference the definition of “qualified individual with a disability” contained within the Rehabilitation Act, as amended, and the ADA, as amended as well as their implementing regulations for the Federal sector. In interpreting the meaning of these statutes, agencies can and should refer to current regulations and guidance promulgated pursuant to these Acts, see, *e.g.*, 29 CFR part 1630, as well as case law construing these Acts, in consultation with agency counsel.

One agency recommended the term “applicants” be added along with “employees” to § 339.103. The agency noted that 29 CFR 1630.13 included references to both applicants and employees. As revised, § 339.103 no longer makes reference to either employees or applicants. OPM still agrees, however, that including applicants in the final rule was appropriate and has revised the entire rule accordingly.

One agency recommended revising the language in proposed § 339.103 to remove the phrase “to the extent consistent with” from the section in the proposed rule on compliance with disability laws and regulations. The section stated “the Equal Employment Opportunity Commission (EEOC) has issued regulations covering the equal employment provisions of the ADA in 29 CFR part 1630, which must be followed to the extent consistent with the Rehabilitation Act.” The agency stated that under the Rehabilitation Act, agencies must follow the standards applied under title 1 of the ADA and the EEOC regulations reflect the ADA’s nondiscrimination standards. OPM agrees that further clarification is needed and has amended the section to refer directly to compliance with the Rehabilitation Act, the ADA, as it applies to the Federal government, and their implementing regulations for the Federal sector. This language clarifies that the statutory, non-discrimination provisions under the Rehabilitation Act and the ADA apply to actions under this section.

One agency proposed adding three citations to the language on compliance with disability laws and regulations in § 339.103. The agency concurred with the inclusion of specific sections of the EEOC’s ADA regulations within this

OPM regulation and suggested three additional citations relevant to medical qualification determinations. Two other citations, 29 CFR 1614.203(a) and 29 CFR 1614.203(b), were enforcement regulations and outside of the scope of this regulation. OPM has declined to accept this change. Upon further consideration, OPM has decided to remove all references to specific regulations of other agencies, because, as occurred with the current regulations, the outside citations changed, making the cross-references in the OPM regulations difficult to interpret. To avoid perpetuating this sort of ambiguity, OPM has decided to refer directly to compliance with the non-discrimination provisions of the Rehabilitation Act, the ADA, including the ADA Amendments Act of 2008, and their implementing regulations for the Federal sector.

An individual proposed adding clarifying language to the definition of “qualified individual with a disability” in § 339.103. The rationale of the commenter was that there may be job demands (*e.g.*, overtime work) and conditions of employment (*e.g.*, requirement of frequent travel) that are not, of themselves, essential functions of the job. OPM did not accept this comment but has revised the definition. As noted above, the meaning of “qualified individual with a disability” comes from the Rehabilitation Act, the ADA, and their implementing regulations for the Federal sector.

One agency proposed that proposed § 339.103 be revised to include a specific reference to the definition of “direct threat” contained in the EEOC’s regulations, 29 CFR 1630.2(r). The agency did not provide a supporting rationale for this revision. OPM did not adopt this suggestion because the proposed rule only inadvertently referenced 29 CFR 1630.2(r). As noted above, the final rule references the definition of “qualified individual with a disability” contained in the Rehabilitation Act, the ADA, and their implementing regulations for the Federal sector.

Section 339.104

Medical Documentation

One agency requested that OPM insert the words “as defined below” after “other appropriate practitioner” under the definition of the term “medical documentation” to alert the reader that there is a definition of the term “practitioner” in § 339.104. OPM agrees with the commenter but changed “other appropriate practitioner” to “licensed health practitioner” for clarity and

inserted the words “as these terms are defined below” in the final rule to direct the reader to the applicable definitions.

One agency requested that the words “which have been obtained” be removed from the sentence under the definition of “medical documentation” in proposed § 339.104(2). The agency rationale was that the information may not have been initially provided by the applicant or employee, but the information may still be needed by the agency. Further, if the applicant or employee does not provide the information, the agency can request the applicant to obtain it, at his/her expense, in order to be considered for the position. The agency indicated that if the definition is not changed, and the agency requests the information because it may not have been obtained, the agency will have to pay the associated costs for attaining the information. OPM agrees that this is a legitimate concern and has accepted the proposed change and deleted the term “which have been obtained” from item (2) in the definition of “medical documentation” to remove any suggestion that the agency would be expected to incur any costs associated with obtaining medical information the agency deems necessary when the agency needs to request an applicant or employee to submit additional information in order for the agency to render an informed employment decision. By changing “and” to “and/or” in the appropriate places, OPM also clarified that any, but not necessarily all, of the clinical findings listed in item (2) may need to be provided.

One agency requested that the word “and” be changed to the word “or” between (6) and (7) in the list of items contained in the definition of “medical documentation” in proposed § 339.104 where it stated “an acceptable diagnosis must include the following information, or parts of this information identified by the agency as necessary and relevant to its employment decision.” The agency rationale was that the type and amount of medical information needed in each case may differ and the regulation does not require submission of documentation meeting all of the seven listed categories in this part. OPM has revised the section to insert the words “and, either of the following:” after the text for (5) and insert the word “or” between (6) and (7) to avoid any suggestion that all seven categories of information must be submitted. OPM made a similar change to item (2), by changing “and” to “and/or” to clarify and to be consistent with the opening statement of this item “including any of the following.”

Further, the same agency stated that the section conflicted with the Rehabilitation Act limitation on medical examinations because it effectively instructs agencies to obtain substantially more medical information than may be necessary to make an employment decision. OPM agrees that clarification was needed to eliminate any suggestion that documentation meeting all seven categories must be submitted. OPM has revised the section to insert the words “and, either of the following:” after the text for (5) and insert the word “or” between (6) and (7).

One agency proposed amending the language in the definition of “medical documentation” in § 339.104 to state “such medical documentation must include as much of the following types of information as is necessary and relevant to making the job-related decision for which the information is being requested.” The agency rationale was that section 102(d)(4) of the ADA provides that an employer shall not require a medical examination or make inquiry of an employee unless such examination or inquiry is job-related and consistent with business necessity. The agency further stated any requirement for information outside of this express statutory limitation violates the Rehabilitation Act. OPM has clarified this section by revising the opening sentence to state medical documentation must contain “necessary and relevant information to enable the agency to make an employment decision.” OPM is retaining the remainder of the language in this sentence to maintain consistency with generally accepted medical practice and principle as to what constitutes an acceptable medical diagnosis. By limiting the scope of the requested information, however, to what is “necessary and relevant” the sentence also is consistent with the intent of the ADA and Rehabilitation Act with regard to the scope of an employer’s medical inquiry.

An individual proposed modifying the definition of “medical documentation” in § 339.104 to include new language that medical documentation should include copies of actual medical office or hospital records, in addition to a written statement from a physician. The rationale provided by the commenter was that a statement by a physician, written or oral, must be supported by clinical findings obtained through a medical history, physical examination, and appropriate tests and diagnostic procedures. OPM agrees with the commenter that medical documentation includes copies of related medical office

or hospital records and has amended the section to include these additional materials. Therefore, OPM further clarified the definition by stating the medical documentation must be “dated” and contain “necessary and relevant” medical information to enable the agency to make an informed employment decision.

A union proposed clarification of the definition of “medical documentation” in § 339.104. The union stated the definition leaves agencies and supervisor’s wide berth to determine what constitutes necessary or appropriate medical documentation, particularly in regards to absences. The union further stated that medical documentation for sick leave, whether extended or not, is often left to the discretion of individual supervisors. The union requested that OPM delineate the baseline for appropriate medical documentation and identify practices that should be avoided. OPM did not accept this suggestion of delineating acceptable and unacceptable forms of documentation because medical documentation needed by an agency can vary according to the situation. The modification made to the “medical documentation” definition, as noted directly above, however, now clarifies that a dated written statement from a licensed physician or practitioner should contain necessary and relevant information to enable it to make an employment decision. This revised language provides agencies with needed discretion in obtaining necessary and relevant information while preventing overly broad requests for medical records, consistent with the Rehabilitation Act and the ADA.

OPM also will seek to issue guidance from time to time as to best practices with regard to working with healthcare providers to obtain appropriate information and materials responsive to the agency’s request for information necessary and relevant to making its employment decision.

Medical Evaluation Program

One agency proposed adding examples to the definition of “medical evaluation program” in § 339.104, such as age adjusted periodic medical examinations or anthrax testing for certain employees. OPM did not adopt this suggestion because “medical evaluation program” covers a broad category of medical examination and clinical and diagnostic testing procedures.

Medical Record

An individual proposed a definition for the term “medical record” and

requested the inclusion of this new definition in § 339.104, indicating that a physician’s written statement should be supplemented with the medical history, physical examination and related testing and diagnostic procedures. The individual stated this will aid the reviewer in assessing the validity of the diagnosis and management plan for the medical or physical condition. OPM has not incorporated this proposed definition in the final rule. As noted above, the definition for medical documentation states that an agency may request necessary and relevant information to enable it to make an employment decision. OPM believes this revised definition is appropriate to allow an agency to obtain what is needed for its decision-making process while preventing overly broad requests for medical records, consistent with the Rehabilitation Act and the ADA.

Medical Restriction

One agency noted that the definition of “medical restriction” in § 339.104 as written in the proposed rule was too narrow because it only addressed physical requirements. The agency requested that the words “physical requirements” be replaced with the words “type or duration of work or activity” in order to cover both physical and medical requirements. OPM agrees with the agency proposal and has replaced the phrase “physical requirements” with the words “type or duration of work or activity” to clarify that the definition applies broadly to a variety of activities for which the individual is limited or prevented from performing due to medical conditions and/or physical limitations.

One agency requested revising the definition of “medical restriction” in § 339.104 to eliminate the phrase “operative event” or expound upon the meaning or intent for clarification purposes. OPM agrees with the proposed agency clarification and removed the term “operative event.” OPM revised the language to state that a medical restriction is a “medical determination” that an applicant or employee is limited or prevented from performing a certain type or duration of work or activity, or motion, because of a particular medical condition or physical limitation.

An individual requested modifying the definition of “medical restriction” in § 339.104 to include language that a restriction is medically warranted if the physician can support a conclusion that there is risk-avoiding or therapeutic value associated with the restriction. The rationale of the individual was that unless there is a risk-avoiding or

therapeutic value inherent in a physician's recommendation that a patient not engage in a particular kind of activity, the physician cannot justify the recommendation as medically warranted. OPM did not adopt this specific language. The modification made to the definition of "medical restriction," as noted above, clearly defines the term without the potential confusion to a reader who may not have the medical knowledge or expertise to accurately interpret and apply the language proposed by the commenter.

Medical Standard

An individual recommended replacing the term "medical standard" with "medical qualification standard" in § 339.104 as well as the remainder of the regulations. The commenter described a "medical qualification standard" as a written description of the clinical findings associated with a health status or level of fitness below which the individual would be at an unacceptable level of potential risk for injury, harm or performance failure. OPM has not adopted the term "medical qualification standard" because its intent is covered by the existing definition. OPM has, however, revised the definition of "medical standard" for clarity. As noted in the final rule, the term "medical standard" represents the minimum medical requirements necessary for an applicant or employee to perform essential job duties as a condition of employment. By referencing the phrase "condition of employment" rather than the descriptive phrase in the proposed rule, the definition makes it clear this is an agency-established qualification standard that must be met prior to appointment and/or maintained during employment for successful performance. In addition, just inserting the term "qualifications" in the title could lead to confusion with the more general employment qualifications for Federal positions.

Medical Surveillance

One agency requested adding a new definition of "medical surveillance" to § 339.104 to clarify to the reader the distinction between medical surveillance, medical evaluation program, and medical examination and to ensure uniform application. OPM agrees that a clear understanding of the different terms is important and has incorporated a definition for "medical surveillance" into § 339.104. "Medical surveillance" is the collection and analysis of health data and trends, such as injuries or illnesses, to improve and protect the health and safety of

employees. A "medical evaluation program," however, refers to an overall program of recurring medical examinations or testing, established by written agency policy, to monitor employees whose work may subject them to significant health or safety risks due to occupational or environmental exposures.

Physical Requirement

An individual commented that the definitions of "physical requirement" and "physical fitness standard" in § 339.104 were virtually identical and suggested eliminating one of the definitions to avoid redundancy. OPM did not accept the comment but, as noted earlier, has decided to withdraw references to "physical fitness standard" and "physical fitness testing" from the regulations at this time. OPM has taken the matter of appropriate definitions of the terms "physical fitness standard" and "physical fitness testing" under further consideration. OPM did revise the definition of "physical requirement" in the final rule to provide better harmony with the underlying statute. See 5 U.S.C. 3312.

Subtle Incapacitation/Sudden Incapacitation

One agency recommended inclusion of a stand-alone definition for the term "static or well stabilized" along with the stand-alone definitions of "subtle incapacitation" and "sudden incapacitation." In the alternative, the commenter recommended retaining all three terms only as part of the definition of the term "medical documentation" in § 339.104. The commenter believed that for consistency, these terms should appear in the same manner. OPM is not including a stand-alone definition for the term "static or well stabilized" and is retaining, with some modification, the stand-alone definitions for the terms "subtle incapacitation" and "sudden incapacitation." As stated in § 339.104, the term "static or well stabilized" is offered only for the purpose of clarification within the definition of "medical documentation." In this context, the term is intended to mean a medical condition that is not likely to change as a consequence of the natural progression of the condition, specifically as a result of the normal aging process, or in response to the work environment or the work itself. In contrast, the terms "subtle incapacitation" and "sudden incapacitation" remain as stand-alone definitions because they are not limited only to clarification of the definition of "medical documentation." These terms relate to the gradual or abrupt

impairment of physical or mental function and are not only medical in nature, but also relate directly to safety, performance, and/or conduct issues that may undermine the agency's commitment to maintaining a safe working environment for all employees and others. OPM revised these terms further in the final rule to make the additional related issues clear.

Subpart B

Background—Subpart B

Subpart B governs medical standards, physical requirements, and medical evaluation programs. We proposed changing the title of subpart B to clarify application of this part to medical evaluation programs. The proposed subpart B added language to clarify application of part 339 to arbitrary disqualification; added "medical surveillance" to policies agencies may establish to safeguard employee health; provided an example of an immunization program; and changed "incumbents" to "employees" to clarify § 339.205. As explained above, OPM has withdrawn the physical fitness standards and physical fitness testing from the final regulation for further consideration. Consequently, these references have been removed from the title and other parts of this section, including § 339.203.

In response to the comments on the proposed rule which are discussed below, we have revised subpart B to—

(1) Correct an erroneous reference to subpart C of part 731 of this chapter in § 339.201.

(2) Add a requirement to § 339.202 that OPM approve medical standards established by agencies prior to implementation.

(3) Provide language to § 339.202 regarding performance and behavioral and personality characteristics.

(4) Add a requirement to § 339.202 that there must be a study validating medical standards to the specific occupation.

(5) Include language in § 339.204 on established timeframes for submission of medical documentation by an applicant or employee.

(6) Re-title § 339.204 as "Waiver of standards and requirements and medical review boards."

(7) Change the term "vaccine" to "vaccination" and clarify the language relative to vaccinations in § 339.205.

(8) Change the term "candidate" to "applicant or employee" in § 339.206.

(9) Revise the reference to "substantial harm" in § 339.206 to provide that applicants and employees may be disqualified for positions based

on medical history when the condition (or recurrence) would pose a significant risk of substantial harm.

(10) Change “reasonable probability of substantial harm” in § 339.206 to the ADA and Rehabilitation Act standard of “significant risk of substantial harm.”

Discussion of Comments—Subpart B

Section 339.201

One agency stated there was a need to reference subpart B, rather than subpart C, of 5 CFR part 731 in § 339.201. The agency rationale was that subpart C relates to suitability action procedures, rather than the criteria authority used in making suitability determinations, which are covered in subpart B. After carefully considering the comment, OPM has decided to completely remove the reference to 5 CFR part 731 from 5 CFR 339.201. OPM has previously explained in four separate **Federal Register** notices that a sustained objection to an applicant, or a sustained request to pass over an applicant, is not a suitability determination. *See* 74 FR 30459 (June 26, 2009); 73 FR 51245 (Sept. 2, 2008); 73 FR 20149 (Apr. 15, 2008); 72 FR 2203 (Jan. 18, 2007). Regardless of whether a medical disqualification of an applicant is made under 5 U.S.C. 3312 or 3318, it is not a determination under 5 CFR part 731 that the applicant is unsuitable for employment in the competitive service. In fact, there is no suitability factor in 5 CFR part 731, subpart B, addressing medical disqualification. Further, as noted in 5 CFR part 339’s authority citation, the part is issued only under rule II of E.O. 10577, as amended. It is not issued under rule V thereof, which authorizes OPM to order the removal of incumbent employees on grounds of fitness, pursuant to the President’s standard-setting authority in 5 U.S.C. 3301, 3302, and 7301, and consistent with OPM’s administrative authority in 5 U.S.C. 1103(a)(5)(A) and 1302(a). Accordingly, OPM also is amending § 339.201 to delete the text concerning directed removals of appointees based on physical or mental unfitness. OPM is retaining the reference to exclusion of applicants from examinations, which falls under OPM’s authority in 5 U.S.C. 1302(a). OPM also is adding text to clarify that the procedures applicable to a medical disqualification under 5 U.S.C. 3312 or 3318 are in 5 CFR 339.306.

Section 339.202

An individual proposed adding language to § 339.202 relative to performance and human reliability demands. The rationale of the

commenter was that the need for standards is to minimize the risk of human failure, rather than to predict successful performance. OPM agrees with the commenter’s rationale but has amended the language to more plainly note the direct relationship between performance and the requirements needed to perform the duties of the position.

One agency proposed revising § 339.202 to add language regarding the requirement for OPM approval of medical standards established by agencies prior to implementation. The agency rationale was that although the current language states an agency may establish medical standards in certain circumstances, definitive language on OPM approval would provide clarity and eliminate agency questions. OPM agrees and amended the section to state that agencies are required to obtain OPM approval of all medical standards within the competitive service prior to implementation.

One agency proposed revising § 339.202 to add the requirement that there must be a study validating medical standards to that specific occupation. The agency rationale is that this section should clearly state that a medical standard for an occupation should be supported by a job analysis. OPM agrees generally with the comment and revised this section to clarify that there must be a study(ies) or evaluation(s) establishing the medical standard is job-related to one or more occupations (recognizing some medical requirements may be similar across occupations). A validation study generally is not required where there is no evidence of adverse action; therefore OPM did not wish to impose a higher legal standard here. *See* Uniform Guidelines on Employee Selection Procedures, 29 CFR part 1607. The “job-related” standard is consistent with the non-discrimination provisions under Part 300 of this title and Title VII. OPM made a similar change to the definition of physical requirement, as discussed below.

One agency stated that the language in parenthesis in § 339.202, “(i.e., where the agency has 50 percent or more of the position(s) in a particular occupation)”, is confusing and restrictive. OPM disagrees and has not amended this language. The regulation states that an agency may establish medical standards for positions that predominate in that agency and the parenthetical gives an example of what may constitute a predominance of a particular occupation.

Section 339.203

One agency proposed revising § 339.203 to clarify the difference between “physical requirements” and “physical fitness standards.” The agency rationale was to eliminate potential confusion concerning requirements when applying § 339.204, (re-titled “Waiver of Standards and Requirements and Medical Review Boards”) to § 339.203. OPM agrees with the need to avoid confusion between these terms. Consequently, as noted above, OPM has withdrawn references to “physical fitness standards or testing” from the final rule for further consideration. This provision is revised and re-titled to “Physical requirements.”

A union proposed that in relation to the physical requirements and physical fitness standards or testing in § 339.203, OPM accept the role to carry out oversight and external validation for the positions to which agencies choose to apply a physical requirements standard. As a rationale, the union cited its experience with inconsistent use of the authority granted to agencies to establish physical requirements for individual positions without OPM approval. In addition, the union proposed that OPM further expand on procedures for the validation process. The union rationale was to provide consistency throughout the government of individuals who perform essentially the same functions, but work for different agencies. OPM has not accepted these comments. As noted, OPM has withdrawn the language related to “physical fitness standards or testing” at this time. In addition, as noted in the rule, approval by OPM remains available to agencies, but is not mandatory. Further, challenges to such policies or directives can be addressed through administrative processes or grievances or through the courts.

OPM revised this section in the final rule for the reasons noted in section 202, *supra*, to clarify that there must be a study(ies) or evaluation(s) that establishes the physical requirement(s) is job-related to one or more occupations (recognizing some physical requirements may be similar across occupations).

Section 339.204

One agency proposed adding to § 339.204, the waiver provision, examples of “sufficient evidence” and “additional information” that an applicant or employee may submit or any agency may obtain with regard to waiving a medical standard or physical requirement, to ensure uniform

application and to provide clarity. OPM has not accepted this comment because the regulatory language is clear and the standards are best elucidated by case law.

One agency proposed including language in § 339.204 to state the established timeframe an applicant or employee has to provide sufficient medical evidence or that an agency has to obtain additional information prior to rendering a final decision. The agency was concerned the existing language implied that documentation could be supplied at any time, which could tax the agency administrative workload and affect and/or indefinitely extend the timeframe for rendering an employment decision. OPM agrees with the agency concerns and has clarified the language to state that an agency may establish timeframes, in writing, for submission of initial or additional information for consideration, with allowance for reasonable extensions.

A union proposed mandating review panels at agencies. The union rationale was that these review panels will assist agencies in determining appropriate accommodation of a disability or review of medical ineligibility determinations. OPM agrees that medical review boards can assist agencies in making determinations under this section and included language permitting agencies to establish medical review boards. Consequently, OPM has re-titled § 339.204 as “Waiver of standards and requirements and medical review boards.” At this time, however, OPM believes agencies should be given discretion in determining whether and how best to use medical review boards, so the creation of such boards is not mandatory. OPM plans to confer periodically with agencies regarding their use of medical review boards. OPM also will seek to issue guidance from time to time as to best practices with regard to the composition and use of medical review boards.

Section 339.205

An individual proposed replacing the term “vaccine” with “vaccination” and clarifying that the need for a medical evaluation program “must be clearly supported by the nature of the exposures incurred in the course of the work” in § 339.205. The commenter stated only that the need for these inclusions were “self-evident.” OPM agrees the term “vaccine” should be replaced with the term “vaccination” and amended the term to reflect the act of receiving a vaccine. OPM did not include the additional language above. The existing language conveys the same meaning and the commenter provided

no supporting or convincing rationale for further change.

A union commented that although § 339.205 of the proposed rule would mandate that employees be vaccinated under certain circumstances limited to work, and although this requirement may be imposed only upon written notification, only limited guidance is provided in the regulation concerning the circumstance under which such vaccinations may be compelled. In addition, the union stated that agencies should be allowed to retroactively impose an immunization requirement on an employee only if the employee was notified of the requirement prior to acceptance of the position through the vacancy announcement or position description. OPM recognizes the need for some clarification and has amended the language to clarify that any vaccinations required by this section must be FDA-approved. OPM does not otherwise accept this comment. As noted in the rule, agencies that choose to implement one or more of the programs noted in § 339.205 must have written policies or directives. Challenges to such policies or directives can be addressed through administrative processes or grievances or through the courts.

One agency recommended that the proposed language in § 339.205 be expanded to read “this may include, but is not limited to the requirement to undergo vaccination with FDA approved vaccines (e.g., for national security reasons or in order to safely carry out an agency program.” The rationale of the agency was that the modification eliminated the possibility that an applicant or employee could challenge an agency requirement to undergo a vaccination under the contention that the FDA may have licensed the vaccination, but had not “mandated” its use.” OPM agrees with the rationale of the commenter and has amended § 339.205 to state vaccinations may include FDA-approved vaccines.

One agency requested clarification of what is meant by “mandatory vaccines” in § 339.205. Further, the agency states an example would be helpful (e.g., in the event of a pandemic flu when the position does not permit the accomplishment of work at home or in isolation). OPM has not accepted this comment. OPM has included situational examples but has not included specific vaccination examples to allow flexibility to address changes in environmental, situational, and other circumstances wherein agencies determine and document the need for certain vaccinations.

Section 339.206

An individual proposed replacing the reference to reasonable probability of substantial harm in § 339.206 with a provision that applicants and employees may be disqualified for positions only if the condition(s) at issue is disqualifying “and a recurrence would pose an unacceptable risk of injury or harm to the individual or others, or would present an unacceptable risk of human failure.” The rationale provided was that the decision in this type of situation must be based on minimum/maximum criteria, not probability criteria. The commenter also noted that if a recurrence is possible and the consequences of a recurrence are unacceptable, it does not matter how small the probability. OPM recognizes the concern of the individual and based in part on this comment and another comment described below has amended the section to read that a history of a medical condition may result in medical disqualification only if the condition is itself disqualifying, “recurrence of the condition is a reasonable medical probability, and the duties of the position are such that a recurrence of the condition would pose a significant risk to the health and safety of the applicant or employee or others that cannot be eliminated or reduced by reasonable accommodation or any other agency efforts to mitigate risk.” This revised language is clearer and consistent with the ADA, as amended, and applied through the Rehabilitation Act.

One agency recommended referring to “significant risk” of substantial harm in § 339.206 instead of “reasonable probability of substantial harm” because the latter is less exacting than the ADA and Rehabilitation Act standard of “significant risk” of substantial harm. OPM disagrees with the commenter’s view as to which term is “less exacting.” OPM does agree, however, that, in order to avoid any ambiguity, § 339.206 should be consistent with the statutory language. Therefore, as discussed above, this provision has been revised.

One agency recommended changing the term “candidate” to “applicant or employee” for clarity and consistency. OPM agrees that using the phrase “applicant or employee” is clearer and should be used consistently throughout this regulation. OPM has amended § 339.206 accordingly.

One agency recommended adding an example of a disqualifying condition to § 339.206 for clarification purposes. OPM has not accepted this comment. Medical disqualifications must be made

on a case-by-case, fact-based, individualized assessment prior to reaching a conclusion as to the applicant's or employee's qualifications for a particular position.

One agency recommended inclusion of a reference in § 339.206 to recent behavioral or mental health history as a subset for disqualification. The agency requested consideration of language that an individual's previous "mental health treatment shall not be a basis for a psychiatric examination or psychological assessment unless the individual has been hospitalized within the past seven years for a mental health related condition." The agency rationale was that this seems to be an area of potential employee medical disqualifiers that does not neatly fit into a category (*i.e.* medical standard) that applies to positions with and without medical standards and physical requirements, and where an employee may pose substantial harm to himself and others. OPM is not adopting this approach to amending § 339.206. With respect to mental health histories, mental health conditions are evaluated to determine whether they are temporary, transient, transitional or self-limiting, as opposed to mental health difficulties that are chronic and ongoing with no perceivable end in sight. While behavioral traits, personality characteristics, temperaments, attitudes and biases, may be linked to mental health problems, they in and of themselves would not normally rise to a level supporting a clinical diagnosis of a mental condition. See, *e.g.* *Diagnostic and Statistical Manual of Mental Disorders (DSM)* published by the American Psychiatric Association. Moreover, medical disqualifications based on mental health must be made on a case-by-case, fact-based, individualized assessment prior to reaching a conclusion as to the applicant's or employee's qualifications for a particular position.

Subpart C

Background—Subpart C

Subpart C governs medical examinations. The proposed subpart C incorporated minor corrections in references, spelling and punctuation; added wording to clarify examinations the agency may require and provide examples of "benefits" in § 339.304; and added wording to clarify applicability of this regulation to excepted service positions when requesting a medical disqualification or a passover of a preference eligible in § 339.306.

In response to the comments on the proposed rule which are discussed below, we have revised subpart C to—

(1) Add language to § 339.301(b) regarding return to work from medically based absence in addition to reemployment from medically based absence.

(2) Revise the language in § 339.301(b)(1) to be consistent with the ADA prohibition against employers making disability inquiries or conducting medical examinations of job applicants' prior to an offer of employment.

(3) Clarify § 339.301(b)(3) to state an agency may require an individual to report for a medical examination "whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee's continued capacity to meet the medical standards or physical requirements of a position."

(4) Add language to § 339.301(c) relative to the Federal Employees' Compensation Act.

(5) Include language in § 339.301(e) addressing vulnerability of business operation and information systems to potential threats.

(6) Add clarifying language to § 339.301(e) relative to the licensing of physicians conducting psychiatric examinations.

(7) Add language to § 339.303(a) that an agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions dependent on the nature of the condition and the availability of qualified physicians.

(8) Add the term "applicant" to § 339.303(a).

(9) Revise § 339.303(a) and (b) to add the requirement that an applicant or employee must furnish and authorize the release of medical documentation generated as a result of a medical examination and relevant medical documentation from his or her private physician, to authorized agency representatives.

(10) Revise § 339.303(a)(2) in relation to above to further state an employee may be subject to adverse action if he or she fails or refuses to authorize release of the above referenced medical documentation.

(11) Revise the language in § 339.303(b) to address situations where medical documentation from the applicant or employee's private physician or practitioner is contradictory to, and cannot be resolved by, documentation from the examining physician or the agency medical review officer.

(12) In § 339.304, clarify when an agency is financially responsible, versus when an applicant or employee is financially responsible, for the cost of medical examinations, testing and related documentation.

(13) Removed references to "physical fitness standards or testing" from throughout this section in light of OPM's decision, as discussed earlier, to withdraw these terms for further consideration.

Discussion of Comments—Subpart C

Section 339.301

An individual proposed adding "appropriate for the purpose of obtaining and recording baseline medical information" following the term "pre-employment medical examination" in § 339.301(a). OPM did not include this language because the section is intended only to define when a routine pre-employment examination is appropriate, which is following a tentative offer of employment and only for a position with specific medical standards, physical requirements, or covered by a medical evaluation program.

An individual proposed adding language in § 339.301(b) concerning the return to work from medically based absence. The rationale provided by the individual was that if there is reason to suspect that a medical condition has caused or contributed to the failure of an employee to perform the essential functions of the position in an acceptable manner or meet the conditions of employment, including a demand for human reliability, then a complete medical evaluation may be appropriate. OPM agrees with the concerns noted by the commenter and has amended the section to include language to make clear that this provision includes employees returning to work from medically based absences.

One agency proposed revising the language in § 339.301(b)(1) to be consistent with the ADA prohibition against employers making disability inquiries or conducting medical examinations of job applicants' prior to an offer of employment. OPM agrees that revising the language would eliminate any confusion as to when disability inquiries can be made. Consequently, OPM has accepted the proposed language and amended the section to read "subsequent to a tentative offer of employment or reemployment," rather than the previous language of "prior to appointment or selection," to be more consistent with the Rehabilitation Act and ADA prohibition of disability

inquiries or medical examinations prior to a tentative job offer.

One agency proposed revising § 339.301(b)(2) to state that regularly recurring examinations are to be limited to persons in positions affecting public safety. The agency rationale was that the language in the proposed regulation was overbroad in allowing an employer to conduct medical examinations of current employees “on a regularly recurring, periodic basis after appointment.” The agency stated that the standard that the examination be job related and consistent with business necessity applies to all employer efforts to obtain medical information from employees. Further, the agency noted that there is EEOC guidance stating that any such regularly occurring examinations should be limited to persons in positions affecting public safety. OPM did not accept this comment. As noted in the provision, this section applies to positions that have “medical standards and/or physical requirements” and must be applied in a manner consistent with disability laws. Thus, OPM intends this provision to apply to all positions that may require medical examinations due to the nature of the work and/or the vulnerability of business operation and information systems to potential threats. This includes, but is not limited to, public safety positions.

One agency proposed revising § 339.301(b)(3), which, in the proposed rule, stated that an agency may require an individual to report for a medical examination “whenever there is a direct question about an employee’s continued capacity to meet the physical or medical or physical fitness requirements of a position.” The agency proposed clarifying language to define the above medical and physical components. Another agency proposed revising § 339.301(b)(3) to replace “direct question” with “reasonable belief based on objective evidence.” The agency’s rationale was that the section intended to specify the circumstances under which an agency may require an employee to undergo a medical or psychiatric examination. The agency noted that the basic rule establishing when an employee examination may be required is that the requirement must be job related and consistent with business necessity. The agency proposed revising the language to read “whenever the agency has a reasonable belief based on objective evidence, that there is a question about an employee’s capacity to meet the physical or medical or physical fitness requirements of a position.” OPM agrees with both comments that further clarification was

appropriate and amended the section. The relevant clause now reads “whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee’s continued capacity to meet the medical standards and/or physical requirements.” An example of where this section could be triggered includes a situation where medical opinions submitted by an applicant or employee are at variance with one another or there is insufficient medical documentation.

An individual proposed clarifying the language in § 339.301(c) to state that an agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an injury or disease “covered under the provisions of the Federal Employee’s Compensation Act (FECA)” to report for an examination to determine medical limitations that may affect placement decisions. OPM agrees and has amended the section by inserting the specific reference to FECA in order to provide more definitive guidance. An examination under FECA is ordered for compensation purposes. An examination under 5 CFR 339 is ordered to determine medical limitation that may affect job placement decisions.

One agency proposed expanding § 339.301(d) to include the term “physical fitness standards or testing” to the existing terms “medical standards” or “physical requirements” for clarification purposes. OPM declines to adopt this comment. As noted previously, OPM has withdrawn these terms from the final rule for further consideration.

One agency proposed revising § 339.301(e)(1) to address when an agency may require an employee to undergo a medical or psychiatric examination. The agency states that the basic rule is that an examination requirement for employees must be job related and consistent with business necessity. The agency recommended revising the section to read “an agency may order a psychiatric examination (including a psychological assessment) only when it has a reasonable belief, based on objective evidence, that the employee appears unable to meet the physical or mental or physical fitness requirements of a position.” OPM did not accept inclusion of the proposed additional language. The existing provision limits a psychiatric examination or psychological assessment to circumstances where there is no physical-based reason for the employment-related difficulty or where such examination/assessment is an articulated condition of employment.

One agency proposed adding language relative to potential threats to Federal Government equipment and systems. The rationale provided by the agency was in relation to situations where an individual may not be a threat to individuals, but because of the nature of the position, could be a threat to agency equipment and systems. OPM agrees that threats to infrastructure by individuals is within the scope of these regulations, and has amended § 339.301(e) to include a reference to vulnerability of business operation and information systems to potential threats to enhance understanding of the need to safeguard agency information and security systems.

An individual proposed that § 339.301(e)(1)(i) be revised to state that an agency may order a psychiatric examination including a psychological assessment only when “the physician who has performed a current general medical examination that the agency has the authority to order under this section identifies a basis upon which a psychiatric examination is medically warranted.” The individual also requested clarifying § 339.301(e)(2) relative to the licensing of physicians conducting psychiatric examinations to state that a psychiatric examination or psychological assessment must be conducted in accordance with accepted professional standards “by a licensed physician certified in psychiatry by the American Board of Psychiatry and Neurology.” The rationale of the commenter was that, if a medical qualification standard for a position includes criteria for mental status and function, and there is a reason to suspect that a medical condition has caused or contributed to failure of the employee to perform the essential functions of the position, including a demand for human reliability, then a complete medical evaluation may be appropriate. The commenter further explained that such an evaluation would begin with a complete medical examination by, most likely, a specialist in internal medicine who would determine what additional specialty evaluations are medically warranted, including a psychiatric examination. OPM declines to adopt the comment related to § 339.301(e)(1)(i). OPM believes the existing language in this section clearly states when an agency may order a psychiatric examination or psychological assessment. OPM did modify the language in § 339.301(e)(2), and included references to clarify the licensing of physicians relative to psychiatric examinations. The language now states that the examination must be

conducted by a licensed physician “certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Psychiatry and Neurology,” “or by a licensed psychologist or clinical neuropsychologist.”

One agency proposed amending § 339.301(e) to provide that an individual’s previous mental health treatment will not be a basis for a psychiatric examination or psychological assessment unless the individual has been hospitalized for a mental health related condition within the past seven years. The agency stated that there “seems to be one area of potential employee medical disqualifiers that doesn’t neatly ‘fit’ into a category . . . that applies to positions with and without medical standards and physical requirements, and where an employee may pose ‘substantial harm’ to themselves and others” OPM is not adopting this approach to amending § 339.301(e). With respect to mental health histories, mental health conditions are evaluated to determine whether they are temporary, transient, transitional or self-limiting, as opposed to mental health difficulties that are chronic and on-going with no perceivable end in sight. While behavioral traits, personality characteristics, temperaments, attitudes and biases, may be linked to mental health problems, they in and of themselves would not normally rise to a level supporting a clinical diagnosis of a mental health condition. See, e.g. *Diagnostic and Statistical Manual of Mental Disorders (DSM-5;* American Psychiatric Association, 2013).

Section 339.302

An individual recommended deleting the authority to offer examinations covered in § 339.302 and retain only the section on authority to order an examination. The commenter believed there are no circumstances under which an employer needs medical information to manage an employee’s duty or employment status unless there are already medical qualification standards in place for the position. OPM has not accepted this comment. This regulation clearly distinguishes situations wherein an agency can order or offer an examination.

Section 339.303

One agency stated that, in § 339.303(a) of the proposed rule, a refusal or failure to report for a medical examination ordered by the agency could result in the agency determining that the employee is not qualified for the position. The agency proposed adding

the term “applicant” along with “employee” to § 339.303(a) as this section also applies to applicants. OPM agrees and has amended this section on medical examination procedures to make clear the application of this rule to both applicants and employees.

One agency recommended language be added to § 339.303 that states that employees must be given a reasonable amount of time to provide medical documentation, based upon the nature of the condition and the accessibility of qualified individuals. The agency rationale is that this change would afford a level of protection to the employee and takes into consideration accessibility and availability of appropriate healthcare providers. OPM agrees with the needed clarification and has amended § 339.303(a) to state that “an agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions.”

One agency proposed adding language to § 339.303 requiring an applicant or employee to provide medical documentation generated as a result of a medical examination. The agency questioned whether an agency could find that an applicant or employee is not qualified for the position if the individual reported for the examination, but refused to authorize release of any resulting medical documentation to the agency. The agency also recommended adding the requirement that an individual must furnish and authorize release of relevant medical documentation from his or her private physician to authorized agency representatives. OPM agrees there is a need for clarification and has amended § 339.303 to state that refusal or failure by an applicant or employee to authorize release of any results from an agency ordered or offered medical examination, or the results of any previous medical treatments or evaluations relative to the identified issue, to authorized agency representatives, including the agency physician or independent medical specialists, may be a basis for disqualification for the position by the hiring agency. In addition, the employee may be subject to adverse action. Relevant medical documentation is needed in order for agency representatives, such as the agency physician or medical review officer, to render an informed medical and/or management decision relative to the health and safety of the applicant, employee, coworkers, and the public they serve.

One agency requested clarifying § 339.303(b) to address situations where

medical documentation from the applicant or employee’s private physician or practitioner is contradictory to, and cannot be resolved by, the examining physician or the agency medical review officer. OPM agrees and has amended the section to state that in situations where medical documentation of the private physician or practitioner is contradictory and cannot be resolved by the examining physician or the agency medical review officer, the agency may, at its option, pursue a third opinion from an appropriate specialist (e.g. independent medical specialist). This enables the hiring agency to make an informed management decision relative to the medical eligibility determination of an applicant or employee.

Section 339.304

Two agencies proposed revising § 339.304 to clarify circumstances where an agency is financially responsible, versus when the applicant or employee is financially responsible, for the cost of medical examinations, testing and related documentation, noting that this issue has caused confusion in the past. OPM agrees that this can be a confusing issue for managers, applicants and employees. OPM has amended the section to clearly state when an agency is responsible, and when an applicant or employee is responsible, for payment of medical examinations, related testing, and documentation.

Section 339.305

An individual proposed revising § 339.305 relative to workers compensation issues. Specifically, the individual stated the section was confusing. The individual also stated he did not understand the purpose of the communication and information interchange with the Office of Workers Compensation (OWCP) and requested to discuss the objectives further. OPM has not accepted this comment or request. This section provides that agencies must forward to OWCP copies of medical documentation and examinations of employees who are receiving or have applied for injury compensation benefits, including continuation of pay. The results of these employee evaluations are significant to the agency and to OWCP in that this information and any related periodic updates are critical to determining medical limitations that may affect job placement decisions.

The final part 339 is published in its entirety for the convenience of the reader.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act (5 U.S.C. 601, et seq.)

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because it affects only Federal agencies and employees.

E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Paperwork Reduction Act

These proposed regulations impose no new reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995.

List of Subjects in 5 CFR Part 339

Equal employment opportunity, Government employees, Health, Individuals with disabilities.

U.S. Office of Personnel Management.

Beth F. Colbert,

Director.

■ Accordingly, OPM is revising 5 CFR part 339 to read as follows:

PART 339—MEDICAL QUALIFICATION DETERMINATIONS

■ 1. Revise part 339 to read as follows:

Subpart A—General

Sec.

- 339.101 Coverage.
- 339.102 Purpose and effect.
- 339.103 Compliance with disability laws.
- 339.104 Definitions.

Subpart B—Medical Standards, Physical Requirements, and Medical Evaluation Programs

- 339.201 Disqualification by OPM.
- 339.202 Medical standards.
- 339.203 Physical requirements
- 339.204 Waiver of standards and requirements and medical review boards.

- 339.205 Medical evaluation programs.
- 339.206 Disqualification on the basis of medical history.

Subpart C—Medical Examinations

- 339.301 Authority to require an examination.
- 339.302 Authority to offer examinations.
- 339.303 Medical examination procedures.
- 339.304 Payment for examination.
- 339.305 Records and reports.
- 339.306 Processing medical eligibility determinations.

Authority: 5 U.S.C. 1104(a), 1302(a), 3301, 3302, 3304, 3312, 3318, 3320, 3504, 5112; 39 U.S.C. 1005, Executive Order 10577, Rule II, codified as amended in 5 CFR 2.1(a).

Subpart A—General**§ 339.101 Coverage.**

This part applies to—

- (a) Applicants for and employees in competitive service positions; and
- (b) Applicants for and employees in positions excepted from the competitive service when medical issues arise in connection with an OPM regulation that governs a particular personnel action, such as removal of a preference eligible employee in the excepted service under part 752.

§ 339.102 Purpose and effect.

(a) This part defines the circumstances under which OPM permits medical documentation to be required and examinations and/or evaluations conducted to determine the nature of a medical condition that affects safe and efficient performance.

(b) Personnel decisions based wholly or in part on the review of medical documentation, as defined below, and the results of medical examinations and evaluations must be made in accordance with appropriate sections of this part.

(c) Failure to meet medical (which may include psychological) standards and/or physical requirements established under this part means that the applicant or employee is not qualified for the position, unless reasonable accommodation or a waiver is appropriate, in accordance with §§ 339.103 and 339.204. An employee's refusal to be examined or provide medical documentation, as defined below, in accordance with a proper agency order authorized under this part, constitutes a basis for appropriate disciplinary or adverse action. After a tentative job offer of employment conditioned on completion of a medical examination, an applicant's refusal to be examined or provide medical documentation, as defined below, may result in the applicant's removal from further consideration for the position.

§ 339.103 Compliance with disability laws.

(a) The Americans with Disabilities Act (ADA) of 1990, as amended by the Amendments Act of 2008 (collectively the ADA), establishes prohibitions against discrimination and the requirements for reasonable accommodation that apply to the Federal Government through the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791(f). Consequently, actions under this part must comply with the non-discrimination provisions of the Rehabilitation Act, the non-discrimination provisions of the ADA, and their implementing regulations.

(b) Use of the term “qualified” in this part must comply with the Rehabilitation Act, as amended, and the ADA, as amended. Specifically, a “qualified individual with a disability” means that the individual possess the requisite skill, experience, education, and other job-related requirements of an employment position that the individual holds or seeks, and can perform the essential functions of the position with or without reasonable accommodation.

§ 339.104 Definitions.

For purposes of this part—

Accommodation means *reasonable accommodation* as described in the ADA.

Arduous or hazardous positions means positions that are dangerous or physically demanding to such a degree that an employee's medical and/or physical condition is necessarily an important consideration in determining ability to perform safely and efficiently.

Medical condition means a health impairment which results from birth, injury or disease, including mental disorder.

Medical documentation or *documentation of a medical condition* means a copy of a dated, written and signed statement, or a dated copy of actual medical office or hospital records, from a licensed physician or other licensed health practitioner, as these terms are defined below, that contains necessary and relevant information to enable the agency to make an employment decision. To be acceptable, the diagnosis or clinical impression must be justified according to established diagnostic criteria and the conclusions and recommendations must be consistent with generally accepted professional standards. The determination that the diagnosis meets these criteria is made by or in coordination with a licensed physician or, if appropriate, a practitioner of the same discipline as the one who issued the documentation. An acceptable

diagnosis must include the information identified by the agency as necessary and relevant to its employment decision. This information may include, but is not limited to, the following:

(1) The history of the medical condition(s), including references to findings from previous examinations, treatment, and responses to treatment;

(2) Clinical findings from the most recent medical evaluation, including any of the following: Findings of physical examination; results of laboratory tests; X-rays; EKGs and/or other special evaluations or diagnostic procedures; and, in the case of psychiatric examination or psychological assessment, the findings of a mental status examination and/or the results of psychological tests, if appropriate;

(3) Diagnosis, including the current clinical status;

(4) Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;

(5) An explanation of the impact of the medical condition(s) on overall health and activities, including the basis for any conclusion as to whether restrictions or accommodations are necessary and, if determined to be necessary, an explanation supporting that determination; and, either of the following:

(6) An explanation of the medical basis for any conclusion that indicates the likelihood that the applicant or employee will suffer sudden incapacitation or subtle incapacitation by carrying out, with or without accommodation, the tasks or duties of a specific position; or

(7) Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well-stabilized and the likelihood that the applicant or employee may experience sudden incapacitation or subtle incapacitation as a result of the medical condition. In this context, “static or well-stabilized” medical condition means a medical condition which is not likely to change as a consequence of the natural progression of the condition, such as a result of the normal aging process, or in response to the work environment or the work itself.

Medical evaluation program means a program of recurring medical examinations or tests established by written agency policy or directive, to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands. For example, an agency policy or directive may include

medical clearances and medical surveillance to test for occupational exposure to biological, chemical, and/or radiological hazardous agents, occupational diseases, and occupational risk.

Medical restriction is a medical determination that an applicant or employee is limited, or prevented from performing a certain type or duration of work or activity (e.g., standing and/or ability to concentrate) or motion (e.g., bending, lifting, pulling), because of a particular medical condition or physical limitation. The purpose of a medical restriction is to try to prevent aggravation, acceleration, exacerbation, or permanent worsening of the medical condition or physical limitation.

Medical standard is a written description of the minimum medical requirements necessary for an applicant or employee to perform essential job duties as a condition of employment.

Medical surveillance is the on-going systematic collection and analysis of health data to improve and protect the health and safety of employees in the workplace, and to monitor for health trends both in individual workers and in population of workers. Medical surveillance can include the tracking of occupational injuries, illnesses, hazards, and exposures, as well as laboratory and examination-based medical data, in order to identify findings that could provide an early warning of, or indicate the risk for, an occupational disease. Medical surveillance also is part of compliance with those Federal and state regulations that require medical monitoring when employees use or are exposed to certain hazardous materials.

Physical requirement is a written description of job-related physical abilities that are essential for performance of the duties of a specific position.

Physician means a licensed Doctor of Medicine or Doctor of Osteopathy, or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this part.

Practitioner means a person providing health services who is not a medical doctor, but who is certified by a national organization, licensed by a State, and/or registered as a health professional to provide the health service in question.

Subtle incapacitation means gradual, initially imperceptible impairment of physical or mental function, whether reversible or not, which is likely to result in safety, performance and/or conduct issues that may undermine the agency’s commitment to maintaining a safe working environment for all employees and others.

Sudden incapacitation means abrupt onset of loss of control of physical or mental function(s), whether reversible or not, which is likely to result in safety, performance or conduct issues that may undermine the agency’s commitment to maintaining a safe working environment for all employees and others.

Subpart B—Medical Standards, Physical Requirements, and Medical Evaluation Programs

§ 339.201 Disqualification by OPM.

OPM must review and decide upon an agency’s request to pass over a candidate, who is a preference eligible, on medical grounds pursuant to § 339.306. OPM may deny an applicant employment by reason of physical or mental unfitness for the position for which he or she has applied. An OPM decision under this section or § 339.306 is separate and distinct from a determination of disability pursuant to statutory provisions for disability retirement under the Civil Service Retirement System and the Federal Employees’ Retirement System.

§ 339.202 Medical standards.

OPM may establish and/or approve medical standards for a Governmentwide occupation (i.e., an occupation common to more than one agency) or approve revisions to its established medical standards. An individual agency may establish medical standards for positions that predominate in that agency (i.e., where the agency has 50 percent or more of the positions in a particular occupation). Such standards must be justified on the basis that the duties of the positions are arduous or hazardous, or require a certain level of health status for successful performance when the nature of the positions involves a high degree of responsibility toward the public or sensitive national security concerns. The rationale for establishing the standard must be documented and supported by a study(ies) or evaluation(s) establishing the medical standard is job-related to the occupation(s). Medical standards established by agencies must be approved by OPM prior to implementation. Standards established by OPM or an agency must be:

(a) Established by written directive and uniformly applied, and

(b) Directly related to the actual performance and requirements necessary for the performance of the duties of the position.

§ 339.203 Physical requirements.

(a) An agency may establish physical requirements for individual positions

without OPM approval when such requirements are considered essential for performance of the duties of a specific position. Physical requirements must be clearly supported by the actual duties of the position, documented in the position description, and supported by a study(ies) or evaluation(s) establishing physical requirement(s) is job-related to the occupation(s).

(b) An applicant or employee may not be disqualified arbitrarily on the basis of physical requirements or other criteria that do not relate specifically to performance of the duties of a specific position.

§ 339.204 Waiver of standards and requirements and medical review boards.

(a) An agency must waive a medical standard or physical requirement established under this part when an applicant or employee, unable to meet that standard or requirement, presents sufficient evidence that the applicant or employee, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the applicant or employee or others. Additional information obtained by the agency may be considered in determining whether a waiver is appropriate. An agency may establish timeframes, in writing, for submission of initial or additional information for consideration, with allowance for reasonable extensions.

(b) Agencies may, but are not required to, establish medical review boards to help the agency provide a case-by-case, fact-based, individualized assessment whenever an individual is found to not meet agency medical standards or physical requirements. An agency may also use a medical review board as a forum for a higher level of review within the agency when medical questions or issues arise. If established, the Board is expected to recommend administrative actions that are consistent with applicable law, as well as applicable and current medical practice standards of care, through the combined expertise of its members.

(c) The use and composition of a medical review board will be determined by the agency. Upon request, an agency will provide to OPM information regarding the composition and use of medical review boards. OPM may issue guidance from time to time as to best practices with respect to the composition and use of such boards.

§ 339.205 Medical evaluation programs.

Agencies may establish periodic medical examinations, medical surveillance, or immunization programs

by written policies or directives to safeguard the health of employees whose work may expose them or others to significant health or safety risks due to occupational or environmental exposure or demands. This may include the requirement to undergo vaccination with products approved by the Food and Drug Administration (*e.g.*, for national security reasons or in order to fulfill the duties of a position designated as national security sensitive). The need for a medical evaluation program must be clearly supported by the nature of the work. The specific positions covered must be identified and the applicants or employees notified in writing of the reasons for including the positions in the program.

§ 339.206 Disqualification on the basis of medical history.

An employee or applicant may not be disqualified for any position solely on the basis of medical history. For positions subject to medical standards and/or physical requirements, and for positions under medical evaluation programs, a history of a particular medical condition may result in medical disqualification only if the condition at issue is itself disqualifying, recurrence of the condition is based on reasonable medical judgment, and the duties of the position are such that a recurrence of the condition would pose a significant risk of substantial harm to the health and safety of the applicant or employee or others that cannot be eliminated or reduced by reasonable accommodation or any other agency efforts to mitigate risk.

Subpart C—Medical Examinations

§ 339.301 Authority to require an examination.

(a) A routine pre-employment medical examination is appropriate only for a position with specific medical standards and/or physical requirements, or that is covered by a medical evaluation program established under this part.

(b) Subject to § 339.103, an agency may require an applicant or employee who has applied for or occupies a position that has medical standards and/or physical requirements, or is covered by a medical evaluation program established under this part, to report for a medical examination:

(1) Subsequent to a tentative offer of employment or reemployment (including return to work from medically based absence on the basis of a medical condition);

(2) On a regularly recurring, periodic basis after appointment in accordance with § 339.205; or

(3) Whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee's continued capacity to meet the medical standards or physical requirements of a position.

(c) An agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an injury or disease covered under the provisions of the Federal Employees' Compensation Act to report for an examination to determine medical limitations that may affect job placement decisions.

(d) An agency may require an employee who is released from his or her competitive level in a reduction in force under part 351 of this chapter to undergo a relevant medical evaluation if the position to which the employee has assignment rights has medical standards and/or physical requirements, that are different from those required in the employee's current position.

(e)(1) An agency may order a psychiatric examination (including a psychological assessment) only when:

(i) The result of a current general medical examination that the agency has the authority to order under this section indicates no physical explanation for behavior or actions that may affect the safe and efficient performance of the applicant or employee, the safety of others, and/or the vulnerability of business operation and information systems to potential threats, or

(ii) A psychiatric examination or psychological assessment is part of the medical standards for a position having medical standards or required under a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under paragraphs (e)(1) of this section must be conducted in accordance with accepted professional standards by a licensed physician certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Psychiatry and Neurology, or by a licensed psychologist or clinical neuropsychologist, and may only be used to make inquiry into a person's mental fitness as it directly relates to successfully performing the duties of the position without significant risk to the applicant or employee or others, and/or to the vulnerability of business operation and information systems to potential threats.

§ 339.302 Authority to offer examinations.

An agency may, at its option, offer a medical examination (including a

psychiatric examination or psychological assessment) in situations where the agency needs additional medical documentation to make an informed management decision. This may include situations where an employee requests, for medical reasons, a change in duty status, assignment, working conditions, or any other different treatment (including reasonable accommodation or return to work on the basis of full or partial recovery from a medical condition) or where the employee has a performance or conduct problem that may require agency action. Reasons for offering an examination must be documented. When an offer of an examination has been made by an agency and the offer has been accepted by the applicant or employee, the examination must be carried out in accordance with the authorities cited in § 339.103. The results of the examination must also be used in accordance with the authorities cited in § 339.103.

§ 339.303 Medical examination procedures.

(a) When an agency requires or offers a medical or psychiatric examination or psychological assessment under this subpart, it must inform the applicant or employee in writing of its reasons for doing so, the consequences of failure to cooperate, and the right to submit medical information from his or her private physician or practitioner. A single written notification is sufficient to cover a series of regularly recurring or periodic examinations ordered under this subpart. An agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions.

(1) Refusal or failure to report for a medical examination ordered by the agency may be a basis for a determination that the applicant or employee is not qualified for the position. In addition, an employee may be subject to adverse action.

(2) Refusal or failure on the part of an applicant or the employee to authorize release of any results from an agency ordered or offered medical examination issued in accordance with §§ 339.301 or 339.302, or the results of any previous medical treatments or evaluations relative to the identified medical issue, to authorized agency representatives, including the agency physician or medical review officer and/or independent medical specialists, may be a basis for disqualification for the position by the hiring agency. In addition, an employee may be subject to adverse action.

(b) The agency designates the examining physician or other appropriate practitioner, but must offer the applicant or employee an opportunity to submit medical documentation from his or her private physician or practitioner for consideration in the medical examination process. The agency must review and consider all such documentation supplied by the private physician or practitioner. The applicant or employee must authorize release of this documentation to all authorized agency representatives. In situations where the medical documentation of the applicant or employee's private physician or practitioner is contradictory and cannot be resolved by the examining physician or the agency physician or medical review officer, the agency may, at its option, pursue another opinion from an appropriate specialist at agency expense. An applicant or employee also may, at his or her option, pursue another opinion from an appropriate specialist at his or her expense in the event of conflicting or contradictory medical documentation.

§ 339.304 Payment for examination.

(a) An agency must pay for all medical and/or psychological and/or psychiatric examinations required or offered by the agency under this subpart, whether conducted by the agency's physician or medical review officer, an independent medical evaluation specialist (e.g., occupational audiologist) identified by the agency, or a licensed physician or practitioner chosen by the applicant or employee. This includes special evaluations or diagnostic procedures required by an agency.

(b) Following conclusion of the initial medical, psychological, and/or psychiatric examination, the agency physician or medical review officer will render a final medical determination. In certain final medical ineligibility determinations, the agency physician or medical review officer may reference supplemental medical examination, testing or documentation, which the applicant or employee may submit to the agency for consideration and further review relative to potential medical eligibility. Under these circumstances, the applicant or employee is responsible for payment of this further examination, testing and documentation.

(c) An applicant or employee must pay to obtain all relevant medical documentation from his or her private licensed physician or required practitioners in instances where no medical examination is required or

offered by the agency, but where the agency requests the applicant or employee to provide medical documentation relative to an identified medical or physical condition in question or where the agency needs medical documentation to render an informed management decision.

(d) An applicant or employee must pay for a medical examination conducted by his or her private licensed physician or practitioner where the purpose of the examination is to secure a change sought by an applicant (e.g., new employment) or by an employee (e.g., a request for change in duty status, reasonable accommodation, and/or job modification).

§ 339.305 Records and reports.

(a) Agencies will receive and maintain all medical documentation and records of examinations obtained under this part in accordance with part 293, subpart E, of this chapter.

(b) The report of an examination conducted under this subpart must be made available to the applicant or employee under the provisions of part 297 of this chapter.

(c) Agencies must forward to the Office of Workers' Compensation Programs (OWCP), Employment Standards Administration, Department of Labor, a copy of all medical documentation and reports of examinations of employees who are receiving or have applied for injury compensation benefits under 5 U.S.C. chapter 81, including continuation of pay. The agency must also report to OWCP the failure of such employees to report for examinations that the agency orders under this subpart. When the employee has applied for disability retirement, this information and any medical documentation or reports of examination must be forwarded to OPM.

§ 339.306 Processing medical eligibility determinations.

(a) In accordance with the provisions of this part, agencies are authorized to medically disqualify a nonpreference eligible. A nonpreference eligible so disqualified has a right to a higher level review of the determination within the agency.

(b) OPM must approve the sufficiency of the agency's reasons to:

(1) Medically disqualify or pass over a preference eligible in order to select a nonpreference eligible for:

(i) A competitive service position under part 332 of this chapter; or

(ii) An excepted service position in the executive branch subject to title 5, U.S. Code;

(2) Medically disqualify or pass over a 30 percent or more compensably

disabled veteran for a position in the U.S. Postal Service in favor of a nonpreference eligible;

(3) Medically disqualify a 30 percent or more compensably disabled veteran for assignment to another position in a reduction in force under § 351.702(d) of this chapter; or

(4) Medically disqualify a 30 percent or more disabled veteran for noncompetitive appointment, for example, under § 316.302(b)(4) of this chapter.

[FR Doc. 2017-00804 Filed 1-17-17; 8:45 am]

BILLING CODE 6325-39-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 25 and 195

[Docket ID OCC-2016-0031]

RIN 1557-AE11

FEDERAL RESERVE SYSTEM

12 CFR Part 228

[Regulation BB; Docket No. R-1554]

RIN 7100-AE64

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 345

RIN 3064-AD90

Community Reinvestment Act Regulations

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint final rule; technical amendment.

SUMMARY: The OCC, the Board, and the FDIC (collectively, the Agencies) are amending their Community Reinvestment Act (CRA) regulations to adjust the asset-size thresholds used to define “small bank” or “small savings association” and “intermediate small bank” or “intermediate small savings association.” As required by the CRA regulations, the adjustment to the threshold amount is based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). The FDIC is also amending its CRA Notice requirements to reflect two technical changes concerning the

manner in which the agency will receive public comments considered in the CRA examination process.

DATES: Effective January 18, 2017.

FOR FURTHER INFORMATION CONTACT:

OCC: Emily Boyes, Attorney, Community and Consumer Law Division, (202) 649-6350; Marta E. Stewart-Bates, Attorney, Legislative and Regulatory Activities Division, (202) 649-5490; for persons who are deaf or hard of hearing, TTY, (202) 649-5597; or Bobbie K. Kennedy, Bank Examiner, Compliance Policy Division, (202) 649-5470, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

Board: Amal S. Patel, Senior Supervisory Consumer Financial Services Analyst, (202) 912-7879; or Nikita Pastor, Senior Counsel, (202) 452-3667, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

FDIC: Patience R. Singleton, Senior Policy Analyst, Supervisory Policy Branch, Division of Depositor and Consumer Protection, (202) 898-6859; or Richard M. Schwartz, Counsel, Legal Division, (202) 898-7424, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Background and Description of the Joint Final Rule

The Agencies' CRA regulations establish CRA performance standards for small and intermediate small banks and savings associations. The CRA regulations define small and intermediate small banks and savings associations by reference to asset-size criteria expressed in dollar amounts, and they further require the Agencies to publish annual adjustments to these dollar figures based on the year-to-year change in the average of the CPI-W, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million. 12 CFR 25.12(u)(2), 195.12(u)(2), 228.12(u)(2), and 345.12(u)(2). This adjustment formula was first adopted for CRA purposes by the OCC, the Board, and the FDIC on August 2, 2005, effective September 1, 2005. 70 FR 44256 (Aug. 2, 2005). The Agencies noted that the CPI-W is also used in connection with other federal laws, such as the Home Mortgage Disclosure Act. *See* 12 U.S.C. 2808; 12 CFR 1003.2. On March 22, 2007, and effective July 1, 2007, the former Office of Thrift Supervision, the agency then responsible for regulating savings associations, adopted an annual

adjustment formula consistent with that of the other federal banking agencies in its CRA rule previously set forth at 12 CFR 563e. 72 FR 13429 (Mar. 22, 2007).

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),¹ effective July 21, 2011, CRA rulemaking authority for federal and state savings associations was transferred from the OTS to the OCC, and the OCC subsequently republished, at 12 CFR 195, the CRA regulations applicable to those institutions.² In addition, the Dodd-Frank Act transferred responsibility for supervision of savings and loan holding companies and their non-depository subsidiaries from the OTS to the Board, and the Board subsequently amended its CRA regulation to reflect this transfer of supervisory authority.³

The threshold for small banks and small savings associations was revised most recently in December 2015 and became effective January 1, 2016. 80 FR 81162 (Dec. 29, 2015). The current CRA regulations provide that banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.216 billion are small banks or small savings associations. Small banks and small savings associations with assets of at least \$304 million as of December 31 of both of the prior two calendar years and less than \$1.216 billion as of December 31 of either of the prior two calendar years are intermediate small banks or intermediate small savings associations. 12 CFR 25.12(u)(1), 195.12(u)(1), 228.12(u)(1), and 345.12(u)(1). This joint final rule revises these thresholds.

During the 12-month period ending November 2016, the CPI-W increased by 0.84 percent. As a result, the Agencies are revising 12 CFR 25.12(u)(1), 195.12(u)(1), 228.12(u)(1), and 345.12(u)(1) to make this annual adjustment. Beginning January 18, 2017, banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.226 billion are small banks or small savings associations. Small banks and small savings associations with assets of at least \$307 million as of December 31 of both of the prior two calendar years and less than \$1.226 billion as of December 31 of either of the prior two calendar years are intermediate small banks or intermediate small savings associations. The Agencies also publish

¹ Public Law 111-203, 124 Stat. 1376 (2010).

² *See* OCC interim final rule, 76 FR 48950 (Aug. 9, 2011).

³ *See* Board interim final rule, 76 FR 56508 (Sept. 13, 2011).

current and historical asset-size thresholds on the Web site of the Federal Financial Institutions Examination Council at <http://www.ffiec.gov/cra/>.

The FDIC is also amending its CRA Notice requirements located at Appendix B to Part 345. The current appendix states that Regional Managers are the proper agency officials responsible for both making available, upon request, lists of the banks scheduled for CRA examination in any particular quarter and receiving any public comment regarding the CRA performance of any of those banks. Since that language was published, a technical change was made to the responsible official's title from Regional Manager to Regional Director. In addition, since the original notice requirements were written, there has been the creation of a Web page to receive public comments electronically. The amendments made in this notice reflect those two changes. The associated changes to the CRA notice requirements will compel covered institutions to print and post the revised CRA notices in their main and branch offices.

Administrative Procedure Act and Effective Date

Under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The amendments to the regulations to adjust the asset-size thresholds for small and intermediate small banks and savings associations result from the application of a formula established by a provision in the respective CRA regulations that the Agencies previously published for comment. *See* 70 FR 12148 (Mar. 11, 2005), 70 FR 44256 (Aug. 2, 2005), 71 FR 67826 (Nov. 24, 2006), and 72 FR 13429 (Mar. 22, 2007). As a result, §§ 25.12(u)(1), 195.12(u)(1), 228.12(u)(1), and 345.12(u)(1) of the Agencies' respective CRA regulations are amended by adjusting the asset-size thresholds as provided for in §§ 25.12(u)(2), 195.12(u)(2), 228.12(u)(2), and 345.12(u)(2).

Accordingly, the Agencies' rules provide no discretion as to the computation or timing of the revisions to the asset-size criteria. Furthermore, revising the FDIC's CRA Notice requirements to reflect the two referenced changes to the manner in which the agency will receive public

comments considered in the CRA examination process is a technical and non-substantive revision. For these reasons, the Agencies have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary.

The effective date of this joint final rule is January 18, 2017. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. Because this rule adjusts asset-size thresholds consistent with the procedural requirements of the CRA rules, the Agencies conclude that it is not substantive within the meaning of the APA's delayed effective date provision. Moreover, the Agencies find that there is good cause for dispensing with the delayed effective date requirement, even if it applied, because their current rules already provide notice that the small and intermediate small asset-size thresholds will be adjusted as of December 31 based on 12-month data as of the end of November each year.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking when a general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the Agencies have determined that it is unnecessary to publish a general notice of proposed rulemaking for this joint final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Agencies have determined that this final rule does not create any new, or revise any existing, collections of information pursuant to the Paperwork Reduction Act. Consequently, no information collection request will be submitted to the OMB for review.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), 2 U.S.C. 1532, requires the OCC to prepare a budgetary impact statement before

promulgating any final rule for which a general notice of proposed rulemaking was published. As discussed above, the OCC has determined that the publication of a general notice of proposed rulemaking is unnecessary. Accordingly, this joint final rule is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects

12 CFR Part 25

Community development, Credit, Investments, National banks, Reporting and recordkeeping requirements.

12 CFR Part 195

Community development, Credit, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 228

Banks, Banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

12 CFR Part 345

Banks, Banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

For the reasons discussed in the preamble, the Office of Comptroller of the Currency amends 12 CFR parts 25 and 195, the Board of Governors of the Federal Reserve System amends part 228 of chapter II, and Board of Directors of the Federal Deposit Insurance Corporation amends part 345 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 25—COMMUNITY REINVESTMENT ACT AND INTERSTATE DEPOSIT PRODUCTION REGULATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 12 U.S.C. 21, 22, 26, 27, 30, 36, 93a, 161, 215, 215a, 481, 1814, 1816, 1828(c), 1835a, 2901 through 2908, and 3101 through 3111.

■ 2. Section 25.12 is amended by revising paragraph (u)(1) to read as follows:

§ 25.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.226 billion. *Intermediate small bank* means a small bank with assets of at least \$307 million as of December 31 of both of the prior two calendar years and less than \$1.226 billion as of December 31 of either of the prior two calendar years.

PART 195—COMMUNITY REINVESTMENT

■ 3. The authority citation for part 195 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1814, 1816, 1828(c), 2901 through 2908, and 5412(b)(2)(B).

■ 4. Section 195.12 is amended by revising paragraph (u)(1) to read as follows:

§ 195.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small savings association* means a savings association that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.226 billion. *Intermediate small savings association* means a small savings association with assets of at least \$307 million as of December 31 of both of the prior two calendar years and less than \$1.226 billion as of December 31 of either of the prior two calendar years.

* * * * *

Federal Reserve System

12 CFR Chapter II

PART 228—COMMUNITY REINVESTMENT (REGULATION BB)

■ 5. The authority citation for part 228 continues to read as follows:

Authority: 12 U.S.C. 321, 325, 1828(c), 1842, 1843, 1844, and 2901 *et seq.*

■ 6. Section 228.12 is amended by revising paragraph § 228.12(u)(1).

The revision is set forth below:

§ 228.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.226 billion. *Intermediate small bank* means a small bank with assets of at least \$307 million as of December 31 of both of the prior two calendar years and less than \$1.226 billion as of December 31 of either of the prior two calendar years.

Federal Deposit Insurance Corporation 12 CFR Chapter III

PART 345—COMMUNITY REINVESTMENT

■ 7. The authority citation for part 345 continues to read as follows:

Authority: 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2908, 3103–3104, and 3108(a).

■ 8. Section 345.12 is amended by revising paragraph (u)(1) to read as follows:

§ 345.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than \$1.226 billion. *Intermediate small bank* means a small bank with assets of at least \$307 million as of December 31 of both of the prior two calendar years and less than \$1.226 billion as of December 31 of either of the prior two calendar years.

* * * * *

■ 9. Appendix B to part 345 is amended by revising the fourth and fifth paragraphs of section (a) and the fifth and sixth paragraphs of section (b) to read as follows:

Appendix B to Part 345—CRA Notice

(a) * *

Community Reinvestment Act Notice

* * * * *

At least 30 days before the beginning of each quarter, the FDIC publishes a nationwide list of the banks that are scheduled for CRA examination in that quarter. This list is available from the Regional Director, FDIC (address). You may send written comments about our performance in helping to meet community credit needs to (name and address of official at bank) and FDIC Regional Director. You may also submit comments electronically through the FDIC's Web site at www.fdic.gov/regulations/cra. Your letter, together with any response by us, will be considered by the FDIC in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the FDIC Regional Director. You may also request from the FDIC Regional Director an announcement of our applications covered by the CRA filed with the FDIC. We are an affiliate of (name of holding company), a bank holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____ (address) an announcement of applications covered by the CRA filed by bank holding companies.

* * * * *

(b) * * *

Community Reinvestment Act Notice

* * * * *

At least 30 days before the beginning of each quarter, the FDIC publishes a nationwide list of the banks that are scheduled for CRA examination in that quarter. This list is available from the Regional Director, FDIC (address). You may send written comments about our performance in helping to meet community credit needs to (name and address of official at bank) and the FDIC Regional Director. You may also submit comments electronically through the FDIC's Web site at www.fdic.gov/regulations/cra. Your letter, together with any response by us, will be considered by the FDIC in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the FDIC Regional Director. You may also request from the FDIC Regional Director an announcement of our applications covered by the CRA filed with the FDIC. We are an affiliate of (name of holding company), a bank holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____ (address) an announcement of applications covered by the CRA filed by bank holding companies.

* * * * *

Dated: December 16, 2016.

Amy S. Friend,

Senior Deputy Comptroller and Chief Counsel.

By order of the Board of Governors of the Federal Reserve System, December 28, 2016.

Robert deV. Frierson,

Secretary of the Board.

By order of the Board of Directors.

Dated at Washington, DC, this 16th day of December, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–31928 Filed 1–17–17; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9187; Directorate Identifier 2016–NM–032–AD; Amendment 39–18777; AD 2017–01–10]

RIN 2120–AA64

Airworthiness Directives; Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Defense and Space S.A. Model C-212 airplanes. This AD was prompted by multiple reports of damaged and cracked rudder torque tube shafts. This AD requires various repetitive inspections, and corrective actions if necessary. This AD also provides a modification which terminates the repetitive inspections. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 22, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 22, 2017.

ADDRESSES: For service information identified in this final rule, contact Airbus Defense and Space, Services/Engineering Support, Avenida de Aragón 404, 28022 Madrid, Spain; telephone: +34 91 585 55 84; fax: +34 91 585 31 27; email: MTA.TechnicalService@Airbus.com. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9187.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9187; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone: 800-647-5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone: 425-227-1112; fax: 425-227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Defense and Space S.A. Model C-212 airplanes. The NPRM published in the **Federal Register** on October 11, 2016 (81 FR 70062). The NPRM was prompted by multiple reports of damaged and cracked rudder torque tube shafts. The NPRM proposed to require repetitive general visual and high frequency eddy current (HFEC) inspections of the inner rudder torque tube shaft for cracks, deformation, and damage; repetitive detailed inspections, and HFEC inspections, if necessary, of the inner and outer rudder torque tube shaft for cracks, deformation, and damage; and corrective actions if necessary. We are issuing this AD to detect and correct damaged and cracked rudder torque tube shafts, which could lead to structural failure of the affected rudder torque tube shaft and possible reduced control of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016-0052, dated March 14, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Airbus Defense and Space S.A. Model C-212 airplanes. The MCAI states:

Occurrences were reported of finding a damaged and cracked rudder torque tube shaft, Part Number (P/N) 212-46237-01. Subsequent investigation determined that this damage occurred after parking of the aeroplane during a heavy wind gust, without having set the flight control surfaces in locked position.

This condition, if not detected and corrected, could lead to structural failure of the affected rudder torque tube shaft, possibly resulting in reduced control of the aeroplane.

To address this potential unsafe condition, EADS-CASA issued Alert Operators Transmission (AOT) AOT-C212-27-0001 to provide inspection instructions, and Service Bulletin (SB) SB-212-27-0058 providing modification instructions.

For the reasons described above, this [EASA] AD requires repetitive inspections of the affected rudder torque tube shaft, and introduces an optional modification [replacement], which constitutes terminating action for those repetitive inspections.

Required actions include repetitive general visual and HFEC inspections of the inner rudder torque tube shaft for cracks, deformation, and damage; repetitive detailed inspections, and HFEC inspections, if necessary, of the inner and outer rudder torque tube shaft for cracks, deformation, and damage; a

general visual inspection to verify rudder alignment if necessary; and corrective actions if necessary. Repetitive inspections are done depending on conditions (wind conditions, gust lock engagement, and rudder deviation) identified in Airbus Defense & Space Alert Operators Transmission AOT-C212-27-0001, Revision 0, dated July 15, 2015 (“AOT-C212-27-0001, Rev. 0”). Damage may include bulging, dents, peeled paint, or visible corrosion. Corrective actions include replacement of the rudder torque tube shaft with a new rudder torque tube shaft, and repair. The optional terminating action includes replacement of the rudder torque tube shaft with an improved rudder torque tube shaft. You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9187.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Clarification of the Actions in Paragraph (g)(2) of the Proposed AD

Paragraph (g)(2) of the proposed AD specifies to do inspections “after the conditions” identified in paragraph 3.1.1.1 of AOT-C212-27-0001, Rev. 0. We have revised paragraph (g)(2) of the AD to clarify the inspections are done after any weather event that includes the conditions identified in paragraph 3.1.1.1 of AOT-C212-27-0001, Rev. 0.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD with the change described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 14 CFR Part 51

We reviewed the following Airbus Defense and Space service information.

- EADS CASA Service Bulletin SB-212-27-0058, dated April 25, 2014. This service information describes procedures for replacement of the rudder torque tube shaft with an improved rudder torque tube shaft.

• AOT-C212-27-0001, Rev. 0. This service information describes procedures for general visual and HFEC inspections of the inner rudder torque tube shaft for cracks, deformation, and damage; detailed inspections, and HFEC inspections, if necessary, of the inner and outer rudder torque tube shaft for

cracks, deformation, and damage; a general visual inspection to verify rudder alignment; and corrective actions, if necessary.

This service information is reasonably available because the interested parties have access to it through their normal

course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 49 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	Up to 33 work-hours × \$85 per hour = \$2,805 per inspection cycle.	\$0	Up to \$2,805 per inspection cycle.	Up to \$137,445 per inspection cycle.

ESTIMATED COSTS FOR OPTIONAL ACTIONS

Action	Labor cost	Parts cost	Cost per product
Optional modification	Up to 48 work-hours × \$85 per hour = \$4,080.	\$48,729	Up to \$52,809.

We have received no definitive data that will enable us to provide cost estimates for the on-condition actions and parts cost specified in this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska; and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017-01-10 Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.): Amendment 39-18777; Docket No. FAA-2016-9187; Directorate Identifier 2016-NM-032-AD.

(a) Effective Date

This AD is effective February 22, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Defense and Space S.A. (formerly known as Construcciones Aeronauticas, S.A.) Model C-212-CB, C-212-CC, C-212-CD, C-212-CE, C-212-CF, C-212-DF, and C-212-DE airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Reason

This AD was prompted by multiple reports of damaged and cracked rudder torque tube shafts. We are issuing this AD to detect and correct damaged and cracked rudder torque tube shafts, which could lead to structural failure of the affected rudder torque tube shaft and possible reduced control of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Repetitive Inspections

For airplanes equipped with a rudder torque tube shaft having part number (P/N) 212-46237-01: Do the actions specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Within 30 days after the effective date of this AD: Do general visual, detailed, and high frequency eddy current (HFEC) inspections of the inner and outer surfaces of the rudder torque tube shaft, as applicable, for cracks, deformation, and damage, in accordance with the instructions of Airbus Defense & Space Alert Operators Transmission AOT-C212-27-0001, Revision 0, dated July 15, 2015 ("AOT-C212-27-0001, Rev. 0").

(2) Thereafter, before further flight after any weather event that includes the conditions identified in paragraph 3.1.1.1 of AOT-C212-27-0001, Rev. 0, do the applicable inspections identified for each condition.

(h) Corrective Actions

If, during any inspection required by paragraph (g) of this AD, any crack, deformation, or damage is found, before further flight do all applicable corrective actions, in accordance with AOT-C212-27-0001, Rev. 0. Where AOT-C212-27-0001, Rev. 0, specifies to contact Airbus for corrective action: Before further flight, accomplish corrective actions in accordance with the procedures specified in paragraph (k)(2) of this AD.

(i) Optional Modification

Modification of an airplane by replacing the rudder torque tube shaft P/N 212-46237-01 with an improved part, in accordance with the Accomplishment Instructions of EADS CASA Service Bulletin SB-212-27-0058, dated April 25, 2014, constitutes terminating action for the inspections required by paragraphs (g)(1) and (g)(2) of this AD for the modified airplane.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Airbus Military All Operator Letter (AOL) AOL-212-037, Revision 01, dated April 11, 2014.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone: 425-227-1112; fax: 425-227-1149. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or EADS CASA's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016-0052, dated March 14, 2016, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9187.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (m)(4) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) EADS CASA Service Bulletin SB-212-27-0058, dated April 25, 2014.

(ii) Airbus Defense & Space Alert Operators Transmission AOT-C212-27-0001, Revision 0, dated July 15, 2015.

(3) For service information identified in this AD, contact Airbus Defense and Space, Services/Engineering Support, Avenida de Aragón 404, 28022 Madrid, Spain; telephone: +34 91 585 55 84; fax: +34 91 585 31 27; email: MTA.TechnicalService@Airbus.com.

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on January 4, 2017.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017-00407 Filed 1-17-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2016-9317; Directorate Identifier 2016-CE-029-AD; Amendment 39-18779; AD 2017-01-12]

RIN 2120-AA64

Airworthiness Directives; Diamond Aircraft Industries GmbH Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Diamond Aircraft Industries GmbH Model DA 42 airplanes. This AD results from mandatory continuing

airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as an uncommanded engine shutdown during flight due to failure of the propeller regulating valve caused by hot exhaust gases escaping from fractured engine exhaust pipes. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective February 22, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 22, 2017.

ADDRESSES: You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9317; or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

For service information identified in this AD, contact Diamond Aircraft Industries GmbH, N.A. Otto-Straße 5, A-2700 Wiener Neustadt, Austria, telephone: +43 2622 26700; fax: +43 2622 26780; email: office@diamond-air.at; Internet: <http://www.diamondaircraft.com>. You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. It is also available on the Internet at <http://www.regulations.gov> by searching for Docket No. FAA-2016-9317.

FOR FURTHER INFORMATION CONTACT:

Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4144; fax: (816) 329-4090; email: mike.kiesov@faa.gov.

SUPPLEMENTARY INFORMATION:**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Diamond Aircraft Industries GmbH Model DA 42 airplanes. The NPRM was published in the **Federal Register** on October 25, 2016 (81 FR 73360). The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of

another country. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No. 2016–0156R1, dated November 23, 2016 (referred to after this as “the MCAI”). The revised MCAI states:

Two cases were reported of uncommanded engine in-flight shutdown (IFSD) on DA 42 aeroplanes. Subsequent investigations identified these occurrences were due to failure of the propeller regulating valve, caused by hot exhaust gases coming from fractured engine exhaust pipes. The initiating cracks on the exhaust pipes were not detected during previous inspections, since those exhaust pipes are equipped with non-removable heat shields that do not allow inspection for certain sections of the exhaust pipe.

This condition, if not corrected, could lead to further cases of IFSD or overheat damage, possibly resulting in a forced landing, with consequent damage to the aeroplane and injury to occupants.

To address this potential unsafe condition, Diamond Aircraft Industries (DAI) developed an exhaust pipe without a directly attached integral heat shield that allows visual inspection over the entire exhaust pipe length. DAI issued Mandatory Service Bulletin (MSB) 42–120 and relevant Working Instruction (WI) WI–MSB 42–120, providing instructions to install the modified exhaust pipes. As an interim measure, an additional bracket was designed to hold the exhaust pipe in place in case of a pipe fracture.

Consequently, EASA issued AD 2016–0156, requiring replacement of the exhaust pipes with pipes having new design, and prohibiting (re)installation of the previous design pipes.

Since that AD was issued, cracks were identified on modified exhaust pipes during an inspection. Furthermore, it was determined that the additional brackets provide a level of safety equivalent to the modified exhaust pipes. Consequently, DAI revised MSB 42–120, allowing installation of the additional brackets as alternative to the installation of the modified exhaust pipes.

For the reasons described above, this AD is revised to reduce the Applicability, excluding certain post-mod aeroplanes, to allow only installation of the additional brackets as final solution and to remove the prohibition of reinstallation of unmodified exhaust pipes.

The MCAI can be found in the AD docket on the Internet at <https://www.regulations.gov/document?D=FAA-2016-9317-0002>.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the

public interest require adopting this AD as proposed except for the changes discussed above. We have determined that these changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed Diamond Aircraft Industries GmbH Mandatory Service Bulletin MSB 42–120, dated June 24, 2016, Mandatory Service Bulletin MSB 42–120/1, dated November 10, 2016, and Work Instruction WI–MSB 42–120, dated June 24, 2016. In combination, this service information describes procedures for replacing the exhaust pipes with exhaust pipes having a new design. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section of this AD.

Costs of Compliance

We estimate that this AD will affect 130 products of U.S. registry. We also estimate that it will take the following to comply with the requirements of this AD:

It will take about 1 work-hour per product to comply with the installation of additional exhaust clamps required by this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$125 per product.

Based on these figures, we estimate the cost of this AD on U.S. operators for the installation of additional exhaust clamps to be \$27,300, or \$210 per product.

It will take about 4 work-hours per product to comply with the exhaust pipe replacement required by this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$1,990 per product.

Based on these figures, we estimate the cost of this AD on U.S. operators for the exhaust pipe replacement requirement to be \$302,900, or \$2,330 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. “Subtitle VII: Aviation Programs,” describes in more detail the scope of the Agency’s authority.

We are issuing this rulemaking under the authority described in “Subtitle VII, Part A, Subpart III, section 44701: General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–9317; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2017-01-12 Diamond Aircraft Industries GmbH: Amendment 39-18779; Docket No. FAA-2016-9317; Directorate Identifier 2016-CE-029-AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective February 22, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Diamond Aircraft Industries GmbH DA 42 airplanes, serial numbers 42.004 through 42.427 and 42.AC001 through 42.AC151, that have a TAE 125-02-99 or TAE 125-02-114 engine installed, are equipped with an exhaust pipe, DAI part number (P/N) D60-9078-06-01, or Technify P/Ns 52-7810-H0001 02, 52-7810-H0001 03, or 52-7810-H0001 04, and are certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 78: Engine Exhaust.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as an uncommanded engine shutdown during flight due to failure of the propeller regulating valve caused by hot exhaust gases escaping from fractured engine exhaust pipes. We are issuing this AD to prevent failure of the propeller regulating valve, which could result in forced landing with consequent damage to the airplane.

(f) Actions and Compliance

Unless already done, do one of the actions in either paragraph (f)(1) or (2) of this AD. For the purpose of this AD, if the flight hours accumulated since first installation of an affected exhaust pipe is not known, use the total hours time-in-service (TIS) accumulated on the airplane.

Note 1 to paragraph (f) of this AD: The NPRM for this AD proposed to require both the installation of clamps and the replacement of the exhaust pipes. This AD only requires one or the other.

(1) At the following compliance times, install additional exhaust pipe clamps following section III.2 of the INSTRUCTIONS section of Diamond Aircraft Industries GmbH Work Instruction WI-MSB 42-120, dated June 24, 2016, as specified in the Accomplishments/Instructions paragraph of Diamond Aircraft Industries GmbH

Mandatory Service Bulletin MSB 42-120, dated June 24, 2016, or Diamond Aircraft Industries GmbH Mandatory Service Bulletin MSB 42-120/1, dated November 10, 2016.

(i) If the affected exhaust pipe has 1,300 hours TIS or less since first installed on an airplane as of February 22, 2017 (the effective date of this AD): Before or upon accumulating 1,500 hours TIS since the affected exhaust pipe was first installed on an airplane.

(ii) If the affected exhaust pipe has more than 1,300 hours TIS since first installed on an airplane as of February 22, 2017 (the effective date of this AD): Within the next 200 hours TIS after February 22, 2017 (the effective date of this AD) or within the next 12 months after February 22, 2017 (the effective date of this AD), whichever occurs first.

(2) At the following compliance times, replace the exhaust pipes listed in paragraph (c) of this AD with an exhaust pipe DAI P/N D60-9078-06-01_01 or Technify P/N 52-7810-H0014 01 following section III.1 of the INSTRUCTIONS section of Diamond Aircraft Industries GmbH Work Instruction WI-MSB 42-120, dated June 24, 2016, as specified in the Accomplishments/Instructions paragraph of Diamond Aircraft Industries GmbH Mandatory Service Bulletin MSB 42-120, dated June 24, 2016, or Diamond Aircraft Industries GmbH Mandatory Service Bulletin MSB 42-120/1, dated November 10, 2016.

(i) If the affected exhaust pipe has 1,300 hours TIS or less since first installed on an airplane as of February 22, 2017 (the effective date of this AD): Before or upon accumulating 1,500 hours TIS since the affected exhaust pipe was first installed on an airplane.

(ii) If the affected exhaust pipe has more than 1,300 hours TIS since first installed on an airplane as of February 22, 2017 (the effective date of this AD): Within the next 200 hours TIS after February 22, 2017 (the effective date of this AD) or within the next 12 months after February 22, 2017 (the effective date of this AD), whichever occurs first.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4144; fax: (816) 329-4090; email: mike.kiesov@faa.gov. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority

(or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES-200.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2016-0156, dated August 2, 2016, for related information. You may examine the MCAI on the Internet at <https://www.regulations.gov/document?D=FAA-2016-9317-0002>.

(i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Diamond Aircraft Industries GmbH Mandatory Service Bulletin MSB 42-120, dated June 24, 2016.

(ii) Diamond Aircraft Industries GmbH Mandatory Service Bulletin MSB 42-120/1, dated November 10, 2016.

(iii) Diamond Aircraft Industries GmbH Work Instruction WI-MSB 42-120, dated June 24, 2016.

(3) For Diamond Aircraft Industries GmbH service information identified in this AD, contact Diamond Aircraft Industries GmbH, N.A. Otto-Straße 5, A-2700 Wiener Neustadt, Austria, telephone: +43 2622 26700; fax: +43 2622 26780; email: office@diamond-air.at; Internet: <http://www.diamondaircraft.com>.

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. In addition, you can access this service information on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9317.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov>

www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued in Kansas City, Missouri, on January 6, 2017.

Melvin Johnson,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017-00502 Filed 1-17-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2015-0831; Directorate Identifier 2014-NM-061-AD; Amendment 39-18778; AD 2017-01-11]

RIN 2120-AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Model A318 and A319 series airplanes, Model A320-211, -212, -214, -231, -232, and -233 airplanes, and Model A321 series airplanes. This AD was prompted by a report of a rupture of a main landing gear (MLG) sliding tube axle. This AD requires identification of the part number and serial number of the MLG sliding tubes; inspection of affected chromium plates and sliding tube axles for damage; and replacement of the sliding tube if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 22, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 22, 2017.

ADDRESSES: For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; Internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the Internet at <http://www.regulations.gov> by searching for

and locating Docket No. FAA-2015-0831.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-0831; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800-647-5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-1405; fax 425-227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Model A318 and A319 series airplanes, Model A320-211, -212, -214, -231, -232, and -233 airplanes, and Model A321 series airplanes. The SNPRM published in the **Federal Register** on June 28, 2016 (81 FR 41886) (“the SNPRM”). We preceded the SNPRM with a notice of proposed rulemaking (NPRM) that published in the **Federal Register** on April 24, 2015 (80 FR 22939) (“the NPRM”). The NPRM proposed to require an inspection to identify the part number and serial number of the MLG sliding tubes installed on the airplane; an inspection of the axle on certain MLG sliding tubes for damage; and replacement of the sliding tube if necessary. The NPRM was prompted by a report of a rupture of a MLG sliding tube axle. The SNPRM proposed to remove certain service information that does not adequately address the identified unsafe condition and revise the compliance method. We are issuing this AD to detect and correct cracks in the axle and (partial) detachment of the axle and wheel from the sliding tube, which could result in failure of an MLG. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness

Directive 2014-0058, dated March 11, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Airbus Model A318 and A319 series airplanes, Model A320-211, -212, -214, -231, -232, and -233 airplanes, and Model A321 series airplanes. The MCAI states:

A main landing gear (MLG) sliding tube axle rupture occurred in service. Investigation of the affected part showed that this failure was due to an abnormal grinding operation during overhaul by a certain maintenance and repair organization located in Singapore. A population of MLG sliding tubes was subsequently identified whose axles may have been subject to this grinding operation, which may have resulted in areas of residual stress on the axles on the MLG sliding tubes. In addition, the MSN [manufacturer serial number] of the aeroplanes which are known to have had the affected parts installed have been identified.

This condition, if not detected and corrected, could lead to cracks in the axle and (partial) detachment of axle and wheel from the sliding tube, possibly resulting in failure of a MLG with consequent damage to the aeroplane and injury to occupants.

To address this potential unsafe condition, Messier-Bugatti-Dowty, the MLG gear manufacturer, issued Service Bulletin (SB) 200-32-313 and SB 201-32-62 [both dated February 25, 2013], providing inspection instructions and criteria for removal from service of the affected MLG sliding tubes.

For the reasons described above, this [EASA] AD requires a one-time Special Detailed Inspection (SDI) of the axle on the affected MLG sliding tubes and, depending on findings, replacement of the MLG sliding tube.

The SDI includes a detailed visual inspection of the chromium plate for damage, and a Barkhausen noise inspection of the sliding tube axles for damage.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-0831.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the SNPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the SNPRM for correcting the unsafe condition; and

• Do not add any additional burden upon the public than was already proposed in the SNPRM.

Related Service Information Under 1 CFR Part 51

Airbus has issued Service Bulletin A320–32–1416, including Appendix 01, dated March 10, 2014. This service information describes procedures for inspecting MLG axles and brake flanges by doing a detailed visual inspection of the chromium plates for damage, a Barkhausen noise inspection of the sliding tube axles for damage, and replacement of affected parts if necessary. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Costs of Compliance

We estimate that this AD affects 3 airplanes of U.S. registry.

We also estimate that it would take about 18 work-hours per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be \$4,590, or \$1,530 per product.

In addition, we estimate that any necessary on-condition actions will take about 3 work-hours, for a cost of \$255 per product. We have received no definitive data that would enable us to provide part cost estimates for the on-condition actions specified in this AD. We have no way of determining the number of aircraft that might need these actions.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in

air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017–01–11 Airbus: Amendment 39–18778; Docket No. FAA–2015–0831; Directorate Identifier 2014–NM–061–AD.

(a) Effective Date

This AD is effective February 22, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Airbus airplanes identified in paragraphs (c)(1) through (c)(4) of this AD, certificated in any category, all manufacturer serial numbers.

(1) Airbus Model A318–111, –112, –121, and –122 airplanes.

(2) Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Airbus Model A320–211, –212, –214, –231, –232, and –233 airplanes.

(4) Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by a report of a rupture of a main landing gear (MLG) sliding tube axle. We are issuing this AD to detect and correct cracks in the axle and (partial) detachment of the axle and wheel from the sliding tube, which could result in failure of an MLG.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) MLG Sliding Tube Part Number and Serial Number Identification

Within 3 months after the effective date of this AD: Do an inspection to identify the part number and serial number of the MLG sliding tubes installed on the airplane. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number and serial number of the MLG sliding tubes can be conclusively determined from that review.

(h) Identification of Airplanes Not Affected by the Requirements of Paragraph (i) of this AD

An airplane with a manufacturer serial number (MSN) not listed in figure 1 to paragraph (h) of this AD is not affected by the requirements of paragraph (i) of this AD, provided it can be determined that no MLG sliding tube having a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD has been installed on that airplane since first flight of the airplane.

FIGURE 1 TO PARAGRAPH (H) OF THIS AD

Affected Airplanes Listed by MSN					
0179	0214	0296	0412	0558	0604
0607	0668	0704	0720	0726	0731
0754	0771	0799	0828	0841	0855
0909	0914	0925	0939	0986	1028
1030	1041	1070	1083	1093	1098

FIGURE 1 TO PARAGRAPH (H) OF THIS AD—Continued

1108	1148	1294	1356	2713	2831
TABLE 1 TO PARAGRAPHS (h), (i), (k)(1), (k)(2), (l)(1), AND (l)(2) OF THIS AD—AFFECTED MLG SLIDING TUBES					
Part No.	Serial No.				
201160302	78B	a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD: Within 3 months after the effective date of this AD, inspect affected MLG axles and brake flanges by doing a detailed visual inspection of the chromium plates for damage, and a Barkhausen noise inspection of the sliding tube axles for damage, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–32–1416, including Appendix 01, dated March 10, 2014. For Model A318 series airplanes, use the procedures specified for Model A319 series airplanes in Airbus Service Bulletin A320–32–1416, including Appendix 01, dated March 10, 2014.			
201160302	1016B11				
201160302	1144B				
201371302	B4493				
201371302	B4513				
201371302	SS4359				
201371302	B4530				
201371302	B4517				
201371302	B4568				
201371302	B4498				
201371302	4490B	(j) Corrective Action If, during any inspection required by paragraph (i) of this AD, any damage is detected: Before further flight, replace the MLG sliding tube with a serviceable tube, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–32–1416, including Appendix 01, dated March 10, 2014. For Model A318 series airplanes, use the procedures specified for Model A319 series airplanes in Airbus Service Bulletin A320–32–1416, including Appendix 01, dated March 10, 2014.			
201371302	B202–4598				
201371302	B165–4623				
201371302	B244–4766				
201371302	B267–4794				
201371302	B272–4813				
201160302	1108B				
201371304	B041–4871				
201371304	B045–4869				
201371304	B001–4781				
201371304	B051–4892	(k) Definition of Serviceable Sliding Tube For the purpose of this AD, a serviceable sliding tube is defined as a sliding tube that meets the criterion in either paragraph (k)(1) or (k)(2) of this AD. (1) A sliding tube having a part number and serial number not listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD. (2) A sliding tube having a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD that has passed the inspections required by paragraph (i) of this AD.			
201371304	B110–1952				
201371304	B054–4891				
201371304	B063–4921				
201371304	B071–4911				
201371304	B071–4917				
201371304	B080–1933				
201371304	B117–5010				
201371304	B120–4989				
201371304	B132–2023				
201371304	B114–1956	(l) Parts Installation Prohibitions (1) For airplanes that have an MLG sliding tube installed that has a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD: After an airplane is returned to service following accomplishment of the actions required by paragraphs (g), (h), and (i) of this AD, no person may install on any airplane an MLG sliding tube having a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD unless that sliding tube has passed the inspection required by paragraph (i) of this AD. (2) For airplanes that, as of the effective date of this AD, do not have an MLG sliding tube installed that has a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD: No person may install on any airplane an MLG sliding tube having a part number and serial number listed in table 1 to paragraphs (h), (i), (k)(1), (k)(2), (l)(1), and (l)(2) of this AD unless that sliding tube has passed the inspection required by paragraph (i) of this AD.			
201371304	B208–2009				
201371304	B133–1947				
201371304	B154–5037				
201371304	B89 4952				
201371304	B129–1964				
201371304	B227–2010				
201371304	B170–5031				
201371304	B182–5047				
201371304	B239–2053				
201371304	B1401–2856	(m) Other FAA AD Provisions The following provisions also apply to this AD: (1) <i>Alternative Methods of Compliance (AMOCs)</i> : The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: 9–ANM–116–AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD. (2) <i>Required for Compliance (RC)</i> : If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC. (3) <i>Contacting the Manufacturer</i> : For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature. (n) Special Flight Permits Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the airplane can be modified (if the operator elects to do so), provided the MLG remains extended throughout the flight. (o) Related Information Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA			
201371304	B1813–3142				
201371304	B116–5004				
201522353	B011–149				
201522350	B014–25				
201522350	B019–56				
201522350	B019–57				
201522350	B021–69				
201522350	B022–60				
201522353	B03–111				
201522353	B03–110				
201522353	B112–317				
201522353	B174–351				
201522353	B179–392				
201383350	4377B				
201383350	4393B				
201383350	B1831				
201383350	B1832				
201383350	SS4355B				
201383350	SS4400B				

(i) Inspections

For each MLG sliding tube identified as required by paragraph (g) of this AD, having

Airworthiness Directive 2014–0058, dated March 11, 2014, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–0831.

(p) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Airbus Service Bulletin A320–32–1416, including Appendix 01, dated March 10, 2014.

(ii) Reserved.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—ELAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; Internet <http://www.airbus.com>.

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on January 4, 2017.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017–00408 Filed 1–17–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9058; Directorate Identifier 2016–NM–024–AD; Amendment 39–18771; AD 2017–01–04]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Fokker Services B.V. Model F28 Mark 0100 airplanes. This AD was prompted by an analysis which determined that,

for certain areas of the fuselage, the current threshold of an Airworthiness Limitations Section inspection is insufficient to detect early crack development. This AD requires one time high and low frequency eddy current inspections of the affected fuselage skin for cracks, and repair if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 22, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 22, 2017.

ADDRESSES: For service information identified in this final rule, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: technicalservices@fokker.com; Internet <http://www.myfokkerfleet.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–9058.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–9058; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425 227 1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would

apply to certain Fokker Services B.V. Model F28 Mark 0100 airplanes. The NPRM published in the **Federal Register** on September 8, 2016 (81 FR 62029) (“the NPRM”). The NPRM was prompted by an analysis which determined that, for certain areas of the fuselage, the current threshold of an Airworthiness Limitations Section inspection is insufficient to detect early crack development. The NPRM proposed to require one time high and low frequency eddy current inspections of the affected fuselage skin for cracks, and repair if necessary. We are issuing this AD to detect and correct cracks in the fuselage skin; such cracking could result in reduced structural integrity of the fuselage.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive Airworthiness Directive 2016–0029R1, dated November 17, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Fokker Services B.V. Model F28 Mark 0100 airplanes. The MCAI states:

A complementary fatigue and damage tolerance analysis was accomplished by the design approval holder on the traffic collision avoidance system (TCAS) antenna installation on the top of the fuselage between station (STA) 6805 and STA7305. Based on the results, it was determined that for the affected area, the current 58 000 flight cycles (FC) threshold of Airworthiness Limitations Section (ALS) inspection task 533001–00–20 and 533028–00–20 (special detailed inspection of longitudinal lap joints) is insufficient to timely detect possible crack development.

This condition, if not detected and corrected, could affect the structural integrity of the fuselage in this area.

To address this potential unsafe condition, Fokker Services published Service Bulletin (SB) SBF100–53–130 to provide inspection instructions.

Consequently, EASA issued AD 2016–0029 to require a one-time inspection of the fuselage skin around the largest TCAS antenna external doubler and of the longitudinal lap joint at stringer (STR) 37 between fuselage STA6805 and STA7305.

Since that [EASA] AD was issued, it was discovered that another ALS inspection task, 533028–00–20, is also related to this subject. This [EASA] AD is revised to clarify that the inspection threshold of both ALS inspection tasks has been re-assessed. It is expected that a repetitive inspection task will be included in the ALS, which will cover only the area close to the TCAS antenna installation. For the remainder of the affected lap joint, no change is anticipated and this will therefore continue to be inspected in accordance with the existing ALS tasks.

This [EASA] AD is still considered to be an interim action and further [EASA] AD

action may follow. More information on this subject can be found in Fokker Services All Operators Message AOF100.199#02.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-9058.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Revised MCAI AD

Since the NPRM was issued, EASA revised 2016-0029, dated March 8, 2016. EASA AD 2016-0029R1, dated November 17, 2016, clarifies that the

inspection threshold of both ALS inspection tasks have been re-assessed. The revised MCAI did not result in a change to the NPRM. We have revised this AD to refer to EASA AD 2016-0029R1, dated November 17, 2016.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD with the change described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed Fokker Service Bulletin SBF100-53-130, dated December 1, 2015. This service information describes one time high and low frequency eddy current inspections for cracks of the fuselage skin. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Costs of Compliance

We estimate that this AD affects 8 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × \$85 per hour = \$85	\$0	\$85	\$680

We have received no definitive data that will enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017-01-04 Fokker Services B.V.:

Amendment 39-18771; Docket No. FAA-2016-9058; Directorate Identifier 2016-NM 024-AD.

(a) Effective Date

This AD is effective February 22, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Fokker Services B.V. Model F28 Mark 0100 airplanes, certificated in any category, serial numbers 11244 through 11407 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by an analysis which determined that, for certain areas of the fuselage, the current threshold of an Airworthiness Limitations Section inspection is insufficient to detect early crack development. We are issuing this AD to detect and correct cracks in the fuselage skin; such cracking could result in reduced structural integrity of the fuselage.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection

Within the compliance time specified in paragraphs (g)(1) and (g)(2) of this AD, as applicable, do high and low frequency eddy current inspections for cracks in the fuselage skin around the largest traffic collision avoidance system (TCAS) antenna external doubler and of the longitudinal lap joint at

fuselage stringer STR37 between fuselage station (STA) STA6805 and STA7305, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–53–130, dated December 1, 2015.

(1) For airplanes having 45,000 or more total flight cycles as of the effective date of this AD, since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness: Do the high and low frequency eddy current inspections within 750 flight cycles after the effective date of this AD.

(2) For airplanes having 40,000 or more total flight cycles, but less than 45,000 total flight cycles as of the effective date of this AD, since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness: Do the high and low frequency eddy current inspections within 1,500 flight cycles after the effective date of this AD.

(h) Corrective Action

If any crack is found during any inspection required by paragraph (g) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Fokker B.V. Service's EASA Design Organization Approval (DOA).

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: 9–ANM-116–AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or EASA; or Fokker Services B.V.'s EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0029R1, dated November 17, 2016, for related information. This MCAI may be found in the AD docket on the Internet at

<http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–9058.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Fokker Service Bulletin SBF100–53–130, dated December 1, 2015.

(ii) Reserved.

(3) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: technicalservices@fokker.com; Internet <http://www.myfokkerfleet.com>.

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on December 27, 2016.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017–00410 Filed 1–17–17; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 201

[Release Nos. 33–10276; 34–79749; IA–4599; IC–32414]

Adjustments to Civil Monetary Penalty Amounts

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the “Commission”) is adopting a final rule to implement the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the “2015 Act”), which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the “Inflation Adjustment Act”), as previously amended by the Debt Collection Improvement Act of 1996 (the “DCIA”). The 2015 Act requires all agencies to annually adjust for inflation the civil

monetary penalties that can be imposed under the statutes administered by the agency. Pursuant to this requirement, this final rule performs the first annual adjustment for inflation of the maximum amount of civil monetary penalties administered by the Commission under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002. This adjustment will apply to all penalties imposed after the effective date of this final rule for violations after November 2, 2015. For violations that occurred on or before November 2, 2015, the Commission is reinstating the penalty amounts in the Commission's prior penalty adjustments performed under the DCIA.

DATES: *Effective Date:* January 18, 2017.

FOR FURTHER INFORMATION CONTACT:

James A. Cappoli, Assistant General Counsel, Office of the General Counsel, at (202) 551–7923, or Stephen M. Ng, Senior Counsel, Office of the General Counsel, at (202) 551–7957.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule implements the 2015 Act,¹ which amended the Inflation Adjustment Act.² The Inflation Adjustment Act previously had been amended by the DCIA³ to require that each federal agency adopt regulations at least once every four years that adjust for inflation the civil monetary penalties (“CMPs”) that could be imposed under the statutes administered by the agency. Pursuant to the requirements of the DCIA, the Commission previously adopted regulations in 1996, 2001, 2005, 2009, and 2013 to adjust the maximum amount of the CMPs that could be imposed under the statutes the Commission administers.⁴

¹ Public Law 114–74 Sec. 701, 129 Stat. 599–601 (Nov. 2, 2015), codified at 28 U.S.C. 2461 note.

² Public Law 101–410, 104 Stat. 890–892 (1990), codified at 28 U.S.C. 2461 note.

³ Public Law 104–134, Title III, § 31001(s)(1), 110 Stat. 1321–373 (1996), codified at 28 U.S.C. 2461 note.

⁴ See Release Nos. 33–7361, 34–37912, IA–1596, IC–22310, dated November 1, 1996 (effective December 9, 1996), previously found at 17 CFR 201.1001 and Table I to Subpart E of Part 201; Release Nos. 33–7946, 34–43897, IA–1921, IC–24846, dated January 31, 2001 (effective February 2, 2001), previously found at 17 CFR 201.1002 and Table II to Subpart E of Part 201; Release Nos. 33–8530, 34–51136, IA–2348, IC–26748, dated February 9, 2005 (effective February 14, 2005), previously found at 17 CFR 201.1003 and Table III to Subpart E of Part 201; Release Nos. 33–9009, 34–59449, IA–2845, IC–28635, dated February 25, 2009 (effective March 3, 2009), previously found at 17

Continued

The 2015 Act replaces the inflation adjustment mechanism prescribed in the DCIA with a new mechanism for calculating the inflation-adjusted amount of CMPs. Each agency was first required to use this new mechanism to adjust the maximum amount of its CMPs⁵ in an initial “catch-up” adjustment.⁶ Pursuant to this requirement, the Commission issued an interim final rule adjusting its CMPs on June 27, 2016 (the “June 2016 interim final rule”).⁷ After performing the catch-up adjustment, each agency must now perform annual adjustments for inflation, and publish these adjustments in the **Federal Register** by January 15 of each calendar year.⁸

A CMP is defined in relevant part as any penalty, fine, or other sanction that: (1) Is for a specific amount, or has a maximum amount, as provided by federal law; and (2) is assessed or enforced by an agency in an administrative proceeding or by a federal court pursuant to federal law.⁹ This definition applies to the monetary penalty provisions contained in four statutes administered by the Commission: The Securities Act of 1933; the Securities Exchange Act of 1934 (the “Exchange Act”); the Investment Company Act of 1940; and

the Investment Advisers Act of 1940. In addition, the Sarbanes-Oxley Act of 2002 provides the Public Company Accounting Oversight Board (the “PCAOB”) authority to levy civil monetary penalties in its disciplinary proceedings pursuant to 15 U.S.C. 7215(c)(4)(D).¹⁰ The definition of a CMP in the Inflation Adjustment Act encompasses such civil monetary penalties.¹¹

II. Adjusting the Commission’s Penalty Amounts for Inflation

This final rule implements the first of the required annual adjustments under the 2015 Act for all penalties under the Securities Act, the Exchange Act, the Investment Company Act, and the Investment Advisers Act, and certain penalties under the Sarbanes-Oxley Act.

As the baseline in calculating these new penalty amounts, the Commission uses the penalty amounts in the Commission’s June 2016 interim final rule. The penalty amounts in that interim final rule used the new inflation adjustment mechanism in the 2015 Act as part of the “catch-up adjustment” required by that Act. The Commission affirms that the amounts in the June 2016 interim final rule were correct and

that the adjusted amounts were appropriate.¹²

Pursuant to the 2015 Act, the Commission now adjusts the penalty amounts in the June 2016 interim final rule by multiplying these amounts by the percentage change between the Consumer Price Index for all Urban Consumers (“CPI-U”) for October 2015, and the October 2016 CPI-U.¹³ OMB has provided its calculation of this multiplier (the “CPI-U Multiplier”) to agencies.¹⁴ After multiplying the June 2016 interim final rule amounts by this multiplier, the Commission must round all penalty amounts to the nearest dollar to determine the new inflation-adjusted penalty amounts.

For example, the CMP for certain insider trading violations by controlling persons under Exchange Act Section 21A(a)(3)¹⁵ was readjusted for inflation on August 1, 2016, to \$1,978,690. To determine the new CMP under this provision, the Commission multiplies the current CMP by the CPI-U Multiplier of 1.01636, and rounds to the nearest dollar. Thus, the new CMP for Exchange Act Section 21A(a)(3) is \$2,011,061.

Below is the Commission’s calculation of the new penalty amounts for the penalties it administers.

U.S. code citation	Civil monetary penalty description	Penalty amounts in June 2016 interim final rule	CPI-U multiplier	New adjusted penalty amounts
15 U.S.C. 77h–1(g) (Securities Act Sec. 8A(g)).	For natural person	\$8,156	1.01636	\$8,289
	For any other person	81,559	1.01636	82,893
	For any other person/fraud	407,794	1.01636	414,466
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	163,118	1.01636	165,787
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	788,401	1.01636	801,299
15 U.S.C. 77t(d) (Securities Act Sec. 20(d)).	For natural person	8,908	1.01636	9,054
	For any other person	89,078	1.01636	90,535
	For natural person/fraud	89,078	1.01636	90,535
	For any other person/fraud	445,390	1.01636	452,677

CFR 201.1004 and Table IV to Subpart E of Part 201; and Release Nos. 33–9387, 34–68994, IA–3557, IC–30408, dated February 27, 2013 (effective March 5, 2013), previously found at 17 CFR 201.1005 and Table V to Subpart E of Part 201.

⁵ The 2015 Act also applies to minimum penalty amounts and penalty ranges. See 28 U.S.C. 2461 note Sec. 5(a). All of the statutes administered by the Commission, however, only include maximum penalty amounts. Thus, in this final rule, we only refer to the effect of the 2015 Act on maximum penalty amounts.

⁶ 28 U.S.C. 2461 note Sec. 4(b)(1); Office of Management and Budget, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (February 24, 2016) (“2016 OMB Guidance”) at 1, available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>.

⁷ Release Nos. 33–10104; 34–78156; IA–4437; IC–32162 (June 27, 2016).

⁸ 28 U.S.C. 2461 note Sec. 4; 2016 OMB Guidance at 4.

⁹ 28 U.S.C. 2461 note Sec. 3(2).

¹⁰ 15 U.S.C. 7215(c)(4)(D).

¹¹ The Commission may by order affirm, modify, remand, or set aside sanctions, including civil monetary penalties, imposed by the PCAOB. See Section 107(c) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217. The Commission may enforce such orders in federal district court pursuant to Section 21(e) of the Securities Exchange Act of 1934. As a result, penalties assessed by the PCAOB in its disciplinary proceedings are penalties “enforced” by the Commission for purposes of the Inflation Adjustment Act. See *Adjustments to Civil Monetary Penalty Amounts*, Release No. 33–8530 (Feb. 4, 2005) [70 FR 7606 (Feb. 14, 2005)].

¹² The 2015 Act provided that agencies could seek approval from OMB to reduce the amount of the catch-up adjustment required by the 2015 Act (a “reduced catch-up determination”) if: (1) The otherwise required increase of the maximum amount of the CMPs administered by the agency would have a negative economic impact, or (2) the social costs of adopting the otherwise required

increase of the maximum amount of these CMPs would outweigh the benefits. See 28 U.S.C. 2461 note Sec. 4(c); 2016 OMB Guidance at 3. As part of the June 2016 interim final rule, the Commission determined that it was not necessary to seek a reduced catch-up adjustment determination, but requested comments on whether the Commission should reconsider this decision. See Release No. 33–10104 at 8. The Commission did not receive any comments on this topic and the Commission affirms its decision not to seek a reduced catch-up adjustment determination.

¹³ 28 U.S.C. 2461 note Sec. 5.

¹⁴ Office of Management and Budget, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2016) (“2017 OMB Guidance”) at 1, available at https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-11_0.pdf.

¹⁵ 15 U.S.C. 78u–1(a)(3).

U.S. code citation	Civil monetary penalty description	Penalty amounts in June 2016 interim final rule	CPI-U multiplier	New adjusted penalty amounts
15 U.S.C. 78u(d)(3) (Exchange Act Sec. 21(d)(3)).	For natural person/fraud/substantial losses or risk of losses to others.	178,156	1.01636	181,071
	For any other person/fraud/substantial losses or risk of losses to others.	890,780	1.01636	905,353
	For natural person	8,908	1.01636	9,054
	For any other person	89,078	1.01636	90,535
	For natural person/fraud	89,078	1.01636	90,535
	For any other person/fraud	445,390	1.01636	452,677
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	178,156	1.01636	181,071
15 U.S.C. 78u–1(a)(3) (Exchange Act Sec. 21A(a)(3)).	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	890,780	1.01636	905,353
	Insider Trading—controlling person	1,978,690	1.01636	2,011,061
15 U.S.C. 78u–2 (Exchange Act Sec. 21B).	For natural person	8,908	1.01636	9,054
	For any other person	89,078	1.01636	90,535
	For natural person/fraud	89,078	1.01636	90,535
	For any other person/fraud	445,390	1.01636	452,677
	For natural person/fraud/substantial losses or risk of losses to others.	178,156	1.01636	181,071
	For any other person/fraud/substantial losses or risk of losses to others.	890,780	1.01636	905,353
	Exchange Act/failure to file information documents, reports.	525	1.01636	534
15 U.S.C. 78ff(b) (Exchange Act Sec. 32(b)).	Foreign Corrupt Practices—any issuer	19,787	1.01636	20,111
15 U.S.C. 78ff(c)(1)(B) (Exchange Act Sec. 32(c)(1)(B)).	Foreign Corrupt Practices—any agent or stockholder acting on behalf of issuer.	19,787	1.01636	20,111
15 U.S.C. 80a–9(d) (Investment Company Act Sec. 9(d)).	For natural person	8,908	1.01636	9,054
	For any other person	89,078	1.01636	90,535
	For natural person/fraud	89,078	1.01636	90,535
	For any other person/fraud	445,390	1.01636	452,677
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	178,156	1.01636	181,071
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	890,780	1.01636	905,353
	For natural person	8,908	1.01636	9,054
15 U.S.C. 80a–41(e) (Investment Company Act Sec. 42(e)).	For any other person	89,078	1.01636	90,535
	For natural person/fraud	89,078	1.01636	90,535
	For any other person/fraud	445,390	1.01636	452,677
	For natural person/fraud/substantial losses or risk of losses to others.	178,156	1.01636	181,071
	For any other person/fraud/substantial losses or risk of losses to others.	890,780	1.01636	905,353
	For natural person	8,908	1.01636	9,054
	For any other person	89,078	1.01636	90,535
15 U.S.C. 80b–3(i) (Investment Advisers Act Sec. 203(i)).	For natural person/fraud	89,078	1.01636	90,535
	For any other person/fraud	445,390	1.01636	452,677
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	178,156	1.01636	181,071
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	890,780	1.01636	905,353
	For natural person	8,908	1.01636	9,054
	For any other person	89,078	1.01636	90,535
	For natural person/fraud	89,078	1.01636	90,535
15 U.S.C. 80b–9(e) (Investment Advisers Act Sec. 209(e)).	For any other person/fraud	445,390	1.01636	452,677
	For natural person/fraud/substantial losses or risk of losses to others.	178,156	1.01636	181,071
	For any other person/fraud/substantial losses or risk of losses to others.	890,780	1.01636	905,353
	For natural person	131,185	1.01636	133,331
	For any other person	2,623,700	1.01636	2,666,624
	For natural person	983,888	1.01636	999,984
	For any other person	19,677,750	1.01636	19,999,678

Pursuant to the 2015 Act, the Commission has determined that the adjusted penalty amounts in this final

rule (and all penalty adjustments performed pursuant to the 2015 Act) will apply to penalties imposed after the

effective date of the adjustment for violations that occurred after November 2, 2015, the 2015 Act's enactment date.

Consistent with this determination, the Commission is reinstating the penalty amounts contained in its prior penalty adjustments under the DCIA for violations that occurred from December 10, 1996, through November 2, 2015.¹⁶

The Commission's prior penalty adjustments under the DCIA were previously included in the Code of Federal Regulations at 17 CFR 201.1001 through 1005 and Tables I through V to Subpart E. In the June 2016 interim final rule, Section 201.1001 and Table I were replaced with the new penalty amounts from the interim final rule, and Sections 201.1002 through 201.1005 and Tables II to V were removed. As part of this final rule, the information in these tables will be added back into the Code of Federal Regulations. However, for ease of reference, the information in these tables will be consolidated and included in a single section (17 CFR 201.1001(a)) and Table (Table I to Section 201.1001).

Further, each penalty adjustment performed pursuant to the 2015 Act supersedes the prior adjustments under that Act. Thus, the penalty amounts in this final rule supersede the amounts in the June 2016 interim final rule (except that for the first day this final rule is effective, the prior year's penalty amounts shall apply, *see* 28 U.S.C. 2461 note Sec. 6). Because of this, the amounts in the June 2016 interim final rule will be removed from the Code of Federal Regulations. The penalty amounts in this final rule, however, need only be published in the **Federal Register** and will not be added to the Code of Federal Regulations, in accordance with the 2015 Act and OMB guidance.¹⁷ As a result, the Commission is amending 17 CFR 201.1001 to add subsection (b) to indicate that all penalty adjustments performed under the 2015 Act will be published in the **Federal Register** and will be made available on the Commission's Web site.¹⁸ This framework will avoid the necessity of revising the Code of Federal Regulations every year to include the new inflation-adjusted penalty amounts.

¹⁶ One commenter to the June 2016 interim final rule requested that the Commission re-evaluate the application of the adjusted penalty amounts included in that interim final rule to violations that occurred before the enactment of the 2015 Act (*see* Ltr. from Wilmer Cutler Pickering Hale and Dorr LLP, Aug. 15, 2016). Our determination to apply the penalty amounts in this final rule to violations that occurred after November 2, 2015, renders the commenter's request moot. As explained below, the penalty amounts in this final rule supersede the penalty amounts in the June 2016 interim final rule.

¹⁷ 28 U.S.C. 2461 note Sec. 4(a)(2); 2017 OMB Guidance at 3.

¹⁸ The Web site will also list the penalty amounts for violations that occurred on or before November 2, 2015.

Section 201.1001(b) will also clarify that penalty adjustments performed pursuant to the 2015 Act will only apply to violations that occurred after November 2, 2015, the enactment date of the 2015 Act.

III. Procedural and Other Matters

The Commission is required by the 2015 Act to adjust the CMPs within its jurisdiction for inflation using a statutorily prescribed formula and the 2015 Act mandates that agencies perform this adjustment annually by January 15th of each year.¹⁹ The 2015 Act further provides that these annual adjustments shall be made "notwithstanding section 553 of title 5, United States Code."²⁰ In light of this Congressional mandate, the Commission is not required to provide for public notice and comment pursuant to the notice and comment provisions of the Administrative Procedure Act.²¹ Under the Regulatory Flexibility Act, a regulatory flexibility analysis is required only when an agency must publish a general notice of proposed rulemaking.²² Because public notice and comment is not required for this final rule, a regulatory flexibility analysis is not required. Further, this rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995 as amended.²³

IV. Economic Analysis²⁴

The Commission is sensitive to the costs and benefits that result from its rules. This regulation merely adjusts CMPs for inflation as required by the 2015 Act. It has no impact on disclosure or compliance costs. The Commission further notes that the CMPs ordered in SEC proceedings and PCAOB disciplinary proceedings in fiscal year 2016 totaled approximately \$1.28 billion. The inflationary adjustment required by the 2015 Act results in the increase of the maximum amount of the CMPs administered by the Commission of 1.636%. Assuming that the Commission is successful in obtaining civil monetary penalties in fiscal year

2017 in similar proportion to that obtained in fiscal year 2016, the inflationary adjustment pursuant to this final rule would result in an increase in the CMPs ordered of approximately \$21 million.

This potential increase, however, overstates the effect of the rule. First, this figure represents the amount of penalties that could be potentially ordered, whereas the amount of penalties collected in any given year—the amount of penalties that would affect the economy—can be lower than the ordered amount. Second, the adjusted penalty amounts will not apply to all penalties ordered, but rather only to those penalties whose associated violations occurred after November 2, 2015. Third, penalties imposed in insider trading cases brought in district court are based on the profit gained or loss avoided as a result of the violation rather than by reference to a statutory dollar amount that is affected by this regulation.²⁵ The average annual amount of penalties obtained in insider trading cases from FY 2010 through FY 2016 is \$95.7 million. Third, in many cases where the Commission has obtained large civil monetary penalties, such penalties were calculated on the basis of the defendant's gross pecuniary gain rather than the maximum penalty dollar amount set by statute that will be adjusted by the proposed rule.²⁶ In addition, the intent of the new regulation is merely to keep pace with changes in the economy, not to impose new costs. Therefore, for the instances in which CMPs affected by this rulemaking are imposed, the Commission does not believe that adjusting civil monetary penalties pursuant to the 2015 Act will significantly affect the amount of penalties it obtains beyond that necessary to keep pace with inflation.

The benefit provided by the inflationary adjustment to the maximum CMPs is that of maintaining the level of deterrence effectuated by the CMPs, and not allowing such deterrent effect to be diminished by inflation. The costs of implementing this rule should be negligible because the only change from the current, baseline situation is determining potential penalties using a new maximum dollar amount.

²⁵ 15 U.S.C. 78u-1(a)(2).

²⁶ For example, 15 U.S.C. 77t(d)(2)(A), after adjusting for inflation as required by the 2015 Act, provides that the amount of the penalty shall not exceed the greater of \$9,054 for a natural person or \$90,535 for any other person, or the gross amount of pecuniary gain to such defendant as a result of the violation.

¹⁹ 28 U.S.C. 2461 note Sec. 4(a).

²⁰ 28 U.S.C. 2461 note Sec. 4(b)(2).

²¹ 5 U.S.C. 553(b)(3)(B). This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the amendment to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are impractical, unnecessary or contrary to the public interest, a rule shall take effect at such time as the federal agency promulgating the rule determines).

²² 5 U.S.C. 603.

²³ 44 U.S.C. 3501 *et. seq.*

²⁴ The Commission did not receive any comments on the economic analysis in the June 2016 interim final rule.

V. Statutory Basis

The Commission is adopting these revisions to 17 CFR part 201, subpart E pursuant to the directives and authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890-892 (1990), codified at 28 U.S.C. 2461 note, as amended.

List of Subjects in 17 CFR Part 201

Administrative practice and procedure, Claims, Confidential business information, Lawyers, Penalties, Securities.

Text of Amendment

For the reasons set forth in the preamble, part 201, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 201—RULES OF PRACTICE

Subpart E—Adjustment of Civil Monetary Penalties

- 1. The authority citation for Part 201, Subpart E continues to read as follows:

Authority: 28 U.S.C. 2461 note.

- 2. Revise 201.1001 to read as follows:

§ 201.1001 Adjustment of civil monetary penalties.

(a) For violations from December 10, 1996, through November 2, 2015: As required by the Inflation Adjustment Act of 1990, as amended by the Debt

Collection Improvement Act of 1996, the Commission has adjusted the maximum amounts of all civil monetary penalties it administers under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002 for inflation in the releases and prior regulations listed in the footnotes to Table I. The penalty amounts provided in Table I apply to violations of these statutes that occurred from December 10, 1996, through November 2, 2015, with each column listing the penalty amounts for violations that occurred in a particular time frame. To determine the penalty amounts for violations that occurred prior to December 10, 1996, please refer to the applicable statutory text. To determine penalty amounts for violations after November 2, 2015, please refer to paragraph (b) of this section.

(b) For violations after November 2, 2015: The Federal Civil Penalties Inflation Adjustment Act, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. 2461 note), requires that civil monetary penalties be adjusted on an annual basis for inflation. Pursuant to this requirement, the maximum amounts of all civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the

Investment Company Act of 1940, and the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002 will be adjusted annually for inflation. Notice of these adjusted penalty amounts will be published by the Commission in the **Federal Register** on or before January 15 of each calendar year and will be available, along with the Commission's prior inflation adjustments, on the Commission's Web site at <https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm>. The adjusted penalty amounts will apply to all penalties imposed after the effective date of the adjustment (for the first day the adjustment is effective, the prior year's penalty amounts shall apply), for violations that occurred after November 2, 2015. The adjusted penalty amount each year will be the larger of:

(1) The maximum penalty amount for the previous calendar year; or

(2) An amount adjusted for inflation, calculated by multiplying the maximum penalty amount for the previous calendar year by the percentage by which the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October preceding the current calendar year exceeds the CPI-U for the month of October of the calendar year two years prior to the current calendar year, adding that amount to the amount for the previous calendar year, and rounding the total to the nearest dollar.

TABLE I TO 201.1001—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS FOR VIOLATIONS FROM DECEMBER 10, 1996, THROUGH NOVEMBER 2, 2015

U.S. Code citation	Civil monetary penalty description	Date of violation and corresponding penalty				
		Dec. 10, 1996– Feb. 2, 2001 ⁱ	Feb. 3, 2001– Feb. 14, 2005 ⁱⁱ	Feb. 15, 2005– Mar. 3, 2009 ⁱⁱⁱ	Mar. 4, 2009– Mar. 5, 2013 ^{iv}	Mar. 6, 2013– Nov. 2, 2015 ^v
15 U.S.C. 77h–1(g) (Securities Act Sec. 8A(g)).	For natural person	N/A	N/A	N/A	^{vi} \$7,500	\$7,500
	For any other person	N/A	N/A	N/A	^{vi} 75,000	80,000
	For natural person/fraud	N/A	N/A	N/A	^{vi} 75,000	80,000
	For any other person/fraud	N/A	N/A	N/A	^{vi} 375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	N/A	N/A	N/A	^{vi} 150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	N/A	N/A	N/A	^{vi} 725,000	775,000
15 U.S.C. 77t(d) (Securities Act Sec. 20(d)).	For natural person	\$5,500	\$6,500	\$6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others.	550,000	600,000	650,000	725,000	775,000
15 U.S.C. 78u(d)(3) (Exchange Act Sec. 21(d)(3)).	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000

TABLE I TO 201.1001—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS FOR VIOLATIONS FROM DECEMBER 10, 1996, THROUGH NOVEMBER 2, 2015—Continued

U.S. Code citation	Civil monetary penalty description	Date of violation and corresponding penalty				
		Dec. 10, 1996– Feb. 2, 2001 ⁱ	Feb. 3, 2001– Feb. 14, 2005 ⁱⁱ	Feb. 15, 2005– Mar. 3, 2009 ⁱⁱⁱ	Mar. 4, 2009– Mar. 5, 2013 ^{iv}	Mar. 6, 2013– Nov. 2, 2015 ^v
15 U.S.C. 78u–1(a)(3) (Exchange Act Sec. 21A(a)(3)). 15 U.S.C. 78u–2 (Exchange Act Sec. 21B).	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	550,000	600,000	650,000	725,000	775,000
	Insider Trading—controlling person.	1,100,000	1,200,000	1,275,000	1,425,000	1,525,000
	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others.	550,000	600,000	650,000	725,000	775,000
	15 U.S.C. 78ff(b) (Exchange Act Sec. 32(b)).	110	110	110	110	210
	15 U.S.C. 78ff(c)(1)(B) (Exchange Act Sec. 32(c)(1)(B)).	11,000	11,000	11,000	16,000	16,000
	15 U.S.C. 78ff(c)(2)(B) (Exchange Act Sec. 32(c)(2)(B)).	11,000	11,000	11,000	16,000	16,000
	15 U.S.C. 80a–9(d) (Investment Company Act Sec. 9(d)).	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	550,000	600,000	650,000	725,000	775,000
15 U.S.C. 80a–41(e) (Investment Company Act Sec. 42(e)).	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others.	550,000	600,000	650,000	725,000	775,000
	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
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	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	550,000	600,000	650,000	725,000	775,000
	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
15 U.S.C. 80b–3(i) (Investment Advisers Act Sec. 203(i)).	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	550,000	600,000	650,000	725,000	775,000
	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others.	550,000	600,000	650,000	725,000	775,000
	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
	For any other person/fraud	275,000	300,000	325,000	375,000	400,000
	For natural person/fraud/substantial losses or risk of losses to others.	110,000	120,000	130,000	150,000	160,000
	For any other person/fraud/substantial losses or risk of losses to others.	550,000	600,000	650,000	725,000	775,000
	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
15 U.S.C. 80b–9(e) (Investment Advisers Act Sec. 209(e)).	For natural person	5,500	6,500	6,500	7,500	7,500
	For any other person	55,000	60,000	65,000	75,000	80,000
	For natural person/fraud	55,000	60,000	65,000	75,000	80,000
15 U.S.C. 7215(c)(4)(D)(i) (Sarbanes-Oxley Act Sec. 105(c)(4)(D)(i)).	For natural person	N/A	vii 100,000	110,000	120,000	130,000
	For any other person	N/A	vii 2,000,000	2,100,000	2,375,000	2,525,000

TABLE I TO 201.1001—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS FOR VIOLATIONS FROM DECEMBER 10, 1996, THROUGH NOVEMBER 2, 2015—Continued

U.S. Code citation	Civil monetary penalty description	Date of violation and corresponding penalty				
		Dec. 10, 1996–Feb. 2, 2001 ⁱ	Feb. 3, 2001–Feb. 14, 2005 ⁱⁱ	Feb. 15, 2005–Mar. 3, 2009 ⁱⁱⁱ	Mar. 4, 2009–Mar. 5, 2013 ^{iv}	Mar. 6, 2013–Nov. 2, 2015 ^v
15 U.S.C. 7215(c)(4)(D)(ii) (Sarbanes-Oxley Act Sec. 105(c)(4)(D)(ii)).	For natural person	N/A	^{vii} 750,000	800,000	900,000	950,000
	For any other person	N/A	^{vii} 15,000,000	15,825,000	17,800,000	18,925,000

ⁱ Release Nos. 33–7361, 34–37912, IA–1596, IC–22310, dated November 1, 1996 (effective December 9, 1996), previously found at 17 CFR 201.1001 and Table I to Subpart E of Part 201.

ⁱⁱ Release Nos. 33–7946, 34–43897, IA–1921, IC–24846, dated January 31, 2001 (effective February 2, 2001), previously found at 17 CFR 201.1002 and Table II to Subpart E of Part 201.

ⁱⁱⁱ Release Nos. 33–8530, 34–51136, IA–2348, IC–26748, dated February 9, 2005 (effective February 14, 2005), previously found at 17 CFR 201.1003 and Table III to Subpart E of Part 201.

^{iv} Release Nos. 33–9009, 34–59449, IA–2845, IC–28635, dated February 25, 2009 (effective March 3, 2009), previously found at 17 CFR 201.1004 and Table IV to Subpart E of Part 201.

^v Release Nos. 33–9387, 34–68994, IA–3557, IC–30408, dated February 27, 2013 (effective March 5, 2013), previously found at 17 CFR 201.1005 and Table V to Subpart E of Part 201.

^{vi} Effective from July 21, 2010 (enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203), through March 5, 2013.

^{vii} Effective from July 30, 2002 (enactment of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204), through February 14, 2005.

By the Commission.

January 6, 2017.

Brent J. Fields,

Secretary.

[FR Doc. 2017–00421 Filed 1–13–17; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Office of Workers' Compensation Programs

20 CFR Parts 702, 725, and 726

Wage and Hour Division

29 CFR Parts 500, 501, 530, 570, 578, 579, 801, and 825

Occupational Safety and Health Administration

29 CFR Part 1903

Employee Benefits Security Administration

29 CFR Part 2560, 2575, and 2590

Mine Safety and Health Administration

30 CFR Part 100

RIN 1290–AA31

Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017

AGENCY: Employment and Training Administration, Office of Workers' Compensation Programs, Office of the Secretary, Wage and Hour Division,

Occupational Safety and Health Administration, Employee Benefits Security Administration, and Mine Safety and Health Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (Department) is publishing this final rule to adjust for inflation the civil monetary penalties assessed or enforced in its regulations, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). The Inflation Adjustment Act requires the Department to annually adjust its civil money penalty levels for inflation no later than January 15 of each year. The Inflation Adjustment Act provides that agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedure Act (APA). Additionally, the Inflation Adjustment Act provides a cost-of-living formula for adjustment of the civil penalties. Accordingly, this final rule sets forth the Department's 2017 annual adjustments for inflation to its civil monetary penalties, effective January 13, 2017.

DATES: This final rule is effective on January 13, 2017. As provided by the Inflation Adjustment Act, the increased penalty levels apply to any penalties assessed after the effective date of this rule.

FOR FURTHER INFORMATION CONTACT:

Pamela Peters, Program Analyst, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–5959 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by

calling (202) 693–5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

- I. Background
- II. Adjustment for 2017
- III. Discussion of Public Comments
- IV. Paperwork Reduction Act
- V. Administrative Procedure Act
- VI. Executive Order 12866: Regulatory Planning and Review, and Executive Order 13563: Improving Regulation and Regulatory Review
- VII. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act
- VIII. Other Regulatory Considerations
 - A. The Unfunded Mandates Reform Act of 1995
 - B. Executive Order 13132: Federalism
 - C. Executive Order 13175: Indian Tribal Governments
 - D. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families
 - E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
 - F. Environmental Impact Assessment
 - G. Executive Order 13211: Energy Supply
 - H. Executive Order 12630: Constitutionally Protected Property Rights
 - I. Executive Order 12988: Civil Justice Reform Analysis

I. Background

On November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, 701 (Inflation Adjustment Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 as previously amended by the 1996 Debt Collection Improvement Act (collectively, the “Prior Inflation Adjustment Act”), to improve the

effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act required agencies to: (1) Adjust the level of civil monetary penalties with an initial “catch-up” adjustment through an interim final rule (IFR); and (2) make subsequent annual adjustments for inflation. The Department is required to publish an annual inflation adjustment no later than January 15, 2017, and by January 15 of each subsequent year.

On July 1, 2016, the Department published an IFR that established the initial catch-up adjustment for civil penalties that the Department administers and requested comments. See 81 FR 43430 (DOL IFR). Nine comments were received on the Employment and Training Administration, Wage and Hour Division, Occupational Safety and Health Administration, and Employee Benefit Security Administration sections of the IFR, and are discussed below.

This rule implements the annual inflation adjustment that the

Department is required by the Inflation Adjustment Act to publish by January 15, 2017 for civil monetary penalties assessed or enforced in the Department’s regulations.¹ The Inflation Adjustment Act provides that the increased penalty levels apply to any penalties assessed after the effective date of the increase. Pursuant to the Inflation Adjustment Act, this final rule is published notwithstanding Section 553 of the APA.

II. Adjustment for 2017

The Department has undertaken a thorough review of civil penalties administered by its various components pursuant to the Inflation Adjustment Act and in accordance with guidance issued by the Office of Management and Budget.² The Department first identified the most recent penalty amount, which was the amount established by the catch-up adjustment as set forth in the IFR published on July 1, 2016.

The Department is required to calculate the annual adjustment based on the Consumer Price Index for all Urban Consumers (CPI-U). Annual

inflation adjustments are based on the percent change between the October CPI-U preceding the date of the adjustment, and the prior year’s October CPI-U; in this case, the percent change between the October 2016 CPI-U and the October 2015 CPI-U. The cost-of-living adjustment multiplier for 2017, based on the Consumer Price Index (CPI-U) for the month of October 2016, not seasonally adjusted, is 1.01636.³ In order to complete the 2017 annual adjustment, the Department multiplied the most recent penalty amount for each applicable penalty by the multiplier, 1.01636, and rounded to the nearest dollar.

As provided by the Inflation Adjustment Act, the increased penalty levels apply to any penalties assessed after the effective date of this rule.⁴ Accordingly, for penalties assessed after January 13, 2017, whose associated violations occurred after November 2, 2015, the higher penalty amounts outlined in this rule will apply. The table below demonstrates the penalty amounts that apply:

Violations occurring	Penalty assessed	Which penalty level applies
On or before November 2, 2015	On or before August 1, 2016	Pre-August 1, 2016 levels.
On or before November 2, 2015	After August 1, 2016	Pre-August 1, 2016 levels.
After November 2, 2015	After August 1, 2016, but on or before January 13, 2017.	August 1, 2016 levels.
After November 2, 2015	After January 13, 2017	January 13, 2017 levels.

III. Discussion of Public Comments

Nine organizations filed responsive comments with the Department within the public comment period for the IFR. The Department received comments from the Center for Progressive Reform (CPR); Farmworker Justice; Contractors Risk Management, Inc.; the North Carolina Department of Labor; the National Association of Heath Underwriters (NAHU); the Kentucky Labor Cabinet; the National Guestworker Alliance (NGA); the New Mexico Environment Department; and the Occupational Safety and Health State Plan Association (OSHSPA).

Comments were received on the Employment and Training Administration, Wage and Hour Division, Occupational Safety and Health Administration, and Employee Benefit Security Administration sections of the IFR. No comments were

received related to the Office of Workers’ Compensation Programs, Office of the Secretary, and Mine Safety and Health Administration sections.

The following discussion addresses the comments and the Department’s responses. The Department has reviewed and considered these comments, but found none of them required a change in the penalty levels or regulatory text.

A. Employment and Training Administration (20 CFR Part 655) and Wage and Hour Division (29 CFR Parts 500, 501, 530, 570, 578, 579, 801, 825)

In the IFR, the Department increased the civil monetary penalties enforced by Department’s Wage and Hour Division (WHD) under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the Immigration and Nationality Act (INA) (specifically, the

H–2A, D–1, and H–1B visa programs), the Fair Labor Standards Act (FLSA) (including the child labor provisions), the Employee Polygraph Protection Act, and the Family and Medical Leave Act.⁵ The civil monetary penalties authorized by the INA’s D–1 and H–1B visa programs are reflected in the Employment and Training Administration’s regulations, title 20 of the Code of Federal Regulations (CFR), but are enforced by WHD. The Department increased these civil monetary penalties pursuant to the “catch-up” adjustment formula as specified in the Inflation Adjustment Act. The Department explained each increase in the preamble to the IFR.

The Department received two comments addressing the increase of civil monetary penalties under programs administered by the WHD. Farmworker Justice, a national advocacy

¹ Civil monetary penalties under the H–2B program are addressed separately.
² M–17–11, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec 16, 2016).

³ OMB provided the year-over-year multiplier, rounded to 5 decimal points. *Id.* at 1.
⁴ Appendix 1 consists of a table that provides ready access to key information about each penalty.
⁵ The Department also increased civil monetary penalties provisions of the Contract Work Hours

and Safety Standards Act (CWHSSA) and the Walsh-Healey Public Contracts Act (PCA), as amended. These provisions are included in regulations established by the Office of the Secretary, 29 CFR part 5 and 41 CFR part 50–201, which have been delegated to WHD for enforcement.

organization representing migrant and seasonal farmworkers, submitted a comment addressing civil monetary penalties under MSPA, H-2A, and FLSA.⁶ Farmworker Justice commented that while they were pleased that the civil monetary penalties under these programs had increased, the penalties remain “woefully inadequate to deter agricultural employers from violating labor laws and should be significantly increased.” Farmworker Justice recommended that all civil monetary penalties for these programs “be raised significantly in order to have an impact on the pervasive labor law violations in agriculture.” The National Guestworker Alliance (NGA), a membership organization representing contingent workers across labor sectors, submitted a comment addressing civil monetary penalties under the H-1B visa program.⁷ With respect to civil monetary penalties under the H-1B visa program, the NGA commented that while it supports the increases included in the IFR, “it believes that DOL should have increased the penalt[ies]” to the “150 [percent] maximum allowed under the [Inflation Adjustment Act] to help ensure employer compliance with the regulation.”

The Department agrees that civil monetary penalties serve an important role in deterring violations of the programs administered by the Department. Indeed, the Inflation Adjustment Act is intended to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. See DOL IFR, 81 FR at 43431. However, the Department increased civil monetary penalties under the H-1B, H-2A, FLSA, and MSPA programs in the IFR pursuant to the Inflation Adjustment Act’s mandatory “catch-up” adjustment formula, which is specified in the statute and is based on inflation. For this “catch-up” adjustment, the Inflation Adjustment Act required agencies to identify, for each penalty, the year and corresponding amount(s) for which the penalty amount, the maximum penalty level, or range of minimum and maximum penalties was established (*i.e.*, originally enacted by Congress or by regulation) or last adjusted other than pursuant to the Prior Inflation Adjustment Act. That amount became the basis of the “catch-

up” adjustment, subject to a cap on any penalty increase of 150 percent of the current penalty amount as of November 2015—allowing for a total new penalty of no more than 250 percent of the November 2015 penalty amount. See Inflation Adjustment Act, Sec. 701. This cap is triggered *only* where the relevant calculation results in a higher penalty amount; the Inflation Adjustment Act does not permit agencies to increase civil monetary penalties up to this cap where the specified calculation results in an increase lower than 150 percent of the November 2015 penalty amount. *Id.*

As explained in the preamble to the IFR, applying the “catch-up” formula required by the Inflation Adjustment Act, the civil monetary penalties under the FLSA, H-1B, H-2A, and MSPA were increased to the maximum amounts permissible under the Inflation Adjustment Act, none of which reached or exceeded the 150 percent cap. Accordingly, the Department may not further increase civil monetary penalties under these programs pursuant to the Inflation Adjustment Act, other than by making the subsequent annual adjustments for inflation.

B. Occupational Safety and Health Administration (29 CFR Parts 1902, 1903)

In the IFR, the Department increased the civil monetary penalties administered by the Occupational Safety and Health Administration (OSHA) to enforce provisions of the Occupational Safety & Health Act of 1970 (OSH Act), as amended, including conforming edits to the agency’s State Plan regulations. The Department increased these civil monetary penalties pursuant to the “catch-up” adjustment formula as specified in the Inflation Adjustment Act. The Department explained each increase in the preamble to the IFR. The Department received four comments related to State Plans, and four comments related to the civil penalty adjustments.

Section 18(c)(2) of the OSH Act provides that a State may assume responsibility for development and enforcement of its own occupational safety and health standards by submitting a State Plan. There were four State Plan related comments submitted in response to the DOL IFR. One was from the Occupational Safety and Health State Plan Association (OSHSPA) and three from individual State Plans (North Carolina, Kentucky and New Mexico). Responses to these four comments are discussed below.

Section 18(c)(2) of the OSH Act requires that a State Plan “provides for the development and enforcement of

safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues. . . .” Prior to the July 1, 2016 publication of the IFR, the State Plan Indices of Effectiveness for initial approval stated that State Plans must “[p]rovide[] effective sanctions against employers who violate State standards and orders, such as those prescribed in the Act.” See 29 CFR 1902.4(c)(2)(xi) (2015). In the factors for determination of final approval status, the regulations require that, “[t]he State proposes penalties in a manner at least as effective as under the Federal program, including the proposing of penalties for first instance violations and the consideration of factors comparable to those required to be considered under the Federal program.” See 29 CFR 1902.37(b)(12).

Thus, OSHA-approved State Plans must have maximum and minimum⁸ penalty levels that are at least as effective as federal OSHA’s per Section 18 (c)(2) of the OSH Act; See 29 CFR 1902.4(c)(2)(xi); 1902.37(b)(12). It is OSHA’s long-standing position that “at least as effective,” in this context, means that State Plans must have maximum and minimum penalty levels that are at least as high as OSHA’s maximum and minimum penalty levels. Therefore, all State Plans must increase their maximum and minimum penalty levels to be at least as high as OSHA’s initial catch-up maximum and minimum penalty levels in 29 CFR 1903.15(d), and must thereafter increase these maximums and minimums based on inflation.

With the publication of the IFR, the location of OSHA’s maximum and minimum penalties was moved from Section 17 of the OSH Act to 29 CFR 1903.15(d). To make it clear where the OSHA penalty levels are located, OSHA amended 29 CFR 1902.4(c)(2)(xi) to now read that State Plans must “[p]rovide[] effective sanctions against employers who violated State standards and orders, such as those prescribed in the Act and 29 CFR 1903.15(d)” (emphasis added). This change was simply to add a reference to the new location of OSHA penalty levels, in 29 CFR 1903.15(d).

OSHSPA submitted a letter requesting that OSHA make clear that the amendment to 29 CFR 1902.4(c)(2)(xi) is

⁶ This comment also addressed civil money penalties under the Occupational Safety and Health Act (OSH Act), which is administered by the Occupational Safety and Health Administration; that portion of Farmworker Justice’s comment is addressed below.

⁷ This comment also addressed civil money penalties under the OSH Act; that portion of NGA’s comment is addressed below.

⁸ The penalties increased include the range of penalties for willful citations, which includes both a minimum and a maximum.

not intended to require State Plans to have an identical penalty structure for assessed penalties. As explained above, State Plans have long been required to have effective sanctions as prescribed in the OSH Act. The penalty levels in the OSH Act (Section 17) have historically been OSHA's maximum and minimum penalties, while OSHA's structure or practice for assessing penalties has been developed through policy and is currently contained in OSHA's Field Operations Manual. OSHA confirms that the amendment to § 1902.4(c)(2)(xi) refers only to the location of the new maximum and minimum penalty levels in 29 CFR 1903.15(d). The change to § 1902.4(c)(2)(xi) does not expand OSHA's scope of authority or control over State Plans' penalties, nor does it alter OSHA's obligation to analyze both State Plan maximum penalties and State Plan penalty assessment structures under the "at least as effective" lens.

The North Carolina Department of Labor submitted a comment that took issue with OSHA's amendment of 29 CFR 1902.4(c)(2)(xi), and was joined by Kentucky Labor Cabinet and the New Mexico Environment Department. The North Carolina State Plan contended that OSHA's amendment to 29 CFR 1902.4(c)(2)(xi) was in excess of the authority granted by the Bipartisan Budget Act of 2015's amendment to the Inflation Adjustment Act; not in conformance with the APA, 5 U.S.C. 553; and arbitrary, capricious, and an abuse of discretion.

The Inflation Adjustment Act directed OSHA to increase maximum and minimum penalties through an IFR issuing without prior notice and comment rather than a change to the OSH Act. OSHA has the inherent authority to make technical amendments to its regulations to conform to Congress's direction to increase its penalty levels. With the change to the location of penalty levels to 29 CFR 1903.15(d), OSHA needed to update the reference in 29 CFR 1902.4(c)(2)(xi) to point to both the Act and the new regulation. This change was merely the addition of a reference, or pointer, to increase clarity and transparency in the State Plan Indices of effectiveness.

The North Carolina, Kentucky and New Mexico State Plans argue that the change to 29 CFR 1902.4(c)(2)(xi) violated the APA because it was not issued through notice-and-comment rulemaking, and the good cause exception to notice-and-comment rulemaking is not applicable.

As noted by the North Carolina State Plan, the APA exception from notice and comment applies to regulations that

make minor technical amendments and non-substantive corrections. *See* p. 3. That comports with the APA language that notice and comment is not required where they are "impractical, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). The amendment to 29 CFR 1902.4(c)(2)(xi) fits within that exception because it is a minor, technical amendment that updated the reference to the location of OSHA maximum and minimum penalty levels. It is the "at least as effective" standard in OSH Act § 18 that requires State Plans to increase their maximum and minimum penalty levels, and the amendment to 29 CFR 1902.4(c)(2)(xi) only made clear to State Plans and all other stakeholders that the maximum and minimum penalty levels that State Plans are required to be at least as effective as, are now listed under 29 CFR 1903.15(d), and are no longer in OSH Act § 17. There is no need for notice and comment on that type of "pointer" reference. *See, e.g.,* Corrections and Technical Amendments to 16 OSHA Standards, 76 FR 80735 (Dec. 27, 2011) (updating cross-reference from "Section 101(14)" of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to "Section 103(14)" after Congress amended CERCLA). Nonetheless, DOL did accept comments on the IFR, and several State Plans took advantage of that opportunity to file comments,

Further, the State Plan comments argue that the change to 29 CFR 1902.4(c)(2)(xi) was arbitrary, capricious, and an abuse of discretion under the APA because it is not based on reasoned analysis. The North Carolina State Plan comment argues that OSHA should present current data to support the requirement that State Plans increase penalties to the level assessed by OSHA effective August 1, 2016 in order to be deemed "at least as effective." Further, the North Carolina State Plan comment emphasizes that the "at least as effective" standard does not require State Plans to have programs identical to OSHA's. New Mexico joined in arguing that assessed penalty levels and injury rates are not correlated and thus penalty levels should not be part of the "at least as effective" analysis.

In the Inflation Adjustment Act, Congress found that "(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations; (2) the impact of many civil monetary penalties has been and is diminished

due to the effect of inflation." *See* 28 U.S.C. 2461 note, § 2(a). This finding is as applicable to State Plan penalties as it is to federal penalties.

The regulations that OSHA adopted (29 CFR 1903.15(d)) address only the maximum and minimum penalty levels—they do not address penalties finally assessed or the methodology involved in calculating assessed penalties. The latter are matters to be determined under the "at least as effective" standard, on a case-by-case basis with each State Plan.

OSHA has an obligation to ensure that State Plans continue to maintain maximum and minimum penalty levels that are at least as effective as OSHA's. OSHA agrees that the "at least as effective" standard does not require State Plans to be identical to OSHA. However, as acknowledged by the OSHSPA comment, historically, State Plans have matched OSHA's maximum and minimum penalties identically. In 1990, when Congress last increased OSHA's maximum and minimum penalty levels, all State Plans adopted identical penalty levels, resulting in the \$7,000/\$70,000 penalty levels in effect for 25 years for both OSHA and the State Plans. OSHA recognizes that the August 1, 2016 increase in OSHA's maximum and minimum penalty levels is complicated by the requirement that the penalties levels increase annually, based on the cost-of-living adjustment, but that does not mean that State Plans do not have to increase their maximum and minimum penalty levels. OSHA will assist the State Plans to make these necessary changes occur. OSHA's position has been and continues to be that State Plans must have maximum and minimum penalties that are at least as effective as OSHA's.

The IFR updated § 1903.15 to read in part, "After, or concurrent with, the issuance of a citation, and within a reasonable time after the termination of the inspection, the Area Director shall notify the employer by certified mail or by personal service by the Compliance Safety and Health Officer of the proposed penalty in accordance with paragraph (d) of this section, or that no penalty is being proposed." In its comments, Contractors Risk Management asked whether this means that the employer will be notified if there are no penalties proposed or no citations issued. At the closing of the inspection process, OSHA conducts a closing conference with the employer and the employee representatives to discuss the findings of the inspection. The compliance officer discusses possible courses of action an employer may take following an inspection,

which could include an informal conference with OSHA or contesting citations and proposed penalties where citations and penalties are proposed. The compliance officer also discusses consultation services and employee rights. This closing conference is held regardless of whether citations and penalties are proposed.

The IFR added § 1903.15(d) to provide the adjusted civil penalties for penalties proposed on or after August 1, 2016. Contractors Risk Management expressed concern about a case being opened before August 1, but higher penalty levied because the time OSHA takes to complete the case goes beyond August 1. The Inflation Adjustment Act mandates that the catch-up adjustment apply to any civil monetary penalty assessed after August 1, 2016, “including those whose associated violation predated such increase” See Public Law 114–74 at § 701. OSHA attempted to complete open cases prior to the August 1 conversion date. However, in some cases, citations for inspections opened prior to August 1st were not issued until after August 1, and enhanced penalties were proposed under the new rules. OSHA made every effort to inform employers, through outreach, use of our Web site, and notices to affected employers, of the changes to our penalties and the potential impact on the inspection.

The NGA commented that it supports the increases in penalties for employer violations of the OSH Act, but believes that the Department should have increased the penalties to the 150% maximum allowed under Inflation Adjustment Act to help ensure employer compliance with the law. Farmworker Justice similarly commented that civil monetary penalties under the OSH Act should be increased. The Department agrees that civil monetary penalties serve an important role in deterring violations of the programs administered by the Department. However, the Department increased civil monetary penalties under the OSH Act in the IFR pursuant to the Inflation Adjustment Act’s mandatory “catch-up” adjustment formula, which is specified in the statute and is based on inflation. For this “catch-up” adjustment, the Inflation Adjustment Act required agencies to identify, for each penalty, the year and corresponding amount(s) for which the penalty amount, the maximum penalty level, or range of minimum and maximum penalties was established (*i.e.*, originally enacted by Congress or by regulation) or last adjusted other than pursuant to the Prior Inflation Adjustment Act. That

amount became the basis of the “catch-up” adjustment, subject to a cap on any penalty increase of 150 percent of the current penalty amount as of November 2015—allowing for a total new penalty of no more than 250 percent of the November 2015 penalty amount. See Inflation Adjustment, Sec. 701. This cap is triggered *only* where the relevant calculation results in a higher penalty amount; the Inflation Adjustment Act does not permit agencies to increase civil monetary penalties up to this cap where the specified calculation results in an increase lower than 150 percent of the November 2015 penalty amount. *Id.* By applying the “catch-up” formula required by the Inflation Adjustment Act, the civil monetary penalties under the OSH Act were increased to the maximum amounts permissible under the Inflation Adjustment Act, none of which reached or exceeded the 150 percent cap.

The Center for Progressive Reform commented that it applauds the agency for adjusting the penalties to the maximum amount permitted by the Inflation Adjustment Act, but it encourages OSHA to revise its informal settlement policies. In response to the penalty adjustments mandated by Congress, OSHA revised Chapter 6 of its Field Operations Manual. In revising the guidance, OSHA wanted to be consistent with current procedures and ensure that penalties were impactful. However, we were also mindful of the impact that these changes may have had on small businesses. To offset any undue impact, OSHA created an additional size category for businesses with 1–10 employees, and now offers a reduction of 70 percent for those smallest businesses. The informal settlement policy remains the same, but OSHA is closely monitoring the influence that the new penalties have on our contest rates, etc. to see where adjustments, if needed, may be appropriate.

C. Employee Benefits Security Administration (29 CFR Part 2560, 2575, 2590)

In the IFR, the Department increased the civil monetary penalties administered by the Employee Benefits Security Administration to enforce provisions of the Employee Retirement Income Security Act of 1974, as amended, (ERISA). The Department increased these civil monetary penalties as required by the “catch-up” adjustment formula specified in the Inflation Adjustment Act. Minor modifications were made to 29 CFR 2575.3 to clarify that future inflation adjustments to ERISA civil monetary

penalties would be made by notice in the **Federal Register** without amending the code of federal regulations each year to reflect an increase in the penalty amount.

The Department received one comment letter regarding the adjustment of the ERISA civil monetary penalties under the IFR. The commenter, the National Association of Health Underwriters (NAHU), stated that “the formula used to increase penalties was fairly applied in the IFR.” NAHU, however, questioned the “decision to impose increased penalties on employers at this time” due to the increased cost of compliance and reporting responsibilities placed on group health plans by the Patient Protection and Affordable Care Act (ACA). NAHU expressed concern “that increasing the potential penalties could have a detrimental impact on an employer’s potential willingness to offer group benefits, particularly for smaller employers that have not previously offered coverage.” Most ERISA civil monetary penalties affecting group health plans are expressed in terms of “up to” or “not more than” a maximum penalty. The Department did not automatically impose the maximum penalty in the past and has no plans at this time to change its enforcement policy to maximize penalty collections following the catch-up adjustment. It is the view of the Department that neither the catch-up adjustment nor any subsequent adjustment will have the detrimental impact on group health plans suggested by NAHU. Accordingly, the unverifiable social cost of the catch-up adjustment postulated by NAHU’s comment does not outweigh the benefits of increasing the ERISA civil monetary penalties by the otherwise required amount.

Section 4(a) of the Inflation Adjustment Act states that “[n]ot later than July 1, 2016, and not later than January 15 of every year thereafter,” the head of each agency shall adjust civil monetary penalties in accordance with section 4(b). Section 4(b)(1) states that “for purposes of the first adjustment” (*i.e.*, the catch-up adjustment) the “head of each agency shall adjust the civil monetary penalties by IFR” that “shall take effect no later than August 1, 2016.” Since the operative word of the statute is “shall,” the Department did not have the discretion to delay adjustment of the ERISA civil monetary penalties beyond August 1, 2016, except as otherwise provided by section 4(c) of the Inflation Adjustment Act.

Under section 4(c), an agency could not delay or otherwise reduce the catch-up adjustment unless: (1) After

publishing a notice of proposed rulemaking in the **Federal Register**, the agency determines that the increase in the penalty or penalty range would have a negative economic impact, or that the social costs of increasing the penalty would outweigh the benefits, and (2) OMB concurred with that determination. OMB advised that an agency seeking OMB's concurrence to a reduction of the required catch-up adjustment must submit the associated notice of proposed rulemaking to the Office of Information and Regulatory Affairs (OIRA) of OMB for review by May 2, 2016.⁹ OMB also advised that its concurrence to a reduction of the catch-up adjustment would be "rare."¹⁰ The Department decided not to pursue a reduction in the increase of any of the ERISA penalties, because, in the Department's view, there was no negative economic impact or a verifiable social cost resulting from the catch-up adjustment. Since the Department did not submit the requisite notice of proposed rulemaking to OIRA by May 2, 2016, the Department arguably does not have the authority to reduce a required catch-up adjustment to an ERISA penalty under section 4(c). Even if the Department currently has the authority to reduce a catch-up adjustment under section 4(c), the one comment received by the Department regarding ERISA penalties did not provide sufficient evidence of negative economic impact or social cost for the Department to seek a reduction of the increased ERISA penalties resulting from the catch-up adjustment.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. The Department has determined that this final rule does not require any collection of information.

V. Administrative Procedure Act

The Inflation Adjustment Act provides that agencies shall annually adjust civil monetary penalties for inflation notwithstanding Section 553 of the APA. Additionally, the Inflation Adjustment Act provides a nondiscretionary cost-of-living formula for annual adjustment of the civil monetary penalties. For these reasons, the requirements in sections 553(b), (c), and (d) of the APA, relating to notice

and comment and requiring that a rule be effective 30 days after publication in the **Federal Register**, are inapplicable.

VI. Executive Order 12866: Regulatory Planning and Review, and Executive Order 13563: Improving Regulation and Regulatory Review

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of significant regulatory actions. Under the Executive Order, a "significant regulatory action" is one meeting any of a number of specified conditions, including the following: Having an annual effect on the economy of \$100 million or more; creating a serious inconsistency or interfering with an action of another agency; materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues.

The Department has determined that this final rule is not a "significant" regulatory action and a cost-benefit and economic analysis is not required. This regulation merely adjusts civil monetary penalties in accordance with inflation as required by the Inflation Adjustment Act, and has no impact on disclosure or compliance costs. The benefit provided by the inflationary adjustment to the maximum civil monetary penalties is that of maintaining the incentive for the regulated community to comply with the laws enforced by the Department, and not allowing the incentive to be diminished by inflation.

Executive Order 13563 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility to minimize burden.

This final rule is exempt from the requirements of the APA because the Inflation Adjustment Act directed the Department to issue the annual adjustments without regard to Section 553 of the APA. In that context, Congress has already determined that any possible increase in costs is justified by the overall benefits of such adjustments. This final rule makes only the statutory changes outlined herein; thus there are no alternatives or further analysis required by E.O. 13563.

VII. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b). This final rule is exempt from the requirements of the APA because the Inflation Adjustment Act directed the Department to issue the annual adjustments without regard to Section 553 of the APA. Therefore, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. 603, do not apply to this rule. Accordingly, the Department is not required to either certify that the final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

VIII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

Because the rule simply adjusts for inflation, it does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments; nor does it increase private sector expenditures by more than \$100 million annually; nor does it significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) requires no further agency action or analysis.

B. Executive Order 13132: Federalism

Section 18 of the OSHA Act (29 U.S.C. 667) requires OSHA-approved State Plans to have standards and an enforcement program that are at least as effective as federal OSHA's standards and enforcement program. OSHA-approved State Plans must have maximum and minimum penalty levels that are at least as effective as federal OSHA's per Section 18 (c)(2) of the OSHA Act; 29 CFR 1902.4(c)(2)(xi); 1902.37(b)(12). State Plans are required to increase their penalties in alignment with OSHA's penalty increases to maintain at least as effective penalty levels.

State Plans are not required to impose monetary penalties on state and local government employers. *See* § 1956.11(c)(2)(x). Five (5) states and one territory have State Plans that cover only state and local government employees: Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands. Therefore, the requirements to increase the penalty levels do not apply to these State Plans. Twenty-one (21)

⁹ See, OMB Mem. M-16-06 (Feb. 24, 2016), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>.

¹⁰ *Id.*

states and one U.S. territory have State Plans that cover both private sector employees and state and local government employees: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. These states must increase their penalties for private-sector employers.

Other than as listed above, this final rule does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

C. Executive Order 13175: Indian Tribal Governments

This final rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

D. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

This final rule will have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This final rule will have no adverse impact on children. Accordingly, Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

F. Environmental Impact Assessment

A review of this final rule in accordance with the requirements of the

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the final rule will not have a significant impact on the quality of the human environment. As a result, there is no corresponding environmental assessment or an environmental impact statement.

G. Executive Order 13211: Energy Supply

This final rule has been reviewed for its impact on the supply, distribution, and use of energy because it applies, in part, to the coal mining and uranium industries. MSHA has concluded that the adjustment of civil monetary penalties to keep pace with inflation and thus maintain the incentive for operators to maintain safe and healthful workplaces is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

This final rule has not been identified to have other impacts on energy supply. Accordingly, Executive Order 13211 requires no further Agency action or analysis.

H. Executive Order 12630: Constitutionally Protected Property Rights

This final rule will not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

I. Executive Order 12988: Civil Justice Reform Analysis

This final rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. The Department has determined that this IFR meets the applicable standards provided in section 3 of Executive Order 12988.

List of Subjects

20 CFR Part 655

Immigration, Penalties, Labor.

20 CFR Part 702

Administrative practice and procedure, Longshore and harbor workers, Penalties, Reporting and

recordkeeping requirements, Workers' compensation.

20 CFR Part 725

Administrative practice and procedure, Black lung benefits, Coal miners, Penalties, Reporting and recordkeeping requirements.

20 CFR Part 726

Administrative practice and procedure, Black lung benefits, Coal miners, Mines, Penalties.

29 CFR Part 5

Administrative practice and procedure, Construction industry, Employee benefit plans, Government contracts, Law enforcement, Minimum wages, Penalties, Reporting and recordkeeping requirements.

29 CFR Part 500

Administrative practice and procedure, Aliens, Housing, Insurance, Intergovernmental relations, Investigations, Migrant labor, Motor vehicle safety, Occupational safety and health, Penalties, Reporting and recordkeeping requirements, Wages, Whistleblowing.

29 CFR Part 501

Administrative practice and procedure, Agriculture, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

29 CFR Part 530

Administrative practice and procedure, Clothing, Homeworkers, Indians-arts and crafts, Penalties, Reporting and recordkeeping requirements, Surety bonds, Watches and jewelry.

29 CFR Part 570

Child labor, Law enforcement, Penalties.

29 CFR Part 578

Penalties, Wages.

29 CFR Part 579

Child labor, Penalties.

29 CFR Part 801

Administrative practice and procedure, Employment, Lie detector tests, Penalties, Reporting and recordkeeping requirements.

29 CFR Part 825

Administrative practice and procedure, Airmen, Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Penalties, Reporting and recordkeeping requirements, Teachers.

29 CFR Part 1903

Intergovernmental relations, Law enforcement, Occupational Safety and Health, Penalties.

29 CFR Part 2560

Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Penalties, Pensions, Reporting and recordkeeping.

29 CFR Part 2575

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Health care, Penalties, Pensions.

29 CFR Part 2590

Employee benefit plans, Employee Retirement Income Security Act, Health care, Health insurance, Penalties, Pensions, Reporting and recordkeeping.

30 CFR Part 100

Mine safety and health, Penalties.

For the reasons set out in the preamble, 20 CFR chapters V and VI, 29 CFR chapters V, XVII, and XXV, and 30 CFR chapter I are amended as follows.

Department of Labor**Employment and Training Administration****Title 20—Employees' Benefits****PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C.

1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts F and G issued under 8 U.S.C.

1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C.

1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

§§ 655.620, 655.801, and 655.810 [Amended]

■ 2. In the table below, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

Paragraph	Remove	Add
§ 655.620(a)	\$8,908	\$9,054
§ 655.801(b)	7,251	7,370
§ 655.810(b)(1) introductory text	1,782	1,811
§ 655.810(b)(2) introductory text	7,251	7,370
§ 655.810(b)(3) introductory text	50,758	51,588

Department of Labor**Office of Workers' Compensation Programs****PART 702—ADMINISTRATION AND PROCEDURE**

■ 3. The authority citation for part 702 continues to read as follows:

Authority: 5 U.S.C. 301, and 8171 *et seq.*; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 1651 *et seq.*; 43 U.S.C. 1333; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

§§ 702.204, 702.236, and 702.271 [Amended]

■ 4. In the table below, for each paragraph indicated in the left column, remove the dollar amount or date indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount or date indicated in the right column.

Paragraph	Remove	Add
§ 702.204	\$22,587	\$22,957.
§ 702.204	August 1, 2016	January 13, 2017.
§ 702.236	\$275	\$279.
§ 702.236	August 1, 2016	January 13, 2017.
§ 702.271(a)(2)	August 1, 2016	January 13, 2017.
§ 702.271(a)(2)	\$2,259	\$2,296.
§ 702.271(a)(2)	\$11,293	\$11,478.

PART 725—CLAIMS FOR BENEFITS UNDER PART C OF TITLE IV OF THE FEDERAL MINE SAFETY AND HEALTH ACT, AS AMENDED

■ 5. The authority citation for part 725 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation

Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174; 30 U.S.C. 901 *et seq.*, 902(f), 921, 932, 936; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 405; Secretary's Order 10–2009, 74 FR 58834.

§ 725.621 [Amended]

■ 6. In § 725.621, amend paragraph (d) by removing “August 1, 2016” and adding in its place “January 13, 2017”

and by removing “\$1,375” and adding in its place “\$1,397”.

PART 726—BLACK LUNG BENEFITS; REQUIREMENTS FOR COAL MINE OPERATOR'S INSURANCE

■ 7. The authority citation for part 726 continues to read as follows:

Authority: 5 U.S.C. 301; 33 U.S.C. 901 *et seq.*, 902(f), 925, 932, 933, 934, 936; 33 U.S.C. 901 *et seq.*; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization

Plan No. 6 of 1950, 15 FR 3174; Secretary's Order 10–2009, 74 FR 58834.

§ 726.302 [Amended]

■ 8. In the table below, for each paragraph indicated in the left column,

remove the dollar amount or date indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount or date indicated in the right column.

Paragraph	Remove	Add
§ 726.302(c)(2)(i)	August 1, 2016	January 13, 2017.
§ 726.302(c)(2)(i)	\$134	\$136.
§ 726.302(c)(2)(i)	268	272.
§ 726.302(c)(2)(i)	402	409.
§ 726.302(c)(2)(i)	535	544.
§ 726.302(c)(4)	August 1, 2016	January 13, 2017.
§ 726.302(c)(4)	\$134	\$136.
§ 726.302(c)(5)	August 1, 2016	January 13, 2017.
§ 726.302(c)(5)	\$402	\$409.
§ 726.302(c)(6)	August 1, 2016	January 13, 2017.
§ 726.302(c)(6)	\$2,750	\$2,795.

Department of Labor

Wage and Hour Division

Title 29—Labor

PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

■ 9. The authority citation for part 500 continues to read as follows:

Authority: Pub. L. 97–470, 96 Stat. 2583 (29 U.S.C. 1801–1872); Secretary's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–74, 129 Stat 584.

§ 500.1 [Amended]

■ 10. In § 500.1, amend paragraph (e) by removing “\$2,355” and adding in its place “\$2,394”.

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

■ 11. The authority citation for part 501 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; 28 U.S.C. 2461 Note

(Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–74 at § 701.

§ 501.19 [Amended]

■ 12. In the table below, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

Paragraph	Remove	Add
§ 501.19(c) introductory text	\$1,631	\$1,658
§ 501.19(c)(1)	5,491	5,581
§ 501.19(c)(2)	54,373	55,263
§ 501.19(c)(4)	108,745	110,524
§ 501.19(d)	5,491	5,581
§ 501.19(e)	16,312	16,579
§ 501.19(f)	16,312	16,579

PART 530—EMPLOYMENT OF HOMEWORKERS IN CERTAIN INDUSTRIES

■ 13. The authority citation for part 530 continues to read as follows:

Authority: Sec. 11, 52 Stat. 1066 (29 U.S.C. 211) as amended by sec. 9, 63 Stat. 910 (29 U.S.C. 211(d)); Secretary's Order No. 01–2014

(Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701, 129 Stat 584.

■ 14. In § 530.302, amend paragraph (a) by removing “\$989” and adding in its place “\$1,005” and revise paragraph (b) to read as follows:

§ 530.302 Amounts of civil penalties.

* * * * *

(b) The amount of civil money penalties shall be determined per affected homeworker within the limits set forth in the following schedule, except that no penalty shall be assessed in the case of violations which are deemed to be *de minimis* in nature:

Nature of violation	Penalty per affected homeworker		
	Minor	Substantial	Repeated, intentional or knowing
Recordkeeping	\$20–201	\$201–402	\$402–1,005
Monetary violations	20–201	201–402	
Employment of homeworkers without a certificate		201–402	402–1,005
Other violations of statutes, regulations or employer assurances	20–201	201–402	402–1,005

PART 570—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

■ 15. The authority citation for Subpart G of part 570 continues to read as follows:

Authority: 52 Stat. 1060–1069, as amended; 29 U.S.C. 201–219; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701.

§ 570.140 [Amended]

■ 16. In § 570.140, amend paragraph (b)(1) by removing “\$12,080” and adding in its place “\$12,278” and paragraph (b)(2) by removing “\$54,910” and adding in its place “\$55,808”.

PART 578—MINIMUM WAGE AND OVERTIME VIOLATIONS—CIVIL MONEY PENALTIES

■ 17. The authority citation for part 578 continues to read as follows:

Authority: Sec. 9, Pub. L. 101–157, 103 Stat. 938, sec. 3103, Pub. L. 101–508, 104 Stat. 1388–29 (29 U.S.C. 216(e)), Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by Pub. L. 104–134, section 31001(s), 110 Stat. 1321–358, 1321–373, and Pub. L. 114–74, 129 Stat 584.

§ 578.3 [Amended]

■ 18. In § 578.3, amend paragraph (a) by removing “\$1,894” and adding in its place “\$1,925”.

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

■ 19. The authority citation for part 579 continues to read as follows:

Authority: 29 U.S.C. 203(l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor’s Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–7, 129 Stat 584.

§ 579.1 [Amended]

■ 20. In the table below, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

Paragraph	Remove	Add
§ 579.1(a)(1)(i)(A)	\$12,080	\$12,278
§ 579.1(a)(1)(i)(B)	54,910	55,808
§ 579.1(a)(2)	1,894	1,925

PART 801—APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

■ 21. The authority citation for part 801 continues to read as follows:

Authority: Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. 2001–2009; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701, 129 Stat 584.

§ 801.42 [Amended]

■ 22. In § 801.42, amend paragraph (a) by removing “\$19,787” and adding in its place “\$20,111”.

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

■ 23. The authority citation for part 825 continues to read as follows:

Authority: 29 U.S.C. 2654; 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–74 at sec. 701.

§ 825.300 [Amended]

■ 24. In § 825.300 amend paragraph (a)(1) by removing “\$163” and adding in its place “\$166”.

Department of Labor**Occupational Safety and Health Administration****Title 29—Labor****PART 1903—INSPECTIONS, CITATIONS, AND PROPOSED PENALTIES**

■ 25. The authority citation for part 1903 continues to read as follows:

Authority: Secs. 8 and 9 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 658); 5 U.S.C. 553; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Section 701, Pub. L. 114–74; Secretary of Labor’s Order No. 1–2012 (77 FR 3912, Jan. 25, 2012).

§ 1903.15 [Amended]

■ 26. In the table below, for each paragraph indicated in the left column, remove the dollar amount or date indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount or date indicated in the right column.

Paragraph	Remove	Add
§ 1903.15(d) introductory text	on or after August 1, 2016.	after January 13, 2017.
§ 1903.15(d)(1)	\$8,908	\$9,054.
§ 1903.15(d)(1)	124,709	126,749.
§ 1903.15(d)(2)	124,709	126,749.
§ 1903.15(d)(3)	12,471	12,675.
§ 1903.15(d)(4)	12,471	12,675.
§ 1903.15(d)(5)	12,471	12,675.
§ 1903.15(d)(6)	12,471	12,675.

Department of Labor**Employee Benefits Security Administration****Title 29—Labor****PART 2575—ADJUSTMENT OF CIVIL PENALTIES UNDER ERISA TITLE I**

■ 27. The authority citation for subpart A of 29 CFR part 2575 continues to read as follows:

Authority: Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by section 31001(s) of Pub. L. 104–134, 110 Stat. 1321–373, and section 701 of Pub. L. 114–74, 129 Stat. 584; 29 U.S.C 1059(b), 1132(c), 1135 and 1185d; and Secretary of Labor's Order 1–2011, 77 FR 1088 (January 9, 2012).

■ 28. Revise § 2575.3 to read as follows:

§ 2575.3 Subsequent adjustments to civil monetary penalties

No later than January 15, starting in 2017, and each subsequent year, the Secretary shall adjust for inflation, as required by the Inflation Adjustment Act, the civil monetary penalties described in § 2575.2 for violations occurring on or after November 2, 2015, and any future civil monetary penalties enforceable by the Secretary under title I of ERISA. The Secretary shall publish such annual adjustments in the **Federal Register** notwithstanding section 553 of the Administrative Procedure Act. Future penalties or adjustments to the amount of the penalty that are enacted by statute or regulation (other than an adjustment for inflation under the Inflation Adjustment Act) will not be adjusted for inflation in the first year those penalty levels take effect. Annual inflation adjustments shall apply to penalties assessed after the date notice of the annual inflation adjustment is published in the **Federal Register**.

Department of Labor**Mine Safety and Health Administration****Title 30—Mineral Resources****PART 100—CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES**

■ 29. The authority citation for part 100 continues to read as follows:

Authority: 5 U.S.C. 301; 30 U.S.C. 815, 820, 957; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701;

■ 30. In § 100.3, amend paragraph (a)(1) introductory text by removing “\$68,300” and adding in its place “\$69,417” and in paragraph (g) by revising Table XIV—Penalty Conversion Table to read as follows:

TABLE XIV—PENALTY CONVERSION TABLE

Points	Penalty (\$)
60 or fewer	\$129
61	140
62	151
63	165
64	178
65	193
66	209
67	227
68	245
69	266
70	288
71	312
72	339
73	367
74	396
75	430
76	467
77	504
78	547
79	593
80	642
81	695
82	753
83	816
84	884
85	958
86	1,038
87	1,123
88	1,218
89	1,319
90	1,429
91	1,547
92	1,676
93	1,815
94	1,967
95	2,131
96	2,308
97	2,500
98	2,709
99	2,934
100	3,179
101	3,443
102	3,730
103	4,041
104	4,377

TABLE XIV—PENALTY CONVERSION TABLE—Continued

Points	Penalty (\$)
105	4,742
106	5,137
107	5,565
108	6,029
109	6,531
110	7,075
111	7,663
112	8,303
113	8,994
114	9,743
115	10,554
116	11,433
117	12,385
118	13,417
119	14,535
120	15,745
121	17,057
122	18,477
123	20,016
124	21,684
125	23,488
126	25,445
127	27,565
128	29,861
129	32,348
130	35,042
131	37,960
132	41,122
133	44,546
134	48,099
135	51,652
136	55,206
137	58,758
138	62,311
139	65,864
140 or more	69,417

* * * * *

§§ 100.4 and 100.5 [Amended]

■ 31. In the table below, for each paragraph indicated in the left column, remove the dollar amount indicated in the middle column from wherever it appears in the paragraph and add in its place the dollar amount indicated in the right column.

Paragraph	Remove	Add
§ 100.4(a)	\$2,277	\$2,314
§ 100.4(b)	4,553	4,627
§ 100.4(c) introductory text	5,692	5,785
§ 100.4(c) introductory text	68,300	69,417
§ 100.5(c)	7,399	7,520
§ 100.5(d)	313	318
§ 100.5(e)	250,433	254,530

Note: The following Appendix will not appear in the Code of Federal Regulations.

Agency	Law	Name/description	CFR citation	2016		2017	
				Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)	Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)
MSHA	Federal Mine Safety & Health Act of 1977.	Regular Assessment	30 CFR 100.3(A) .....	.....	\$68,300 .....	.....	\$69,417.
MSHA	Federal Mine Safety & Health Act of 1977.	Penalty Conversion Table	30 CFR 100.3(G)	\$127	68,300	\$129	69,417.
MSHA	Federal Mine Safety & Health Act of 1977.	Minimum Penalty for any order issued under 104(d)(1) of the Mine Act.	30 CFR 100.4(a)	2,277	.....	2,314	.....
MSHA	Federal Mine Safety & Health Act of 1977.	Minimum penalty for any order issued under 104(d)(2) of the Mine Act.	30 CFR 100.4(b)	4,553	.....	4,627	.....
MSHA	Federal Mine Safety & Health Act of 1977.	Penalty for failure to provide timely notification under 103(j) of the Mine Act.	39 CFR 100.4(c)	5,692	68,300	5,785	69,417.
MSHA	Federal Mine Safety & Health Act of 1977.	Any operator who fails to correct a violation for which a citation or order was issued under 104(a) of the Mine Act.	30 CFR 100.5(C) .....	.....	7,399 .....	.....	7,520.
MSHA	Federal Mine Safety & Health Act of 1977.	Violation of mandatory safety standards related to smoking standards.	30 CFR 100.5(D) .....	.....	313 .....	.....	318.
MSHA	Federal Mine Safety & Health Act of 1977.	Flagrant violations under 110(b)(2) of the Mine Act.	30 CFR 100.5(e) .....	.....	250,433 .....	.....	254,530.
EBSA	Employee Retirement Income Security Act.	Section 209(b): Failure to furnish reports (<i>e.g.</i> , pension benefit statements) to certain former participants and beneficiaries or maintain records.	29 CFR 2575.2(a) .....	.....	28 .....	.....	28.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(2)—Per day for failure/refusal to properly file plan annual report.	29 CFR 2575.2(b) .....	.....	2,063 .....	.....	\$2,097.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(4)—Per day for failure to disclose certain documents upon request under ERISA 101(k) and (l); failure to furnish notices under 101(j) and 514(e)(3)—each statutory recipient a separate violation.	29 CFR 2575.2(c) .....	.....	1,632 .....	.....	1,659.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(5)—Per day for each failure to file annual report for Multiple Employer Welfare Arrangements (MEWAs).	29 CFR 2575.2(d) .....	.....	1,502 .....	.....	1,527.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(6)—Per day for each failure to provide Secretary of Labor requested documentation not to exceed a per-request maximum.	29 CFR 2575.2(e) .....	.....	147 per day, not to exceed \$1,472 per request.	.....	149 per day, not to exceed \$1,496 per request.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(7)—Per day for each failure to provide notices of blackout periods and of right to divest employer securities—each statutory recipient a separate violation.	29 CFR 2575.2(f) .....	.....	131 .....	.....	133.

Agency	Law	Name/description	CFR citation	2016		2017	
				Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)	Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)
EBSA	Employee Retirement Income Security Act.	Section 502(c)(8)—Per each failure by an endangered status multi-employer plan to adopt a funding improvement plan or meet benchmarks; failure of a critical status multiemployer plan to adopt a rehabilitation plan.	29 CFR 2575.2(g) .....	.....	1,296 .....	.....	1,317.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(9)(A)—Per day for each failure by an employer to inform employees of CHIP coverage opportunities under Section 701(f)(3)(B)(i)(I)—each employee a separate violation.	29 CFR 2575.2(h) .....	.....	110 .....	.....	112.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(9)(B)—Per day for each failure by a plan to timely provide to any State information required to be disclosed under Section 701(f)(3)(B)(ii), as added by CHIP regarding coverage coordination—each participant/beneficiary a separate violation.	29 CFR 2575.2(i) .....	.....	110 .....	.....	112.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(10)—Failure by any plan sponsor of group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, to meet the requirements of Sections 702(a)(1)(F), (b)(3), (c) or (d); or Section 701; or Section 702(b)(1) with respect to genetic information—daily per participant and beneficiary non-compliance period.	29 CFR 2575.2(j)(1) .....	.....	110 .....	.....	112.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(10)—uncorrected de minimis violation.	29 CFR 2575.2(j)(2)	2,745 .....	.....	2,790.	.....
EBSA	Employee Retirement Income Security Act.	Section 502(c)(10)—uncorrected violations that are not de minimis.	29 CFR 2575.2(j)(3)	16,473 .....	.....	16,742.	.....
EBSA	Employee Retirement Income Security Act.	Section 502(c)(10)—unintentional failure maximum cap.	29 CFR 2575.2(j)(4) .....	.....	549,095 .....	.....	558,078.
EBSA	Employee Retirement Income Security Act.	Section 502(c)(12)—Per day for each failure of a CSEC plan in restoration status to adopt a restoration plan.	29 CFR 2575.2(k) .....	.....	100 .....	.....	102.
EBSA	Employee Retirement Income Security Act.	Section 502(m)—Failure of fiduciary to make a proper distribution from a defined benefit plan under section 206(e) of ERISA.	29 CFR 2575.2(l) .....	.....	15,909 .....	.....	16,169.
EBSA	Employee Retirement Income Security Act.	Failure to provide Summary of Benefits Coverage under PHS Act section 2715(f), as incorporated in ERISA section 715 and 29 CFR 2590.715–2715(e).	29 CFR 2575.2(m) .....	.....	1,087 .....	.....	1,105.
OSHA	Occupational Safety and Health Act.	Serious Violation	29 CFR 1903.15(d)(3) .....	.....	12,471 .....	.....	12,675.

Agency	Law	Name/description	CFR citation	2016		2017	
				Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)	Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)
OSHA	Occupational Safety and Health Act.	Other-Than-Serious	29 CFR 1903.15(d)(4) .....	.....	12,471 .....	.....	12,675.
OSHA	Occupational Safety and Health Act.	Willful	29 CFR 1903.15(d)(1)	8,908	124,709	9,054	126,749.
OSHA	Occupational Safety and Health Act.	Repeated	29 CFR 1903.15(d)(2) .....	.....	124,709 .....	.....	126,749.
OSHA	Occupational Safety and Health Act.	Posting Requirement	29 CFR 1903.15(d)(6) .....	.....	12,471 .....	.....	12,675.
OSHA	Occupational Safety and Health Act.	Failure to Abate	29 CFR 1903.15(d)(5) .....	.....	12,471 .....	.....	12,675.
WHD	Family and Medical Leave Act.	FMLA	29 CFR 825.300(a)(1) .....	.....	163 .....	.....	166.
WHD	Fair Labor Standards Act	FLSA	29 CFR 578.3(a) .....	.....	1,894 .....	.....	1,925.
WHD	Fair Labor Standards Act	Child Labor	29 CFR 579.1(a)(2) .....	.....	1,894 .....	.....	1,925.
WHD	Fair Labor Standards Act	Child Labor	29 CFR 570.140(b)(1) .....	.....	12,080 .....	.....	12,278.
WHD	Fair Labor Standards Act	Child Labor	29 CFR 579.1(a)(1)(i)(A) ..	.....	12,080 .....	.....	12,278.
WHD	Fair Labor Standards Act	Child Labor that causes serious injury or death.	29 CFR 570.140(b)(2) .....	.....	54,910 .....	.....	55,808.
WHD	Fair Labor Standards Act	Child Labor that causes serious injury or death.	29 CFR 579.1(a)(1)(i)(B) ..	.....	54,910 .....	.....	55,808.
WHD	Fair Labor Standards Act	CL willful or repeated that causes serious injury or death.	29 CFR 570.140(b)(2); 29 CFR 579.1(a)(1)(i)(B).	.....	109,820 .....	.....	111,616.
WHD	Migrant and Seasonal Agricultural Worker Protection Act.	MSPA	29 CFR 500.1(e) .....	.....	2,355 .....	.....	2,394.
WHD	Immigration & Nationality Act.	H1B	20 CFR 655.810(b)(1) .....	.....	1,782 .....	.....	1,811.
WHD	Immigration & Nationality Act.	H1B retaliation	20 CFR 655.801(b) .....	.....	7,251 .....	.....	7,370.
WHD	Immigration & Nationality Act.	H1B willful or discrimination.	20 CFR 655.810(b)(2) .....	.....	7,251 .....	.....	7,370.
WHD	Immigration & Nationality Act.	H1B willful that resulted in displacement of a US worker.	20 CFR 655.810(b)(3) .....	.....	50,758 .....	.....	51,588.
WHD	Immigration & Nationality Act.	D-1	20 CFR 655.620(a) .....	.....	8,908 .....	.....	9,054.
WHD	Contract Work Hours and Safety Standards Act.	CWHSSA	29 CFR 5.5(b)(2) .....	.....	25 .....	.....	25.
WHD	Contract Work Hours and Safety Standards Act.	CWHSSA	29 CFR 5.8(a) .....	.....	25 .....	.....	25.
WHD	Walsh-Healey Public Contracts Act.	Walsh-Healey	41 CFR 50-201.3(e) .....	.....	25 .....	.....	25.
WHD	Employee Polygraph Protection Act.	EPPA	29 CFR 801.42(a) .....	.....	19,787 .....	.....	20,111
WHD	Immigration & Nationality Act.	H2A	29 CFR 501.19(c) .....	.....	1,631 .....	.....	1,658.
WHD	Immigration & Nationality Act.	H2A willful or discrimination.	29 CFR 501.19(c)(1) .....	.....	5,491 .....	.....	5,581.
WHD	Immigration & Nationality Act.	H2A Safety or health resulting in serious injury or death.	29 CFR 501.19(c)(2) .....	.....	54,373 .....	.....	55,263.
WHD	Immigration & Nationality Act.	H2A willful or repeated safety or health resulting in serious injury or death.	29 CFR 501.19(c)(4) .....	.....	108,745 .....	.....	110,524.
WHD	Immigration & Nationality Act.	H2A failing to cooperate in an investigation.	29 CFR 501.19(d) .....	.....	5,491 .....	.....	5,581.
WHD	Immigration & Nationality Act.	H2A displacing a US worker.	29 CFR 501.19(e) .....	.....	16,312 .....	.....	16,579.
WHD	Immigration & Nationality Act.	H2A improperly rejecting a US worker.	29 CFR 501.19(f) .....	.....	16,312 .....	.....	16,579.
WHD	Fair Labor Standards Act	Home Worker	29 CFR 530.302(a) .....	.....	989 .....	.....	1,005.
WHD	Fair Labor Standards Act	Home Worker	29 CFR 530.302(b)	20	989	20	1,005.
OWCP	Longshore and Harbor Workers' Compensation Act.	Failure to file first report of injury or filing a false statement or misrepresentation in first report.	20 CFR 702.204 .....	.....	22,587 .....	.....	22,957.
OWCP	Longshore and Harbor Workers' Compensation Act.	Failure to report termination of payments.	20 CFR 702.236 .....	.....	275 .....	.....	279.
OWCP	Longshore and Harbor Workers' Compensation Act.	Discrimination against employees who claim compensation or testify in a LHWCA proceeding.	20 CFR 702.271(a)(2)	2,259	11,293	2,296	11,478.
OWCP	Black Lung Benefits Act ...	Failure to report termination of payments.	20 CFR 725.621(d) .....	.....	1,375 .....	.....	1,397.
OWCP	Black Lung Benefits Act ...	Failure to file required reports.	20 CFR 725.621(d) .....	.....	1,375 .....	.....	1,397.

Agency	Law	Name/description	CFR citation	2016		2017	
				Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)	Min penalty (rounded to nearest dollar)	Max penalty (rounded to nearest dollar)
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits.	20 CFR 726.300 .....	.....	2,500 .....	.....	2,541.
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits for mines with fewer than 25 employees.	20 CFR 726.302(c)(2)(i) ...	134 .....	.....	136 .....	.....
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits for mines with 25–50 employees.	20 CFR 726.302(c)(2)(i) ...	268 .....	.....	272 .....	.....
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits for mines with 51–100 employees.	20 CFR 726.302(c)(2)(i) ...	402 .....	.....	409 .....	.....
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits for mines with more than 100 employees.	20 CFR 726.302(c)(2)(i) ...	535 .....	.....	544 .....	.....
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits after 10th day of notice.	20 CFR 726.302(c)(4)	134 .....	.....	136 .....	.....
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits for repeat offenders.	20 CFR 726.302(c)(5)	402 .....	.....	409 .....	.....
OWCP	Black Lung Benefits Act ...	Failure to secure payment of benefits.	20 CFR 726.302(c)(5) .....	.....	2,750 .....	.....	2,795.

Signed at Washington, DC this 9th day of January, 2017.

Thomas E. Perez,

Secretary, U.S. Department of Labor.

[FR Doc. 2017–00614 Filed 1–13–17; 4:15 pm]

BILLING CODE 4510–HL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9810]

RIN 1535–BN06

Certain Transfers of Property to Regulated Investment Companies [RICs] and Real Estate Investment Trusts [REITs]

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations effecting the repeal of the *General Utilities* doctrine by the Tax Reform Act of 1986. The final regulations address the length of time during which a RIC or a REIT may be subject to corporate level tax on certain dispositions of property. The final regulations affect RICs and REITs.

DATES: *Effective Date:* These regulations are effective January 18, 2017.

Applicability Dates: For dates of applicability, see § 1.337(d)–7(g)(2)(iii).

FOR FURTHER INFORMATION CONTACT:

Austin M. Diamond-Jones, (202) 317–5363 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1. On June 8, 2016, the Department of the Treasury (Treasury Department) and the IRS published temporary regulations (TD 9770) under section 337(d) (temporary regulations) in the **Federal Register** (81 FR 36793) concerning certain transfers of property to regulated investment companies (RICs) and real estate investment trusts (REITs). A notice of proposed rulemaking cross-referencing the temporary regulations (REG–126452–15) (proposed regulations) was published in the **Federal Register** (81 FR 36816) on the same day. A correction to the temporary regulations was published in the **Federal Register** (81 FR 41800) on June 28, 2016. The Treasury Department and the IRS received one written comment in response to the proposed regulations. The comment requested a public hearing, and a hearing was held on November 9, 2016. After consideration of the written comment and the comments made at the public hearing, the proposed regulations are adopted in part and as amended by this Treasury decision, and the corresponding temporary regulations are removed in part. The revisions adopted by this Treasury decision are discussed below.

Summary of Comments and Explanation of Revisions

The comment requested that the temporary regulations and the proposed regulations with respect to the

recognition period be immediately withdrawn and the recognition period with respect to REITs be defined with reference to the recognition period of section 1374(d)(7), which is currently a five-year period as a result of section 127(a) of the Protecting Americans Against Tax Hikes Act of 2015 (PATH Act), enacted as Division Q of the Consolidated Appropriations Act, 2016, Public Law 114–113, 129 Stat. 2422. The comment asserted that the change to the length of the recognition period in the temporary regulations and the proposed regulations was inconsistent with Congress's intent in the PATH Act and with prior administrative guidance. On October 18, 2016, the Chairmen and Ranking Members of the Ways and Means Committee of the U.S. House of Representatives and the Finance Committee of the U.S. Senate addressed a letter to the Secretary of the Treasury stating that the recognition period in the temporary regulations and the proposed regulations was inconsistent with congressional intent and the longstanding practice of treating REITs and RICs as having the same built-in gain recognition period as S corporations, currently five years. The Chairmen and Ranking Members also asked that the temporary regulations and the proposed regulations be modified to provide that REITs, RICs and S corporations are all subject to the same five-year built-in gain recognition period in order to be consistent with congressional intent and longstanding practice.

The Treasury Department and the IRS decline to withdraw the temporary regulations and the proposed regulations relating to the recognition period but agree with the comment relating to the length of the recognition period. Accordingly, these final regulations provide that the term *recognition period* means the recognition period described in section 1374(d)(7), beginning, in the case of a conversion transaction that is a qualification of a C corporation as a RIC or a REIT, on the first day of the RIC's or the REIT's first taxable year, and, in the case of other conversion transactions, on the day the RIC or the REIT acquires the property. The final regulations will apply prospectively from February 17, 2017, but taxpayers may choose to apply the definition of recognition period in the final regulations, instead of the 10-year recognition period in the temporary regulations, for conversion transactions occurring on or after August 8, 2016, and on or before February 17, 2017.

The Treasury Department and the IRS continue to study the other issues addressed in the temporary regulations and the proposed regulations, including other issues raised by the comment, and welcome further comment on those issues.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented by Executive Order 13653. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that this regulation will primarily affect large corporations with a substantial number of shareholders. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Austin M. Diamond-Jones, Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.337(d)–7 is amended by revising paragraphs (b)(2)(iii) and (g)(2)(iii) to read as follows:

§ 1.337(d)–7 Tax on property owned by a C corporation that becomes property of a RIC or REIT.

* * * * *

(b) * * *
(2) * * *

(iii) *Recognition period.* For purposes of applying the rules of section 1374 and the regulations thereunder, as modified by paragraph (b) of this section, the term *recognition period* means the recognition period described in section 1374(d)(7), beginning—

(A) In the case of a conversion transaction that is a qualification of a C corporation as a RIC or a REIT, on the first day of the RIC's or the REIT's first taxable year; and

(B) In the case of other conversion transactions, on the day the RIC or the REIT acquires the property.

* * * * *

(g) * * *
(2) * * *

(iii) *Recognition period.* Paragraphs (b)(1)(ii) and (d)(2)(iii) of this section apply to conversion transactions that occur on or after August 8, 2016. Paragraph (b)(2)(iii) of this section applies to conversion transactions that occur after February 17, 2017. For conversion transactions that occurred on or after August 8, 2016 and on or before February 17, 2017, see § 1.337(d)–7T(b)(2)(iii) in effect on August 8, 2016. However, taxpayers may apply paragraph (b)(2)(iii) of this section to conversion transactions that occurred on or after August 8, 2016 and on or before February 17, 2017. For conversion transactions that occurred on or after January 2, 2002 and before August 8, 2016, see § 1.337(d)–7 as contained in 26 CFR part 1 in effect on April 1, 2016.

■ **Par. 3.** Section 1.337(d)–7T is amended by revising paragraphs (b)(1) through (3) and (g)(2)(iii) to read as follows:

§ 1.337(d)–7T Tax on property owned by a C corporation that becomes property of a RIC or REIT.

* * * * *

(b)(1) through (3) [Reserved]. For further guidance, see § 1.337(d)–7(b)(1) through (3).

* * * * *

(g) * * *
(2) * * *

(iii) [Reserved]. For further guidance, see § 1.337(d)–7(g)(2)(iii).

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: December 30, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2017–00479 Filed 1–17–17; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9812]

RIN 1545–BL00; 1545–BM45

Guidance for Determining Stock Ownership; Rules Regarding Inversions and Related Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations, temporary regulations, and removal of temporary regulations.

SUMMARY: This document contains final regulations that identify certain stock of a foreign corporation that is disregarded in calculating ownership of the foreign corporation for purposes of determining whether it is a surrogate foreign corporation. These regulations also provide guidance on the effect of transfers of stock of a foreign corporation after the foreign corporation has acquired substantially all of the properties of a domestic corporation or of a trade or business of a domestic partnership. These regulations affect certain domestic corporations and partnerships (and certain parties related thereto) and foreign corporations that acquire substantially all of the properties of such domestic corporations or of the trades or businesses of such domestic partnerships. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on Rules

Regarding Inversions and Related Transactions in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on January 18, 2017.

Applicability Dates: For dates of applicability, see §§ 1.7874–4(k), 1.7874–5(e), 1.7874–7T(h), and 1.7874–10T(i).

FOR FURTHER INFORMATION CONTACT: Joshua G. Rabon at (202) 317–6937 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains regulations under section 7874 of the Internal Revenue Code (Code). On September 17, 2009, the Department of the Treasury (Treasury Department) and the IRS issued Notice 2009–78 (2009–40 IRB 452), which announced that regulations would be issued under section 7874 identifying certain stock of a foreign corporation that would not be taken into account for purposes of determining the ownership percentage described in section 7874(a)(2)(B)(ii) (the 2009 notice). On January 17, 2014, temporary regulations (TD 9654) were published in the **Federal Register** (79 FR 3094) that implemented and obsoleted the 2009 notice and provided guidance with respect to subsequent transfers of stock of a foreign corporation described in section 7874(a)(2)(B)(ii) (the 2014 temporary regulations). A notice of proposed rulemaking (REG–121534–12) cross-referencing the 2014 temporary regulations was published in the same issue of the **Federal Register** (79 FR 3145) (the 2014 proposed regulations). On November 19, 2015, the Treasury Department and the IRS issued Notice 2015–79 (2015–49 IRB 775), which announced, in part, that regulations would be issued to clarify certain aspects of the 2014 temporary regulations (the 2015 notice). On April 8, 2016, the Treasury Department and the IRS published temporary regulations (TD 9761) in the **Federal Register** (81 FR 20858) that, in part, implemented the clarifications announced in the 2015 notice and provided common definitions for purposes of certain regulations under sections 367(b), 956, 7701(l), and 7874 (the 2016 temporary regulations). A notice of proposed rulemaking (REG–135734–14) cross-referencing the 2016 temporary regulations was published in the same issue of the **Federal Register** (81 FR 20588) (the 2016 proposed regulations). The 2014 temporary regulations as modified by the 2016 temporary regulations are referred to in this

preamble as the “temporary regulations.” No public hearing was requested or held on the 2014 proposed regulations or the 2016 proposed regulations; however, comments were received. All comments are available at www.regulations.gov or upon request. After consideration of the comments, the 2014 proposed regulations, as modified by the 2016 proposed regulations and as updated to reflect the common definitions in those regulations, are adopted as amended by this Treasury decision, and the corresponding temporary regulations are removed.

Summary of Comments and Explanation of Revisions

I. The Disqualified Stock Rule—General Approach

A foreign corporation (foreign acquiring corporation) generally is treated as a surrogate foreign corporation under section 7874(a)(2)(B) if, pursuant to a plan (or a series of related transactions), three conditions are satisfied. First, the foreign acquiring corporation completes, after March 4, 2003, the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation (domestic entity acquisition). Second, after the domestic entity acquisition, at least 60 percent of the stock (by vote or value) of the foreign acquiring corporation is held by former shareholders of the domestic corporation (former domestic entity shareholders) by reason of holding stock in the domestic corporation (such percentage, the ownership percentage, and the fraction used to calculate the ownership percentage, the ownership fraction). And third, after the domestic entity acquisition, the expanded affiliated group (as defined in section 7874(c)(1)) that includes the foreign acquiring corporation (EAG) does not have substantial business activities in the foreign country in which, or under the law of which, the foreign acquiring corporation is created or organized when compared to the total business activities of the EAG. Similar provisions apply if a foreign acquiring corporation acquires substantially all of the properties constituting a trade or business of a domestic partnership. The domestic corporation or the domestic partnership described in this paragraph is referred to at times in this preamble as the “domestic entity.” For other definitions used throughout this preamble but not defined in this preamble, see § 1.7874–12T (providing common definitions for purposes of

certain regulations under sections 367(b), 956, 7701(l), and 7874).

The temporary regulations provide a rule (the disqualified stock rule) that, subject to a de minimis exception, excludes disqualified stock from the denominator of the ownership fraction. In general, disqualified stock is stock of the foreign acquiring corporation that, in a transaction related to the domestic entity acquisition, is transferred in one of two types of exchanges. See Parts II.A and B of this Summary of Comments and Explanation of Revisions for the discussion of these exchanges. However, stock is disqualified stock only to the extent that the transfer of the stock in the exchange increases the fair market value of the assets of the foreign acquiring corporation or decreases the amount of its liabilities (the net asset requirement). The disqualified stock rule thus generally prevents stock of the foreign acquiring corporation that is transferred in certain transactions that increase the net assets of the foreign acquiring corporation from inappropriately increasing the denominator of the ownership fraction and thereby diluting the ownership percentage.

Under the temporary regulations, stock may be disqualified stock regardless of whether it is, has been, or will be publicly traded. In addition, stock may be disqualified stock regardless of whether it is transferred by reason of an issuance, sale, distribution, exchange, or any other type of disposition, or whether it is transferred by the foreign acquiring corporation or another person.

One comment suggested that disqualified stock should generally include only stock transferred by reason of an issuance by the foreign acquiring corporation. According to the comment, this would generally simplify the disqualified stock rule by obviating the need for the net asset requirement, though it noted that special rules regarding hook stock would likely be needed. The final regulations do not adopt this comment. The Treasury Department and the IRS have determined that transfers other than solely by reason of an issuance can inappropriately dilute the ownership percentage. For example, see § 1.7874–4(j) *Example 6* (iii) (issuance of stock by the foreign acquiring corporation in exchange for qualified property followed by a transfer of that stock by the transferee in satisfaction of an obligation of the transferee) and § 1.7874–4(j) *Example 10* (issuance of stock followed by use of the stock to satisfy an obligation). The Treasury Department and the IRS have concluded

that addressing these transactions and other transactions (such as transactions involving hook stock) via special rules would largely negate the simplicity benefits of the approach recommended by the comment.

II. Exchanges That Give Rise to Disqualified Stock

A. Exchanges for Nonqualified Property

1. In General

Disqualified stock includes stock of the foreign acquiring corporation that, in a transaction related to the domestic entity acquisition, is transferred to a person other than the domestic entity in exchange for “nonqualified property.” Nonqualified property means (i) cash or cash equivalents, (ii) marketable securities, (iii) certain obligations (as discussed in Part II.A.3 of this Summary of Comments and Explanation of Revisions), and (iv) any other property acquired with a principal purpose of avoiding the purposes of section 7874, regardless of whether the transaction involves an indirect transfer of property described in clause (i), (ii), or (iii). This preamble refers at times to the property described in clauses (i), (ii), and (iii) of the preceding sentence collectively as “specified nonqualified property” and to the property described in clause (iv) as “avoidance property.” For this purpose, marketable securities has the meaning set forth in section 453(f)(2), except that the term does not include stock of a corporation or an interest in a partnership that becomes a member of the EAG in a transaction (or series of transactions) related to the domestic entity acquisition.

2. Different Treatment for Stock and Asset Acquisitions

Under the temporary regulations, the extent to which stock of a foreign acquiring corporation is considered transferred in exchange for nonqualified property can differ depending on the structure of a transaction. For example, if, in a transaction related to a domestic entity acquisition, the foreign acquiring corporation acquires all the stock of another foreign corporation (foreign target corporation) in exchange for stock of the foreign acquiring corporation, then such stock of the foreign acquiring corporation would normally not be considered transferred in exchange for nonqualified property, regardless of the extent to which the properties of the foreign target corporation constitute nonqualified property, unless the stock of the foreign target corporation constitutes avoidance property. However, if the transaction were instead structured so that the foreign acquiring

corporation acquires all of the properties of the foreign target corporation in exchange for stock of the foreign acquiring corporation, then such stock of the foreign acquiring corporation would be considered transferred in exchange for nonqualified property, to the extent that the properties of the foreign target corporation constitute nonqualified property. The preamble to the 2014 temporary regulations acknowledged this disparity and the decision not to harmonize the treatment of stock and asset acquisitions by, for example, applying a look-through approach to stock acquisitions. See Part C of the Explanation of Provisions section of the preamble to the 2014 temporary regulations. Nevertheless, comments requested more consistent treatment between stock and asset acquisitions, noting in particular that, when the foreign target corporation is publicly-traded, corporate and other legal considerations may dictate the structure of the transaction.

One comment suggested that this result could be achieved when a foreign acquiring corporation acquires substantially all of the properties of a foreign target corporation by viewing the two corporations as a single combined unit for purposes of the disqualified stock rule. Under this view, properties historically held by the foreign target corporation (including nonqualified property) would not represent an infusion of value into the combined group. The comment thus asserted that, regardless of the structure of the transaction, the disqualified stock rule generally should not apply to stock attributable to such properties. The comment noted, though, that if asset acquisitions were to be treated similar to stock acquisitions, there might be a heightened need for rules, in addition to the anti-abuse rule of section 7874(c)(4), to address certain related transactions in which stock of the foreign target corporation is transferred in exchange for nonqualified property.

After considering the comments, the Treasury Department and the IRS decline to adopt a rule treating certain asset acquisitions as stock acquisitions or to otherwise coordinate their treatment. The Treasury Department and the IRS have determined that stock of a foreign acquiring corporation attributable to any nonqualified property—whether acquired in a transaction related to the domestic entity acquisition or historically held—generally presents opportunities to inappropriately dilute the ownership percentage. For example, see, the passive assets rule of § 1.7874–7T. Thus,

the Treasury Department and the IRS have concluded that a look-through approach, pursuant to which stock acquisitions would be treated similar to asset acquisitions, would be the preferable approach for harmonizing the treatment, in contrast to the comments’ recommendation to treat certain assets acquisitions similar to stock acquisitions. The final regulations, however, do not implement a look-through approach out of concerns of undue complexity and administrative burden.

Another comment recommended that, if the final regulations retain different treatment for stock and asset acquisitions, working capital of a foreign target corporation should be excluded from the definition of nonqualified property. After considering this comment, the Treasury Department and the IRS have determined that providing special rules that exclude working capital from the definition of nonqualified property would result in undue complexity and administrative burden. Notably, such special rules would have limited applicability when the foreign target corporation is a parent corporation of an affiliated group—which is often the case—because, in such a structure, working capital generally would be held by subsidiaries. Accordingly, the final regulations do not adopt the comment.

3. Obligations Constituting Nonqualified Property

Under the temporary regulations, nonqualified property includes an obligation owed by (i) a member of the EAG; (ii) a former domestic entity shareholder or former domestic entity partner; or (iii) a person that owns, before or after the domestic entity acquisition, stock of (or a partnership interest in) a person described in clause (i) or (ii) or that is related (within the meaning of section 267 or 707(b)) to such a person. Comments requested several modifications to this rule.

First, a comment recommended that, if the final regulations retain different treatment for stock and asset acquisitions, they exclude certain obligations owed by a member of the EAG from the definition of nonqualified property. In particular, the comment suggested excluding intercompany obligations held by the foreign target corporation (that is, obligations owed by an affiliate of the foreign target corporation to the foreign target corporation), at least to the extent that the obligations arose in the ordinary course of the foreign target group’s cash management program. The comment noted that, in these cases, had the

foreign target corporation instead funded its affiliate through equity (rather than debt), stock of the foreign acquiring corporation transferred in exchange for the equity generally would not be disqualified stock. The comment questioned this disparate treatment.

After considering the comment, the Treasury Department and the IRS have determined that transfers of stock of a foreign acquiring corporation in exchange for intercompany obligations generally do not present opportunities to inappropriately reduce the ownership fraction. Accordingly, the final regulations exclude from the definition of nonqualified property an obligation owed by a member of the EAG if the holder of the obligation immediately before the domestic entity acquisition and any related transaction (or its successor), is a member of the EAG after the domestic entity acquisition and all related transactions. § 1.7874–4(i)(2)(iii)(A).

Another comment recommended that nonqualified property generally not include an obligation owed by a person that is only a de minimis former domestic entity shareholder or former domestic entity partner. The comment made a similar recommendation for an obligation owed by a person that, before and after the domestic entity acquisition, owns no more than a de minimis interest in any member of the EAG. The Treasury Department and the IRS agree with this comment, and the final regulations are modified accordingly. See § 1.7874–4(i)(2)(iii)(B) and (C) (providing a de minimis rule for a less than five percent ownership interest). Nevertheless, the anti-abuse rule in section 7874(c)(4) may still apply to disregard transfers of stock in exchange for such obligations.

4. Definition of Obligation

The temporary regulations define an obligation by reference to § 1.752–1(a)(4)(ii), which includes “any fixed or contingent obligation to make payment. . . . Obligations include, but are not limited to, debt obligations, environmental obligations, tort obligations, contract obligations, pension obligations, obligations under a short sale, and obligations under derivative financial instruments such as options, forward contracts, futures contracts, and swaps.”

The Treasury Department and the IRS are concerned that the reference in the temporary regulations to § 1.752–1(a)(4)(ii) may cause confusion when applied outside of a partnership setting. The final regulations thus remove the reference to § 1.752–1(a)(4)(ii) and provide that an obligation for purposes

of the disqualified stock rule includes any fixed or contingent obligation to make payment or provide value (such as through providing goods or services). § 1.7874–4(i)(3). No inference is intended regarding the treatment, under § 1.752–1(a)(4)(ii) or the temporary regulations, of a contractual agreement by a person to provide goods or services.

5. Definition of Avoidance Property

Avoidance property means any property (other than specified nonqualified property) acquired with a principal purpose of avoiding the purposes of section 7874. The 2015 notice and the 2016 temporary regulations clarified that this definition applies regardless of whether the transaction involves an indirect transfer of specified nonqualified property. One comment was received regarding this clarification.

The comment agreed with the clarification but asserted that avoidance property should not include property that meets two conditions. First, the property (or, in cases in which the property is stock or a partnership interest, the property indirectly transferred) either (i) constitutes a trade or business within the meaning of § 1.367(a)–2(d)(2), or (ii) is related to an existing business of the foreign acquiring corporation. And, second, the property is transferred without an intention to dispose of it at a later time. After considering the comment, the Treasury Department and the IRS have determined that whether property constitutes avoidance property should in all cases depend on the principal purpose for the acquisition of the property, which cannot be determined based on an exclusive set of objective factors, such as the nature of the property or holding period. In certain circumstances, property that meets the conditions described by the comment could be acquired with a principal purpose of avoiding the purposes of section 7874. Thus, the Treasury Department and the IRS have concluded that it would be inappropriate to exclude such property from the definition of avoidance property. Consequently, the final regulations do not adopt the comment.

B. Subsequent Transfers of Stock in Exchange for the Satisfaction or Assumption of an Obligation Associated With the Property Exchanged

1. In General

Disqualified stock also generally includes stock of the foreign acquiring corporation that is transferred by a person (the transferor) to another person

(the transferee) in exchange for property (the exchanged property) if, pursuant to the same plan (or series of related transactions), the transferee subsequently transfers the stock in exchange for the satisfaction or assumption of one or more obligations associated with the exchanged property (the associated obligation rule). The purpose of the rule is to ensure that the same amount of stock of the foreign acquiring corporation is included in the denominator of the ownership fraction in economically similar situations.

For example, consider a situation in which a foreign acquiring corporation (FA) intends to acquire the property of a domestic entity (DT), which holds property with a fair market value of \$100x and has a \$25x obligation that is associated with the property. The parties could structure the domestic entity acquisition using the following steps: (i) DT transfers all of its property to FA in exchange for \$75x of FA stock and FA's assumption of the \$25x associated obligation, (ii) DT distributes the \$75x of FA stock to its shareholders, and (iii) in a related transaction, FA issues \$25x of its stock to the public for cash and uses that cash to satisfy the associated obligation. Alternatively, FA could not assume the associated obligation and could thus acquire all of DT's properties in exchange for \$100x of FA stock, followed by DT using \$25x of FA stock to satisfy the \$25x associated obligation and distributing the remaining \$75x of FA stock to its shareholders in liquidation. Under the first alternative, the \$25x of FA stock issued to the public in exchange for cash (which is nonqualified property) would be excluded from the denominator of the ownership fraction. Under the second alternative, however, no FA stock would be excluded absent the associated obligation rule. Allowing a different result under the second alternative would be inappropriate because the first and second alternatives are economically similar. That is, under both alternatives, FA's value reflects the gross value of the acquired property (under the first alternative, because the amount of the associated obligation is satisfied with the cash and, under the second alternative, because FA did not assume the associated obligation), and DT's obligations have been reduced by the amount of the associated obligation. The associated obligation rule thus ensures that, as under the first alternative, \$25x of FA stock is excluded from the denominator of the ownership fraction under the second alternative. The rule serves the same

purpose when the transferee is a person other than the domestic entity.

Several comments were received regarding the purpose and effect of the associated obligation rule. First, a comment noted that the rule serves an important purpose and suggested that the final regulations retain the rule. Another comment questioned the practical significance of the rule under the temporary regulations and suggested that the final regulations remove it. In particular, the comment asserted that creditors typically require obligations to be satisfied in cash, rather than stock. Moreover, the comment stated that, under the temporary regulations, the rule might not apply if, instead of using stock of the foreign acquiring corporation to satisfy an associated obligation, the transferee sold the stock for cash and then used the cash to satisfy the obligation. One comment acknowledged, however, that a plan (or series of related transactions) to satisfy obligations of the transferee using the proceeds of the sale of stock of the foreign acquiring corporation could be subject to the anti-abuse rule under section 7874(c)(4).

After considering the comments, the Treasury Department and the IRS have determined that the associated obligation rule promotes an important policy and thus the final regulations retain the rule. The Treasury Department and the IRS also have determined that when a foreign acquiring corporation issues its stock in lieu of assuming an obligation associated with the exchanged property, the rule should not be limited to situations in which, pursuant to the same plan (or series of related transactions), the transferee uses the stock to directly satisfy the associated obligation. Rather, the Treasury Department and the IRS have concluded that the rule should generally apply if, pursuant to the same plan (or series of related transactions), the transferee uses the stock to directly or indirectly satisfy any obligation of the transferee (regardless of whether it is an associated obligation). For example, the rule should apply if the transferee sells the stock and then uses the proceeds to satisfy an amount of an obligation of the transferee equal to the amount of the associated obligation. In these cases, the transferee and the foreign acquiring corporation are in an economic position similar to the one in which they would have been had the foreign acquiring corporation assumed the associated obligation, issued stock in exchange for cash, and then used that cash to satisfy the obligation. The final regulations accordingly modify the associated

obligation rule. See § 1.7874–4(c)(1)(ii)(A). In addition, the final regulations generally limit the amount of disqualified stock arising under the associated obligation rule to the proportionate share of obligations associated with the exchanged property that, pursuant to the same plan (or series of related transactions), is not assumed by the foreign acquiring corporation. See § 1.7874–4(c)(1)(ii)(B).

2. Acquisitions of Less than Substantially All of the Property of Transferee

A comment requested a modification of the associated obligation rule so that it applies only if the transferor acquires substantially all of the property of the transferee. The comment asserted that, when the transferor acquires only a portion (rather than substantially all) of the transferee's property, it may be difficult or burdensome to determine which obligations are associated with the exchanged property.

The associated obligation rule addresses a concern that, absent the rule, a different amount of stock of a foreign acquiring corporation might be included in the denominator of the ownership fraction in economically similar scenarios. The Treasury Department and the IRS have determined that this concern may exist regardless of the portion of the transferee's property that is acquired. In addition, determinations concerning the association between obligations and property may be required under the Code for purposes other than applying the associated obligation rule. For example, see section 358(h)(2). Accordingly, the final regulations decline to adopt the comment.

3. Application of Rule When Domestic Entity Is Transferee

One comment suggested broadening the associated obligation rule to address certain cases in which the domestic entity is the transferee and the foreign acquiring corporation issues its stock in lieu of assuming any obligation of the transferee (regardless of whether it is associated with the exchanged property). For example, consider a situation in which a domestic entity (DT) has two lines of business: (i) Business A, which comprises property that, in the aggregate, has a fair market value of \$90x and no obligations associated with it, and (ii) Business B, which comprises property that, in the aggregate, has a fair market value of \$20x and \$10x of obligations associated with it. If a foreign acquiring corporation (FA) acquires only the Business A property in exchange for

\$90x of FA stock, DT might use \$10x of FA stock to satisfy the Business B associated obligations and distribute the remaining \$80x of FA stock and the \$20x of Business B property to its shareholders in liquidation. In such a case, the \$10x of FA stock would not be disqualified stock under the associated obligation rule because the transferee did not retain any obligations associated with the exchanged property (the Business A property); thus, absent special rules, the stock might inappropriately dilute the ownership percentage. The comment noted that the associated obligation rule could be modified to address such cases.

The Treasury Department and the IRS acknowledge the concern raised by the comment but decline to broaden the associated obligation rule to address it at this time. However, the Treasury Department and the IRS will monitor transactions in which the foreign acquiring corporation transfers its stock in lieu of assuming an obligation of the domestic entity and continue to study whether future guidance should broaden the rule. In addition, section 7874(c)(4) (which would disregard the transfer of the \$10x of FA stock in satisfaction of the obligation if the transfer is part of a plan a principal purpose of which is to avoid the purposes of section 7874) and § 1.7874–10T (which could cause DT's distribution of the \$20x of Business B assets to give rise to a non-ordinary course distribution, which, in turn, would cause the former domestic entity shareholders of DT to be deemed to receive additional FA stock for purpose of computing the ownership fraction) may apply to address the concern raised by the comment.

III. The De Minimis Exception

The disqualified stock rule contains a de minimis exception, which generally applies when two requirements are satisfied. First, the ownership percentage—determined without regard to the application of the disqualified stock rule, the passive assets rule of § 1.7874–7T (the passive assets rule), and the non-ordinary course distribution rule of § 1.7874–10T (the non-ordinary course distribution rule)—must be less than five (by vote and value). Second, after the domestic entity acquisition and all related transactions, former domestic entity shareholders or former domestic entity partners, in the aggregate, must own (applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) less than five percent (by vote and value) of the stock of (or a partnership interest in) any member of

the EAG. When the de minimis exception applies, the disqualified stock rule does not apply and, as a result, no stock of the foreign acquiring corporation is excluded from the denominator of the ownership fraction pursuant to the rule.

The passive assets rule and the non-ordinary course distribution rule contain similar de minimis exceptions (the three exceptions collectively, the de minimis exceptions). See §§ 1.7874–7T(c) and 1.7874–10T(d). Together, the de minimis exceptions generally prevent one or more of the disqualified stock rule, the passive assets rule, and the non-ordinary course rule from causing section 7874 to apply to a domestic entity acquisition that, given minimal actual ownership continuity, largely resembles a cash purchase by the foreign acquiring corporation of the stock of (or interests in) the domestic entity.

Comments requested expanding the de minimis exceptions in several respects. First, comments requested increasing the ownership thresholds in the de minimis exceptions. One comment recommended a 20-percent threshold, noting that such a threshold would be generally consistent with the threshold in the internal group restructuring exception under § 1.7874–1(c)(2) (permitting up to 20 percent ownership by non-EAG members). The internal group restructuring exception, however, addresses different policies than the de minimis exceptions. In particular, the internal group restructuring exception addresses transactions in which there is no, or only a small, shift in ownership of a domestic entity to persons outside of a corporate group, whereas the de minimis exceptions address transactions in which there is almost a complete shift in ultimate ownership of a domestic entity. Moreover, the Treasury Department and the IRS have concluded that a five-percent threshold appropriately differentiates between domestic entity acquisitions that largely resemble a cash purchase and those that do not. Accordingly, the final regulations do not adopt the comment.

Other comments requested removing the second requirement of the de minimis exceptions or, alternatively, modifying the requirement so that it looks only to stock held by reason of holding stock (or interests) of the domestic entity. The comments noted that, particularly in cases involving a publicly-traded domestic entity or a complex ownership structure, it could be difficult or burdensome to identify each former domestic entity shareholder or former domestic entity partner

(including a de minimis former domestic entity shareholder or former domestic entity partner), as applicable, and then determine (taking into account the applicable attribution rules) the former domestic entity shareholders' or former domestic entity partners' collective ownership of the foreign acquiring corporation and each member of the EAG. Accordingly, the comment asserted that, at least in certain cases, uncertainty surrounding whether the second requirement is satisfied could result in taxpayers having to apply—and thus conduct the potentially complicated analyses required by—the disqualified stock rule, passive assets rule, and non-ordinary course distribution rule, notwithstanding that the domestic entity acquisition may largely resemble a purchase.

After considering the comment, the final regulations modify each of the de minimis exceptions to provide that the second requirement is satisfied if, after the domestic entity acquisition and all related transactions, each former domestic entity shareholder or former domestic entity partner, as applicable, owns (applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) less than five percent (by vote and value) of the stock of (or a partnership interest in) each member of the EAG. § 1.7874–4(d)(1)(ii); § 1.7874–7T(c)(2); § 1.7874–10T(d)(2). The Treasury Department and the IRS have determined that limiting the second requirement to consider only the ownership of former domestic entity shareholders or former domestic entity partners (with applicable attribution rules), individually, rather than the ownership of all former domestic entity shareholders or former domestic entity partners, collectively, strikes the appropriate balance between preventing the de minimis exceptions from applying in inappropriate circumstances and addressing the practical difficulties noted in the comment.

IV. Certain Public Offerings

The preamble to the 2014 temporary regulations noted that the de minimis exception with respect to the disqualified stock rule may facilitate certain transactions that have the effect of converting a publicly traded domestic corporation into a publicly traded foreign corporation over time. For example, a buyer may contribute cash to a newly formed foreign acquiring corporation that uses such cash, along with the proceeds from borrowings and a small amount of its stock (often issued to the management of the domestic corporation), to acquire all of the stock of a publicly traded domestic

corporation in a domestic entity acquisition. After a period of time, the buyer may sell its stock of the foreign acquiring corporation pursuant to a public offering, which may have been contemplated at the time of the domestic entity acquisition. The preamble to the 2014 regulations explained that the Treasury Department and the IRS would study these transactions and requested comments on the application of section 7874 to such transactions.

A comment asserted that, given the number of non-tax contingencies between the domestic entity acquisition and the public offering, it would be inappropriate to apply the step-transaction doctrine or related principles to the transactions. Comments also suggested that these transactions do not violate the policies of section 7874 because the domestic entity acquisition is essentially a purchase by the foreign acquiring corporation of the stock of the publicly traded domestic corporation. Accordingly, comments recommended against new rules to address the transactions.

After further study and consideration of the comments, the Treasury Department and the IRS decline at this time to provide special rules to address these transactions. However, section 7874(c)(4), § 1.7874–4(d)(2) (providing that the de minimis exception does not apply to disqualified stock that is transferred with a principal purpose of avoiding the purposes of section 7874), and judicial doctrines each may apply to address the concerns raised by these transactions.

V. Additional Clarifications Requested

A. Stock Included in Numerator Also Included in Denominator

A comment requested that the Treasury Department and the IRS clarify that stock of a foreign acquiring corporation included in the numerator of the ownership fraction is also included in the denominator of the fraction, regardless of whether the stock is disqualified stock. The preamble to the temporary regulations indicated that stock described in section 7874(a)(2)(B)(ii) (by reason of stock) is never treated as disqualified stock and thus cannot be excluded from the denominator of the ownership fraction under the disqualified stock rule. See Part A of the Explanation of Provisions section of the preamble to the 2014 temporary regulations. Nevertheless, in response to the comment and for the avoidance of doubt, the final regulations clarify that by reason of stock may never

be treated as disqualified stock. See § 1.7874–4(c)(1). Accordingly, the final regulations clarify that stock of the foreign acquiring corporation included in the numerator of the ownership fraction is in all cases also included in the denominator of the fraction.

B. Treatment of partnerships

Comments requested clarification about whether an acquisition of a partnership interest is treated similarly to an acquisition of stock for purposes of the disqualified stock rule. That is, the comment asked whether stock of a foreign acquiring corporation transferred in exchange for a partnership interest is treated as stock transferred in exchange for a proportionate share of partnership assets represented by the partnership interest (a look-through approach). The Treasury Department and the IRS confirm that a partnership interest does not constitute nonqualified property unless it is a marketable security (for example, an interest in a publicly traded partnership described in § 1.7704–1(a)(1)(i)) or is avoidance property. The definition of marketable securities in the temporary regulations excludes an interest in a partnership that becomes a member of the EAG in a transaction (or series of transactions) related to the domestic entity acquisition, an exclusion that would be unnecessary if partnership interests were subject to a look-through approach. Nevertheless, in response to the comment and for the avoidance of doubt, the definition of nonqualified property is clarified to provide that an interest in a partnership is nonqualified property only to the extent it is a marketable security or avoidance property.

VI. The Subsequent Transfer Rule

The temporary regulations provide a rule (the subsequent transfer rule) pursuant to which stock of a foreign corporation that is described in section 7874(a)(2)(B)(ii) (that is, by reason of stock) does not cease to be so described as a result of any subsequent transfer of the stock by the former domestic entity shareholder or former domestic entity partner that received such stock, even if the subsequent transfer is related to the domestic entity acquisition. A comment requested adding a de minimis exception to the subsequent transfer rule, similar to the three de minimis exceptions discussed in Part III of this Summary of Comments and Explanation of Revisions. For example, the comment suggested that if, pursuant to a subsequent transfer (or series of transfers) related to the domestic entity acquisition, the former domestic entity

shareholders or former domestic entity partners, in the aggregate, dispose of all but a de minimis amount of stock of the foreign acquiring corporation, then the subsequent transfer rule should not apply. In such a case, the requested de minimis exception would provide that the stock received by the former domestic entity shareholders or former domestic entity partners would not be considered by reason of stock and thus would not be included in the numerator of the ownership fraction (though it generally would be included in the denominator of the ownership fraction).

The final regulations do not adopt the comment. The de minimis exceptions, as discussed in Part III of this Summary of Comments and Explanation of Revisions, provide relief for transactions that are in substance cash purchases by the foreign acquiring corporation of the stock of (or interests in) the domestic entity. In contrast, the subsequent transfer rule applies to ensure the application of section 7874 to transactions where a foreign corporation acquires substantially all the property (directly or indirectly) of a domestic entity in exchange for stock. The ultimate use of the stock received by the former domestic entity shareholders or former domestic entity partners is irrelevant to the three-factor test established by the statute. Accordingly, the final regulations do not adopt a de minimis exception for purposes of the subsequent transfer rule.

VII. Applicability Dates

The final regulations generally apply to domestic entity acquisitions completed on or after September 17, 2009, to the extent described in the 2009 notice. The final regulations generally apply with respect to the remainder of the proposed rules in the 2014 proposed regulations to domestic entity acquisitions completed on or after January 16, 2014. However, see § 1.7874–4(k) for certain rules that apply only to domestic entity acquisitions completed on or after the publication of the 2015 notice or these final regulations, as applicable. Similar to the 2014 temporary regulations, these regulations provide that taxpayers may elect to apply all the rules contained in these final regulations to domestic entity acquisitions completed on or after September 17, 2009, and before January 13, 2017 (transition period), if the taxpayer applies all of the rules consistently to all domestic entity acquisitions completed during the transition period.

No inference is intended as to the treatment of transactions under the law before the various applicability dates of

these regulations. For example, these transactions could be subject to challenge under applicable provisions, including under section 7874(c)(4) or judicial doctrines such as the substance-over-form doctrine.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. The Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply because the regulations do not impose a collection of information on small entities. Pursuant to section 7805(f) of the Code, the notices of proposed rulemaking that preceded this regulation were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal author of these regulations is Joshua G. Rabon of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.7874–4 also issued under 26 U.S.C. 7874(c)(6) and (g).
Section 1.7874–5 also issued under 26 U.S.C. 7874(c)(6) and (g).
* * * * *

■ **Par. 2.** Section 1.7874–4 is added to read as follows:

§ 1.7874–4 Disregard of certain stock related to the domestic entity acquisition.

(a) *Scope.* This section identifies certain stock of the foreign acquiring corporation that is disregarded in determining the ownership fraction and modifies the scope of section 7874(c)(2)(B). Paragraph (b) of this section sets forth the general rule that certain stock of the foreign acquiring

corporation, and only such stock, is treated as stock described in section 7874(c)(2)(B) and therefore is excluded from the denominator of the ownership fraction. Paragraph (c) of this section identifies the stock of the foreign acquiring corporation that is subject to paragraph (b) of this section. Paragraph (d) of this section provides a de minimis exception to the application of the general exclusion rule of paragraph (b) of this section. Paragraph (e) of this section provides rules for transfers of stock of the foreign acquiring corporation in satisfaction of, or in exchange for the assumption of, one or more obligations of the transferor. Paragraph (f) of this section provides rules for certain transfers of stock of the foreign acquiring corporation involving multiple properties or obligations. Paragraph (g) of this section provides rules for the treatment of partnerships, and paragraph (h) of this section provides rules addressing the interaction of this section with the expanded affiliated group rules of section 7874(c)(2)(A) and § 1.7874-1. Paragraph (i) of this section provides definitions. Paragraph (j) of this section provides examples illustrating the application of the rules of this section. Paragraph (k) of this section provides dates of applicability.

(b) *Exclusion of disqualified stock under section 7874(c)(2)(B).* Except as provided in paragraph (d) of this section, disqualified stock (as determined under paragraph (c) of this section) is treated as stock described in section 7874(c)(2)(B) and therefore is not included in the denominator of the ownership fraction. Section 7874(c)(2)(B) shall not apply to exclude stock from the denominator of the ownership fraction that is not disqualified stock.

(c) *Disqualified stock—(1) General rule.* Except as provided in paragraph (c)(2) of this section, disqualified stock is stock of the foreign acquiring corporation (other than stock described in § 1.7874-2(f)) that is transferred in an exchange described in paragraph (c)(1)(i) or (ii) of this section that is related to the domestic entity acquisition. This paragraph (c) applies without regard to whether the stock of the foreign acquiring corporation is publicly traded at the time of the transfer or at any other time.

(i) *Exchanged for nonqualified property.* The stock is transferred to a person other than the domestic entity in exchange for nonqualified property. See *Example 1*, *Example 2*, *Example 6*, *Example 8*, and *Example 9* of paragraph (j) of this section for illustrations of the application of this paragraph (c)(1)(i).

(ii) *Exchanged for property with associated obligations—(A) General rule.* Subject to the limitation provided in paragraph (c)(1)(ii)(B) of this section, the stock is transferred by a person (transferor) to another person (transferee) in exchange for property (exchanged property) and, pursuant to the same plan (or series of related transactions), the transferee subsequently transfers such stock (or, if the transferee exchanges such stock for other property, such other property) in satisfaction of, or in exchange for the assumption of, one or more obligations of the transferee or a person related (within the meaning of section 267 or 707(b)) to the transferee. See *Example 6* and *Example 10* of paragraph (j) of this section for illustrations of the application of paragraph (c)(1)(ii) of this section.

(B) *Limitation.* The amount of stock treated as transferred in an exchange described in paragraph (c)(2)(ii)(A) of this section shall not exceed—

(1) With respect to a transferee that is the domestic entity, the proportionate share of obligations associated with the exchanged property (determined based on the fair market value of the exchanged property relative to the fair market value of all properties with which the obligations are associated) that, pursuant to the same plan (or series of related transactions), is not assumed by the transferor.

(2) With respect to any other transferee, the proportionate share of obligations associated with the exchanged property (determined based on the fair market value of the exchanged property relative to the fair market value of all properties with which the obligations are associated) that, pursuant to the same plan (or series of related transactions), is not assumed by the transferor, multiplied by a fraction, the numerator of which is the amount of exchanged property that is qualified property, and the denominator of which is the total amount of exchanged property.

(C) *Associated obligations.* For purposes of paragraph (c)(1)(ii) of this section, an obligation is associated with property if, for example, the obligation arose from the conduct of a trade or business in which the property has been used, regardless of whether the obligation is a non-recourse obligation.

(2) *Stock transferred in an exchange that does not increase the fair market value of the assets or decrease the amount of liabilities of the foreign acquiring corporation.* Stock is disqualified stock only to the extent that the transfer of the stock in the exchange increases the fair market value of the

assets of the foreign acquiring corporation or decreases the amount of its liabilities. This paragraph (c)(2) is applied to an exchange without regard to any other exchange described in paragraph (c)(1)(i) or (ii) of this section or any other transaction related to the domestic entity acquisition. See *Example 4* and *Example 7* of paragraph (j) of this section for illustrations of the application of this paragraph (c)(2).

(d) *Exception to exclusion of disqualified stock—(1) De minimis ownership.* Except as provided in paragraph (d)(2) of this section, paragraph (b) of this section does not apply if both:

(i) The ownership percentage described in section 7874(a)(2)(B)(ii), determined without regard to the application of paragraph (b) of this section and §§ 1.7874-7T(b) and 1.7874-10T(b), is less than five (by vote and value); and

(ii) After the domestic entity acquisition and all related transactions, each former domestic entity shareholder or former domestic entity partner, as applicable, owns (applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) less than five percent (by vote and value) of the stock of (or a partnership interest in) each member of the expanded affiliated group. See *Example 5* of paragraph (j) of this section for an illustration of this paragraph (d).

(2) *Stock issued to avoid the purposes of section 7874.* The exception in paragraph (d)(1) of this section does not apply to disqualified stock that is transferred in a transaction (or series of transactions) related to the domestic entity acquisition with a principal purpose of avoiding the purposes of section 7874.

(e) *Satisfaction or assumption of obligations.* Except to the extent stock is treated as disqualified stock as a result of being described in paragraph (c)(1)(ii) of this section, this paragraph (e) applies if, in a transaction related to the domestic entity acquisition, stock of the foreign acquiring corporation is transferred to a person other than the domestic entity in exchange for the satisfaction or the assumption of one or more obligations of the transferor. In such a case, solely for purposes of this section, the stock of the foreign acquiring corporation is treated as if it is transferred in exchange for an amount of cash equal to the fair market value of such stock.

(f) *Transactions involving multiple properties.* For purposes of this section, if stock and other property are exchanged for qualified property and

nonqualified property, the stock is treated as transferred in exchange for the qualified property or nonqualified property, respectively, based on the relative fair market value of the property. See also § 1.7874-2(f)(2) (allocating stock of a foreign acquiring corporation between an interest in the domestic entity and other property).

(g) *Treatment of partnerships.* For purposes of this section, if one or more members of the expanded affiliated group own, in the aggregate, more than 50 percent (by value) of the interests in a partnership, such partnership is treated as a corporation that is a member of the expanded affiliated group.

(h) *Interaction with expanded affiliated group rules.* Disqualified stock that is excluded from the denominator of the ownership fraction pursuant to paragraph (b) of this section is taken into account for purposes of determining whether an entity is a member of the expanded affiliated group for purposes of applying section 7874(c)(2)(A) and § 1.7874-1(b) and determining whether a domestic entity acquisition qualifies as an internal group restructuring or results in a loss of control, as described in § 1.7874-1(c)(2) and (c)(3), respectively. However, such disqualified stock is excluded from the denominator of the ownership fraction for purposes of section 7874(a)(2)(B)(ii) regardless of whether it otherwise would be included in the denominator of the ownership fraction as a result of the application of § 1.7874-1(c). See *Example 8* and *Example 9* of paragraph (j) of this section for illustrations of the application of this paragraph (h).

(i) *Definitions.* In addition to the definitions in § 1.7874-12T, the following definitions apply for purposes of this section:

(1) *Marketable securities* has the meaning set forth in section 453(f)(2), except that the term marketable securities does not include stock of a corporation or an interest in a partnership that becomes a member of the expanded affiliated group in a transaction (or series of transactions) related to the domestic entity acquisition. See *Example 4* of paragraph (j) of this section for an illustration of this paragraph (i)(1).

(2) *Nonqualified property* is property described in paragraphs (i)(2)(i) through (iv) of this section. Thus, stock in a corporation or an interest in a partnership is nonqualified property to the extent provided in paragraph (i)(2)(ii) or (iv) of this section. Qualified property is property other than nonqualified property.

(i) Cash or cash equivalents.

(ii) *Marketable securities*, within the meaning of paragraph (i)(1) of this section.

(iii) An obligation owed by any of the following:

(A) A member of the expanded affiliated group, unless the holder of the obligation immediately before the domestic entity acquisition and any related transaction (or its successor) is a member of the expanded affiliated group after the domestic entity acquisition and all related transactions.

(B) A former domestic entity shareholder or former domestic entity partner of the domestic entity that owns (applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) at least five percent (by vote or value) of the stock of, or partnership interests in, the domestic entity before the domestic entity acquisition.

(C) A person that, before or after the domestic entity acquisition, either owns (applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) at least five percent (by vote or value) of the stock of (or partnership interests in) or is related (within the meaning of section 267 or 707(b)) to—

(1) A member of the expanded affiliated group; or

(2) A person described in paragraph (i)(2)(iii)(B) of this section. See *Example 6* of paragraph (j) of this section for an illustration of this paragraph (i)(2)(iii)(C)(2).

(iv) Any other property acquired with a principal purpose of avoiding the purposes of section 7874, regardless of whether the transaction involves an indirect transfer of property described in paragraph (i)(2)(i), (ii), or (iii) of this section. See *Example 2* and *Example 3* of paragraph (j) of this section for illustrations of the application of this paragraph (i)(2)(iv).

(3) An *obligation* means any fixed or contingent obligation to make a payment or provide value without regard to whether the obligation is otherwise taken into account for purposes of the Internal Revenue Code. An obligation includes, but is not limited to, a debt obligation, an environmental obligation, a tort obligation, a contract obligation (including an obligation to provide goods or services), a pension obligation, an obligation under a short sale, and an obligation under derivative financial instruments such as options, forward contracts, futures contracts, and swaps. An obligation does not include any obligation treated as stock for purposes of section 7874 (see, for example, § 1.7874-2(i), which treats certain

interests, including certain creditor claims, as stock).

(4) A *transfer* is, with respect to stock of the foreign acquiring corporation, an issuance, sale, distribution, exchange, or any other disposition of such stock.

(j) *Examples.* The following examples illustrate the application of the rules of this section. For purposes of the examples, unless otherwise indicated, assume the following facts in addition to the facts stated in the examples:

(1) FA, FMS, FS, and FT are foreign corporations, all of which have only one class of stock issued and outstanding;

(2) DMS and DT are domestic corporations;

(3) P and R are corporations that may be either domestic or foreign;

(4) PRS is a partnership with individual partners;

(5) The de minimis ownership exception in paragraph (d)(1) of this section does not apply;

(6) None of the shareholders or partners in the entities described in the examples are related persons with respect to each other;

(7) All transactions described in each example occur pursuant to the same plan;

(8) No property is acquired with a principal purpose of avoiding the purposes of section 7874;

(9) FA, FMS, FS, and FT are tax residents in the same foreign country;

(10) For purposes of determining the ownership fraction, no shares of FA stock are excluded from the denominator pursuant to § 1.7874-7T(b) (which disregards stock attributable to passive assets); and

(11) For purposes of determining the ownership fraction, no shares of FA stock are treated as received by former shareholders of DT pursuant to § 1.7874-10T(b) (which disregards certain distributions).

Example 1. Stock transferred in exchange for marketable securities—(i) Facts. Individual A wholly owns DT. PRS transfers marketable securities (within the meaning of paragraph (i)(1) of this section) to FA, a newly formed corporation, in exchange solely for 25 shares of FA stock. Then Individual A transfers all the DT stock to FA in exchange solely for 75 shares of FA stock.

(ii) *Analysis.* Under paragraph (i)(2)(ii) of this section, the marketable securities constitute nonqualified property. Accordingly, the 25 shares of FA stock transferred by FA to PRS in exchange for the marketable securities constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for the marketable securities increases the

fair market value of the assets of FA by the fair market value of the marketable securities transferred. Under paragraph (b) of this section, the 25 shares of FA stock transferred to PRS are not included in the denominator of the ownership fraction. See also section 7874(c)(4). Accordingly, the only FA stock included in the ownership fraction is the FA stock transferred to Individual A in exchange for the DT stock, and that FA stock is included in both the numerator and the denominator of the ownership fraction. Thus, the ownership fraction is 75/75.

Example 2. Stock transferred in exchange for property acquired with a principal purpose of avoiding the purposes of section 7874—(i) Facts. Individual A wholly owns DT. PRS transfers marketable securities (within the meaning of paragraph (i)(1) of this section) to FT, a newly formed corporation, in exchange solely for all the FT stock. Then PRS transfers the FT stock to FA, a newly formed corporation, in exchange solely for 25 shares of FA stock. Finally, Individual A transfers all the DT stock to FA in exchange solely for 75 shares of FA stock. FA acquires the FT stock with a principal purpose of avoiding the purposes of section 7874.

(ii) **Analysis.** Under paragraph (i)(2)(iv) of this section, the FT stock constitutes nonqualified property because a principal purpose of FA acquiring the FT stock is to avoid the purposes of section 7874. Accordingly, the 25 shares of FA stock transferred by FA to PRS in exchange for the FT stock constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for the FT stock increases the fair market value of FA's assets by the fair market value of the FT stock. Under paragraph (b) of this section, the 25 shares of FA stock transferred to PRS are not included in the denominator of the ownership fraction. Furthermore, even in the absence of paragraph (i)(2)(iv) of this section, the transfer of marketable securities to FT would be disregarded pursuant to section 7874(c)(4). Accordingly, the only FA stock included in the ownership fraction is the FA stock transferred to Individual A in exchange for the DT stock, and that FA stock is included in both the numerator and the denominator of the ownership fraction. Thus, the ownership fraction is 75/75.

Example 3. Stock transferred in exchange for property acquired with a principal purpose of avoiding the purposes of section 7874—(i) Facts. DT is a publicly traded corporation. PRS is a foreign partnership that is unrelated to DT. PRS transfers certain business assets (PRS properties) to FA, a newly formed foreign corporation, in exchange solely for 25 shares of FA stock. The shareholders of DT transfer all of their DT stock to FA in exchange solely for the remaining 75 shares of FA stock (DT acquisition). None of the PRS properties is property described in paragraph (i)(2)(i) through (iii) of this section, but FA acquires the PRS properties with a principal purpose of avoiding the purposes of section 7874.

(ii) **Analysis.** Under paragraph (i)(2)(iv) of this section, the PRS properties transferred to FA constitute nonqualified property, because FA acquires the PRS properties in a transaction related to the DT acquisition with a principal purpose of avoiding the purposes of section 7874. Accordingly, the 25 shares of FA stock transferred by FA to PRS in exchange for the PRS properties constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Paragraph (c)(2) of this section does not apply to reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for the PRS properties increases the fair market value of FA's assets by the fair market value of the PRS properties. Accordingly, pursuant to paragraph (b) of this section, the 25 shares of FA stock transferred to PRS in exchange for the PRS properties are not included in the denominator of the ownership fraction. Furthermore, even in the absence of paragraph (i)(2)(iv) of this section, the transfer of the PRS properties to FA would be disregarded pursuant to section 7874(c)(4). Therefore, the only FA stock included in the ownership fraction is the FA stock transferred to the former domestic entity shareholders of DT in exchange for their DT stock, and that FA stock is included in both the numerator and the denominator of the ownership fraction. Thus, the ownership fraction is 75/75.

Example 4. Stock transferred in exchange for stock of a foreign corporation that becomes a member of the expanded affiliated group—(i) Facts. FT, a publicly traded corporation, forms FA, and then FA forms DMS and FMS. FMS merges with and into FT, with FT surviving the merger (FMS–FT merger). Pursuant to the FMS–FT merger, the FT shareholders exchange their FT stock solely for 100 shares of FA stock and FT becomes a wholly owned subsidiary of FA. Following the FMS–FT merger, DMS merges with and into DT, also a publicly traded corporation, with DT surviving the merger (DT acquisition). Pursuant to the DT acquisition, the DT shareholders exchange their DT stock solely for the remaining 100 shares of FA stock, and DT becomes a wholly owned subsidiary of FA. After the completion of the plan, FA wholly owns FT and DT, DMS and FMS cease to exist, and the stock of FA is publicly traded.

(ii) **Analysis.** Because FT becomes a member of the expanded affiliated group that includes FA in a transaction related to the DT acquisition, the FT stock does not constitute marketable securities (within the meaning of paragraph (i)(1) of this section) and therefore does not constitute nonqualified property pursuant to paragraph (i)(2)(ii) of this section. Accordingly, no FA stock is disqualified stock described in paragraph (c)(1) of this section and therefore the FA stock transferred in exchange for the FT stock and DT stock is included in the denominator of the ownership fraction. Thus, the ownership fraction is 100/200.

(iii) **Alternative facts.** The facts are the same as in paragraph (i) of this *Example 4*, except that, instead of undertaking the FMS–FT merger, FT merges with and into FA with

FA surviving the merger (FT–FA merger). Pursuant to the FT–FA merger, the FT shareholders exchange their FT stock solely for 100 shares of FA stock. At the time of the FT–FA merger, FT does not hold nonqualified property and has no obligations. Accordingly, FA stock transferred by FA to FT in exchange for the property of FT is not disqualified stock described in paragraph (c)(1) of this section. Furthermore, pursuant to paragraph (c)(2) of this section, the 100 shares of FA stock transferred by FT to the shareholders of FT in exchange for their FT stock do not constitute disqualified stock described in paragraph (c)(1) of this section. Although the FT stock is nonqualified property (the FT stock constitutes marketable securities within the meaning of paragraph (i)(2)(ii) of this section because the stock of FT is publicly traded and FT is not a member of the expanded affiliated group that includes FA after the DT acquisition), under paragraph (c)(2) of this section, the transfer of FA stock by FT to the shareholders of FT neither increases the fair market value of the assets of FA nor decreases the liabilities of FA. Accordingly, no FA stock is disqualified stock described in paragraph (c)(1) of this section and, therefore, the FA stock transferred in exchange for the assets of FT and the DT stock is included in the denominator of the ownership fraction. Thus, the ownership fraction is 100/200.

Example 5. De minimis exception—(i) Facts. Individual A wholly owns DT. The fair market value of the DT stock is \$100x. PRS transfers \$96x of cash to FA, a newly formed corporation, in exchange solely for 96 shares of FA stock. Then Individual A transfers the DT stock to FA in exchange for \$96x of cash and 4 shares of FA stock (DT acquisition).

(ii) **Analysis.** Under paragraph (i)(2)(i) of this section, cash constitutes nonqualified property. Accordingly, the 96 shares of FA stock transferred by FA to PRS in exchange for \$96x of cash constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Furthermore, paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for \$96x of cash increases the fair market value of the assets of FA by \$96x. However, without regard to the application of paragraph (b) of this section and §§ 1.7874–7T(b) and 1.7874–10T(b), the ownership percentage described in section 7874(a)(2)(B)(ii) would be less than 5 (by vote and value), or 4 (4/100, or 4 shares of FA stock held by Individual A by reason of owning the DT stock, determined under § 1.7874–2(f)(2), over 100 shares of FA stock outstanding after the DT acquisition). Furthermore, after the DT acquisition and all related transactions, Individual A owns less than 5% (by vote and value, applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) of the stock of FA and DT (the members of the expanded affiliated group that includes FA). Accordingly, the de minimis exception in paragraph (d)(1) of this section applies and therefore paragraph (b) of this section does not apply to exclude the FA stock transferred to PRS from the

denominator of the ownership fraction. Therefore, the FA stock transferred to Individual A and PRS is included in the denominator of the ownership fraction. Thus, the ownership fraction is 4/100.

Example 6. Obligation of the expanded affiliated group satisfied with stock—(i) Facts. Individual A wholly owns DT. The stock of DT held by Individual A has a fair market value of \$75x. Individual A also holds an obligation of DT with a value and face amount of \$25x. DT holds property with a value of \$100x, and the \$25x obligation is associated with the property. FA, a newly formed corporation, transfers 100 shares of FA stock to Individual A in exchange for all the DT stock and the \$25x obligation of DT.

(ii) **Analysis.** Under paragraph (i)(2)(iii)(A) of this section, the \$25x obligation of DT constitutes nonqualified property because DT is a member of the expanded affiliated group that includes FA, and Individual A (the holder of the obligation immediately before the domestic entity acquisition and any related transaction) is not a member of the EAG after the domestic entity acquisition and all related transactions. Thus, the shares of FA stock transferred by FA to Individual A in exchange for the obligation of DT constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Under § 1.7874–2(f)(2), Individual A is treated as receiving 75 shares of FA stock in exchange for the DT stock ($100 \times \$75x / \$100x$) and 25 shares of FA stock in exchange for the obligation of DT ($100 \times \$25x / \$100x$). Thus, 25 shares of FA stock constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock for the \$25x obligation increases the fair market value of FA's assets by \$25x. Therefore, under paragraph (b) of this section, the 25 shares of FA stock transferred to Individual A in exchange for the obligation of DT are not included in the denominator of the ownership fraction. Accordingly, the only FA stock included in the ownership fraction is the 75 shares of FA stock transferred to Individual A in exchange for the DT stock, and that FA stock is included in both the numerator and the denominator of the ownership fraction. Thus, the ownership fraction is 75/75.

(iii) **Alternative facts.** The facts are the same as in paragraph (i) of this *Example 6*, except that instead of acquiring the stock of DT and the \$25x obligation of DT, FA acquires the \$100x of property from DT in exchange solely for 100 shares of FA stock. DT distributes 75 shares of FA stock to Individual A in exchange for Individual A's DT stock and transfers 25 shares of FA stock to Individual A in satisfaction of DT's obligation to Individual A, and liquidates. The 25 shares of FA stock transferred by FA to DT in exchange for the property of DT and then transferred by DT in satisfaction of DT's obligation to Individual A constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(ii) of this section. Paragraph (c)(2) of

this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(ii) of this section because the transfer of FA stock in exchange for the property of DT increases the fair market value of FA's assets by \$100x (although the amount of disqualified stock is limited to 25 shares of FA stock in this case). Therefore, under paragraph (b) of this section, the 25 shares of FA stock that constitute disqualified stock are not included in the denominator of the ownership fraction. Accordingly, only 75 shares of FA stock are included in the ownership fraction, and that FA stock is included in both the numerator and the denominator of the ownership fraction. Thus, the ownership fraction is 75/75.

Example 7. “Over-the-top” stock transfer—(i) Facts. Individual A wholly owns DT. Individual B holds all 100 outstanding shares of FA stock. Individual C acquires 20 shares of FA stock from Individual B for cash, and then FA acquires all of the stock of DT from Individual A in exchange solely for 100 shares of FA stock.

(ii) **Analysis.** Under paragraph (i)(2)(i) of this section, cash constitutes nonqualified property. Accordingly, absent the application of paragraph (c)(2) of this section, the 20 shares of FA stock transferred by Individual B to Individual C in exchange for cash would constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Nevertheless, because Individual B's sale of FA stock neither increases the assets of FA nor decreases the liabilities of FA, such FA stock is not disqualified stock by reason of paragraph (c)(2) of this section. Accordingly, paragraph (b) of this section does not apply to exclude the 20 shares of FA stock sold by Individual B to Individual C, and that FA stock is included in the denominator of the ownership fraction. The 100 shares of FA stock received by Individual A are the only shares included in the numerator of the ownership fraction. Thus, the ownership fraction is 100/200.

Example 8. Interaction with internal group restructuring rule—(i) Facts. P holds 85 shares of DT stock. The remaining 15 shares of DT stock are held by Individual A. P and Individual A transfer their shares of DT stock to FA, a newly formed corporation, in exchange for 85 and 15 shares of FA stock, respectively (DT acquisition), and PRS transfers \$75x of cash to FA in exchange for the remaining 75 shares of FA stock.

(ii) **Analysis.** Under paragraph (i)(2)(i) of this section, cash constitutes nonqualified property. Accordingly, the 75 shares of FA stock transferred by FA to PRS in exchange for \$75x of cash constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Furthermore, paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for \$75x of cash increases the fair market value of the assets of FA by \$75x. Therefore, under paragraph (b) of this section, the 75 shares of FA stock transferred to PRS are not included in the denominator of the ownership fraction. Although PRS's shares of FA stock are

excluded from the denominator of the ownership fraction under paragraph (b) of this section, under paragraph (h) of this section, such shares of FA stock nonetheless are taken into account for purposes of determining whether P is a member of the expanded affiliated group that includes FA and for purposes of determining whether the DT acquisition qualifies as an internal group restructuring. Because P holds 48.6% of the FA stock (85/175) after the DT acquisition and all transactions related to the DT acquisition, it is not a member of the expanded affiliated group that includes FA. In addition, the DT acquisition does not qualify as an internal group restructuring described in § 1.7874–1(c)(2) because P does not hold, directly or indirectly, 80% or more of the shares of FA stock (by vote and value) after the DT acquisition and all transactions related to the DT acquisition. Therefore, the FA stock held by P (along with the FA stock held by Individual A) is included in the numerator and the denominator of the ownership fraction. Thus, the ownership fraction is 100/100.

Example 9. Interaction with loss of control rule—(i) Facts. P wholly owns DT. P transfers all of its shares of DT stock to FA, a newly formed corporation, in exchange for 49 shares of FA stock (DT acquisition), and R transfers marketable securities (within the meaning of paragraph (i)(1) of this section) to FA in exchange for the remaining 51 shares of FA stock.

(ii) **Analysis.** Under paragraph (i)(2)(ii) of this section, the marketable securities constitute nonqualified property. Accordingly, the shares of FA stock transferred by FA to R in exchange for the marketable securities constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section. Paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for the marketable securities increases the fair market value of the assets of FA by the fair market value of the marketable securities transferred. Therefore, under paragraph (b) of this section, the shares of FA stock transferred to R are not included in the denominator of the ownership fraction. Although under paragraph (b) of this section R's shares of FA stock are excluded from the denominator of the ownership fraction, under paragraph (h) of this section, such stock is taken into account for purposes of determining whether P or R is a member of the expanded affiliated group that includes FA. Because P holds 49% of the shares of FA stock (49/100), P is not a member of the expanded affiliated group that includes FA, and P's FA stock is included in both the numerator and the denominator of the ownership fraction. Because R holds 51% of the shares of FA stock (51/100), R is a member of the expanded affiliated group that includes FA and, before taking into account § 1.7874–1(c), R's FA stock would be excluded from the numerator and denominator of the ownership fraction under section 7874(c)(2)(A) and § 1.7874–1(b). However, the DT acquisition results in a loss of control described in § 1.7874–1(c)(3)

because P does not hold, in the aggregate, directly or indirectly, more than 50% of the shares of stock (by vote or value) of R, FA, or DT after the acquisition. Accordingly, the FA stock held by R would be included in the denominator of the ownership fraction under § 1.7874-1(c)(1). Nevertheless, the FA stock held by R is excluded from the denominator of the ownership fraction under paragraphs (b) and (h) of this section. Thus, the ownership fraction is 49/49.

(iii) *Alternative facts.* The facts are the same as in paragraph (i) of this *Example 9*, except that, in exchange for 51 shares of FA stock, R transfers marketable securities (within the meaning of paragraph (i)(1) of this section) with a value equal to that of 16 shares of FA stock and qualified property (within the meaning of paragraph (i)(2) of this section) with a value equal to that of 35 shares of FA stock. Accordingly, 16 of the 51 shares of FA stock transferred to R constitute disqualified stock described in paragraph (c)(1) of this section by reason of paragraph (c)(1)(i) of this section, and 35 of such shares do not constitute disqualified stock. Paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(i) of this section because the transfer of FA stock in exchange for the marketable securities increases the fair market value of the assets of FA by the fair market value of the marketable securities transferred. Therefore, under paragraph (b) of this section, 16 of the 51 shares of FA stock transferred to R are not included in the denominator of the ownership fraction. Although 16 of the 51 shares of FA stock that are transferred to R are excluded from the denominator of the ownership fraction, under paragraph (h) of this section, all 51 of R's shares of FA stock are taken into account for purposes of determining whether P or R is a member of the expanded affiliated group that includes FA. Because P holds 49% of the shares of FA stock (49/100), it is not a member of the expanded affiliated group that includes FA, and its FA stock is included in both the numerator and the denominator of the ownership fraction. Because R holds 51% of the shares of FA stock (51/100), it is a member of the expanded affiliated group that includes FA and, before taking into account § 1.7874-1(c), its FA stock is excluded from the numerator and denominator of the ownership fraction under section 7874(c)(2)(A) and § 1.7874-1(b). However, the DT acquisition results in a loss of control described in § 1.7874-1(c)(3) because P does not hold, in the aggregate, directly or indirectly, more than 50% of the shares of stock (by vote or value) of R, FA, or DT after the acquisition. Accordingly, the 51 shares of FA stock held by R would be included in the denominator of the ownership fraction under § 1.7874-1(c)(1). Nevertheless, the 16 shares of FA stock that constitute disqualified stock are excluded from the denominator of the ownership fraction under paragraphs (b) and (h) of this section. In addition, the 35 shares of FA stock received by R that do not constitute disqualified stock are included in the denominator. Thus, the ownership fraction is 49/84.

Example 10. Stock issued in lieu of assuming associated obligation—(i) Facts.

Individual A wholly owns DT. The stock of DT has a fair market value of \$100x. Individual B wholly owns FT, a foreign corporation, which conducts two businesses, Business C and Business D. Business C comprises property with a gross fair market value of \$70x and \$20x of associated obligations. Business D comprises property with a gross fair market value of \$45x and \$35x of associated obligations. Individual A transfers all of the shares of DT stock to FA, a newly formed corporation, in exchange for \$100x of FA stock (DT acquisition). In transactions related to the DT acquisition, FA acquires all of the Business C property from FT in exchange for \$70x of FA stock and then FT transfers \$30x of the FA stock to its creditors in satisfaction of \$30x of its obligations. None of the Business C property is nonqualified property.

(ii) *Analysis.* Under paragraph (c)(1) of this section by reason of paragraph (c)(1)(ii) of this section, the \$30x of FA stock transferred to FT (the transferee) in exchange for the Business C property (the exchanged property) and then transferred by FT in satisfaction of \$30x of its obligations is disqualified stock, except to the extent limited by paragraph (c)(1)(ii)(B) of this section. Under paragraph (c)(1)(ii)(B)(1) of this section, the proportionate share of obligations associated with the exchanged property that is not assumed by FA must be determined. The proportionate share of obligations associated with the exchanged property is \$20x, calculated as \$20x (the obligations associated with the Business C properties) multiplied by \$70x/\$70x (the fair market value of the exchanged property, \$70x, relative to the fair market value of all the Business C property, \$70x). The proportionate share of obligations associated with the exchanged property that is not assumed by FA is \$20x, calculated as the proportionate share of obligations associated with the exchanged property (\$20x) less the obligations assumed by FA (\$0x). Under paragraph (c)(1)(ii)(B)(2) of this section, the amount of disqualified stock is limited to the proportionate share of obligations associated with the exchanged property that is not assumed (\$20x) multiplied by a fraction, which in this case is \$70x/\$70x (the amount of exchanged property that is qualified property, \$70x, divided by the total amount of exchanged property, \$70x). Accordingly, \$20x of FA stock is disqualified stock under paragraph (c)(1) of this section by reason of paragraph (c)(1)(ii) of this section. Paragraph (c)(2) of this section does not reduce the amount of disqualified stock described in paragraph (c)(1)(ii) of this section because the transfer of the FA stock in exchange for the exchanged property increases the fair market value of FA's assets by \$70x (although the amount of disqualified stock is limited to \$20x of FA stock in this case). Therefore, under paragraph (b) of this section, the \$20x of FA stock that constitutes disqualified stock is not included in the denominator of the ownership fraction. Accordingly, only \$150x of FA stock is included in the denominator of the ownership fraction, calculated as the \$100x of FA stock received by Individual A plus the \$70x of FA stock received by FT less the \$20x of FA stock that is disqualified

stock. Thus, the ownership fraction is \$100x/\$150x. The result would be the same if, in transactions related to the DT acquisition, FT instead sold the \$30x of FA stock for \$30x cash and then transferred the cash in satisfaction of \$30x of its obligations.

(iii) *Alternative facts.* The facts are the same as in paragraph (i) of this *Example 10*, except that FA acquires only \$42x of the Business C property in exchange for \$30x of FA stock and the assumption of \$12x of the obligations associated with the Business C property. Under paragraph (c)(1) of this section by reason of paragraph (c)(1)(ii) of this section, the \$30x of FA stock transferred to FT (the transferee) in exchange for the Business C property (the exchanged property) and then transferred by FT in satisfaction of \$30x of its obligations is disqualified stock, except to the extent limited by paragraph (c)(1)(ii)(B) of this section. Under paragraph (c)(1)(ii)(B)(1) of this section, the proportionate share of obligations associated with the exchanged property that is not assumed by FA must be determined. The proportionate share of obligations associated with the exchanged property is \$12x, calculated as \$20x (the obligations associated with the Business C property) multiplied by \$42x/\$70x (the fair market value of the exchanged property, \$42x, relative to the fair market value of all the Business C property, \$70x). The proportionate share of obligations associated with the exchanged property that is not assumed by FA is \$0, calculated as the proportionate share of obligations associated with the exchanged property (\$12x) less the obligations assumed by FA (\$12x). Accordingly, as a result of the application of paragraph (c)(1)(ii)(B)(2) of this section, no FA stock is disqualified stock under paragraph (c)(1) of this section by reason of paragraph (c)(1)(ii) of this section. As a result, \$130x of FA stock is included in the denominator of the ownership fraction, calculated as the \$100x of FA stock received by Individual A plus the \$30x of FA stock received by FT. Thus, the ownership fraction is \$100x/\$130x.

(k) *Applicability dates—(1) General rule.* Except to the extent otherwise provided in paragraph (k) of this section, this section applies to domestic entity acquisitions completed on or after September 17, 2009. Paragraphs (i)(1) and (i)(2)(iv) of this section apply to domestic entity acquisitions completed on or after November 19, 2015. Paragraph (d)(1)(i) of this section applies to domestic entity acquisitions completed on or after April 4, 2016. Paragraphs (c)(1)(ii), (d)(1)(ii), (i)(2)(iii), and (i)(3) of this section apply to domestic entity acquisitions completed on or after January 13, 2017. For domestic entity acquisitions completed before November 19, 2015, see § 1.7874-4T(i)(6) and (i)(7)(iv) (the predecessors of paragraphs (i)(1) and (i)(2)(iv) of this section) as contained in 26 CFR part 1 revised as of April 1, 2016. For domestic entity acquisitions completed on or after September 22, 2014, and before April 4,

2016, see § 1.7874–4T(d)(1)(i) as contained in 26 CFR part 1 revised as of April 1, 2016. For domestic entity acquisitions completed before January 13, 2017, see § 1.7874–4T(c)(1)(ii), (d)(1)(ii), (i)(7)(iii) (the predecessor of paragraph (i)(2)(iii) of this section), and (i)(8) (the predecessor of paragraph (i)(3) of this section) as contained in 26 CFR part 1 revised as of April 1, 2016.

(2) *Transitional rules for domestic entity acquisitions completed on or after September 17, 2009, but before January 16, 2014.* For domestic entity acquisitions completed on or after September 17, 2009, but before January 16, 2014, except as provided in paragraph (k)(3) of this section, this section shall be applied with the following modifications:

(i) Nonqualified property does not include property described in paragraph (i)(2)(iii) of this section.

(ii) A transfer is limited to an issuance of stock of the foreign acquiring corporation.

(iii) The determination of whether stock of the foreign acquiring corporation is described in paragraph (c)(1) of this section is made without regard to paragraphs (c)(1)(ii), (c)(2), and (e) of this section.

(iv) Paragraphs (d) and (h) of this section do not apply.

(3) *Election for domestic entity acquisitions completed on or after September 17, 2009, and before January 13, 2017.* If, pursuant to paragraph (k)(1) or (2) of this section, a paragraph of this section would not otherwise apply to a domestic entity acquisition completed on or after September 17, 2009, and before January 13, 2017 (transition period), a taxpayer may elect to apply the paragraph if the taxpayer applies the paragraph consistently to all acquisitions completed during the transition period. The election is made by applying the paragraph to all such acquisitions on a timely filed original return (including extensions) or an amended return filed no later than six months after January 13, 2017. A separate statement or form evidencing the election need not be filed.

1.7874–4T [Removed]

■ **Par. 3.** Section 1.7874–4T is removed.

■ **Par. 4.** Section 1.7874–5 is added to read as follows:

§ 1.7874–5 Effect of certain transfers of stock related to the acquisition.

(a) *General rule.* Stock of a foreign acquiring corporation that is described in section 7874(a)(2)(B)(ii) shall not cease to be so described as a result of any subsequent transfer of the stock by the former domestic entity shareholder

or former domestic entity partner that received such stock, even if the subsequent transfer is related to the domestic entity acquisition.

(b) *Example.* The rule of this section is illustrated by the following example:

Example. (i) *Facts.* Individual A wholly owns DT, a domestic corporation. FA, a newly formed foreign corporation, acquires all of the stock of DT from Individual A in exchange solely for 100 shares of FA stock. Pursuant to a binding commitment that was entered into in connection with FA's acquisition of the DT stock, Individual A sells 25 shares of FA stock to B, an unrelated person, in exchange for cash. For federal income tax purposes, the form of the steps of the transaction is respected.

(ii) *Analysis.* Under § 1.7874–2(f)(1), the 100 shares of FA stock received by Individual A are stock of a foreign corporation (FA) that is held by reason of holding stock in a domestic corporation (DT). Accordingly, such stock is described in section 7874(a)(2)(B)(ii). Under paragraph (a) of this section, all 100 shares of FA stock retain their status as being described in section 7874(a)(2)(B)(ii), even though Individual A sells 25 of the 100 shares in connection with the acquisition described in section 7874(a)(2)(B)(i) pursuant to the binding commitment. Therefore, all 100 of the shares of FA stock are included in both the numerator and denominator of the ownership fraction.

(c) *Certain transfers involving expanded affiliated group members.* For rules addressing whether certain stock is treated as held by members of the expanded affiliated group for purposes of applying section 7874(c)(2)(A) and § 1.7874–1, see § 1.7874–6T.

(d) *Definitions.* The definitions provided in § 1.7874–12T apply for purposes of this section.

(e) *Applicability dates.* This section applies to domestic entity acquisitions that are completed on or after January 16, 2014.

§ 1.7874–5T [Removed]

■ **Par. 5.** Section 1.7874–5T is removed.

■ **Par. 6.** Section 1.7874–7T is amended by revising paragraph (c)(2) and paragraph (h) to read as follows:

§ 1.7874–7T Disregard of certain stock attributable to passive assets (temporary).

* * * * *

(c) * * *

(2) After the domestic entity acquisition and all related transactions, each former domestic entity shareholder or former domestic entity partner, as applicable, owns (applying the attribution rules of section 318(a) with the modifications described in section 304(c)(3)(B)) less than five percent (by vote and value) of the stock of (or a

partnership interest in) each member of the expanded affiliated group.

* * * * *

(h) *Applicability dates.* Except as otherwise provided in this paragraph (h), this section applies to domestic entity acquisitions completed on or after September 22, 2014. Paragraph (c)(2) of this section applies to domestic entity acquisitions completed on or after January 13, 2017, and paragraphs (c)(1), (d), and (f)(2) and (4) of this section apply to domestic entity acquisitions completed on or after April 4, 2016. Paragraphs (f)(1)(i)(A)(2) and (f)(1)(i)(D) of this section, as well as the portion of paragraph (f)(1)(i)(C) of this section relating to property that gives rise to income described in section 1297(b)(2)(B), apply to domestic entity acquisitions completed on or after November 19, 2015. However, for domestic entity acquisitions completed on or after September 22, 2014, and before April 4, 2016, taxpayers may elect to apply paragraphs (c)(1), (d), and (f)(2) and (4) of this section. For domestic entity acquisitions completed on or after September 22, 2014, and before January 13, 2017, taxpayers may elect to apply paragraph (c)(2) of this section or § 1.7874–7T(c)(2) as contained in the Internal Revenue Bulletin (IRB) 2016–20 (see https://www.irs.gov/irb/2016-20_IRB/ar05.html). In addition, for domestic entity acquisitions completed on or after September 22, 2014, and before April 4, 2016, taxpayers may elect to apply paragraph (f)(2) of this section by substituting the term “expanded affiliated group” for the term “modified expanded affiliated group.” Furthermore, for domestic entity acquisitions completed on or after September 22, 2014, and before November 19, 2015, taxpayers may elect to apply paragraphs (f)(1)(i)(A)(2) and (f)(1)(i)(D) of this section, as well as the portion of paragraph (f)(1)(i)(C) of this section relating to property that gives rise to income described in section 1297(b)(2)(B).

* * * * *

■ **Par. 7.** Section 1.7874–10T is amended by revising paragraph (d)(2) and paragraph (i) to read as follows:

§ 1.7874–10T Disregard of certain distributions (temporary).

* * * * *

(d) * * *

(2) After the domestic entity acquisition and all related transactions, each former domestic entity shareholder or former domestic entity partner, as applicable, owns (applying the attribution rules of section 318(a) with

the modifications described in section 304(c)(3)(B)) less than five percent (by vote and value) of the stock of (or a partnership interest in) each member of the expanded affiliated group.

* * * * *

(i) *Applicability date.* Except as otherwise provided in this paragraph (i), this section applies to domestic entity acquisitions completed on or after September 22, 2014. Paragraph (d)(2) of this section applies to domestic entity acquisitions completed on or after January 13, 2017, and paragraph (d)(1) of this section applies to domestic entity acquisitions completed on or after November 19, 2015. Paragraph (g) of this section applies to domestic entity acquisitions completed on or after April 4, 2016. However, for domestic entity acquisitions completed on or after

September 22, 2014, and before November 19, 2015, taxpayers may elect to apply paragraph (d)(1) of this section. For domestic entity acquisitions completed on or after September 22, 2014, and before January 13, 2017, taxpayers may elect to apply paragraph (d)(2) of this section or § 1.7874-10T(d)(2) as contained in the Internal Revenue Bulletin (IRB) 2016-20 (see https://www.irs.gov/irb/2016-20_IRB/ar05.html). In addition, for domestic entity acquisitions completed on or after September 22, 2014, and before April 4, 2016, taxpayers may elect to determine NOCDs consistently on the basis of taxable years, in lieu of 12-month periods, in a manner consistent with the principles of this section. See paragraph (h)(5) of this section.

* * * * *

■ **Par. 8.** Section 1.7874-12T is amended by revising the introductory text of paragraph (a) to read as follows:

§ 1.7874-12T Definitions (temporary).

(a) *Definitions.* Except as otherwise provided, the following definitions apply for purposes of this section and §§ 1.367(b)-4T, 1.956-2T, 1.7701(l)-4T, 1.7874-2, 1.7874-2T, 1.7874-4, 1.7874-5, and 1.7874-6T through 1.7874-11T.

* * * * *

§§ 1.7874-1, 1.7874-6T, 1.7874-7T, 1.7874-9T, and 1.7874-10T [Amended]

■ **Par. 9.** For each provision listed in the table below, removing the language in the “Remove” column and adding in its place the language in the “Add” column:

Provision	Remove	Add
§ 1.7874-1(c)(1), second sentence	§ 1.7874-4T	§ 1.7874-4
§ 1.7874-1(c)(1), second sentence	§ 1.7874-4T(h)	§ 1.7874-4(h)
§ 1.7874-6T(g), <i>Example 4</i> (iii), first sentence	§ 1.7874-4T(i)(7)	§ 1.7874-4(i)(2)
§ 1.7874-7T(b)(1), first sentence	§ 1.7874-4T(b)	§ 1.7874-4(b)
§ 1.7874-7T(c)(1)	§ 1.7874-4T(b)	§ 1.7874-4(b)
§ 1.7874-7T(f)(1)(i)	§ 1.7874-4T(i)(7)	§ 1.7874-4(i)(2)
§ 1.7874-7T(f)(2), introductory text	§ 1.7874-4T(b)	§ 1.7874-4(b)
§ 1.7874-7T(f)(3)(i)	§ 1.7874-4T(b)	§ 1.7874-4(b)
§ 1.7874-7T(f)(3)(ii)	§ 1.7874-4T(b)	§ 1.7874-4(b)
§ 1.7874-7T(g), <i>Example 1</i> (i), penultimate sentence	§ 1.7874-4T(i)(7)	§ 1.7874-4(i)(2)
§ 1.7874-7T(g), <i>Example 1</i> (ii), first sentence	§ 1.7874-4T(c)	§ 1.7874-4(c)
§ 1.7874-7T(g), <i>Example 1</i> (ii), first sentence	§ 1.7874-4T(b)	§ 1.7874-4(b)
§ 1.7874-7T(g), <i>Example 2</i> (i), last sentence	§ 1.7874-4T(i)(7)	§ 1.7874-4(i)(2)
§ 1.7874-7T(g), <i>Example 2</i> (ii), first sentence	§§ 1.7874-4T(b) and	§ 1.7874-4(b) and
§ 1.7874-7T(g), <i>Example 3</i> (i), penultimate sentence	§ 1.7874-4T(i)(7)	§ 1.7874-4(i)(2)
§ 1.7874-9T(e)(3), introductory text	§ 1.7874-4T	§ 1.7874-4
§ 1.7874-10T(d)(1), introductory text	§§ 1.7874-4T(b) and	§§ 1.7874-4(b) and
§ 1.7874-10T(f)(3)(iii)(B)	§ 1.7874-4T and	§ 1.7874-4 and

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: December 6, 2016.

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2010-0895; 9958-01-OAR]

RIN 2060-AS90

National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of final action on reconsideration.

SUMMARY: This action sets forth the Environmental Protection Agency's (EPA's) final decision on the issues for which it announced reconsideration on July 12, 2016, that pertain to certain aspects of the June 30, 2015, final amendments for the Ferroalloys Production source category regulated under national emission standards for hazardous air pollutants (NESHAP). The EPA is amending the rule to allow existing facilities with positive pressure baghouses to perform visible emissions monitoring twice daily as an alternative to installing and operating bag leak detection systems (BLDS) to ensure the baghouses are operating properly. In addition, this final action explains that EPA is maintaining the requirement that facilities must use a digital camera opacity technique (DCOT) method to demonstrate compliance with opacity limits. However, this final action revises

the rule such that it references the recently updated version of the DCOT method. In this action, the EPA also explains that no changes are being made regarding the rule provision that requires quarterly polycyclic aromatic hydrocarbons (PAH) emission testing for furnaces producing ferromanganese (FeMn) with an opportunity for facilities to request decreased compliance test frequency from their permitting authority after the first year. Furthermore, in this action, the EPA is denying the request for reconsideration of the PAH emission limits for both FeMn and silicomanganese (SiMn) production furnaces.

DATES: This final action is effective on January 18, 2017. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of January 18, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket ID

No. EPA-HQ-OAR-2010-0895. All documents are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA Docket Center (EPA/DC), Room 3334, EPA WJC West Building, 1301 Constitution Ave. NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Phil Mulrine, Sector Policies and Programs Division (D243-02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5289; fax number: (919) 541-3207; email address: mulrine.phil@epa.gov.

SUPPLEMENTARY INFORMATION:

Organization of this Document. The following outline is provided to aid in locating information in this preamble.

- I. General Information
 - A. Does this action apply to me?
 - B. How do I obtain a copy of this document and other related information?
 - C. Judicial Review and Administrative Reconsideration
- II. Background Information
- III. Summary of Final Action on Issues Reconsidered
 - A. Alternative Monitoring for Existing Positive Pressure Baghouses
 - B. DCOT Compliance Demonstration and Revised DCOT Test Method
 - C. Quarterly PAH Testing for Furnaces Producing FeMn
- IV. Denial of Petition for Reconsideration of FeMn and SiMn PAH Emission Limits
- V. Impacts Associated With This Final Rule
 - A. What are the air impacts?
 - B. What are the energy impacts?
 - C. What are the compliance costs?
 - D. What are the economic and employment impacts?
 - E. What are the benefits of the final standards?
- VI. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Paperwork Reduction Act (PRA)
 - C. Regulatory Flexibility Act (RFA)

- D. Unfunded Mandates Reform Act (UMRA)
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Congressional Review Act (CRA)

I. General Information

A. Does this action apply to me?

Regulated Entities. Categories and entities potentially regulated by this action are shown in Table 1 of this preamble.

TABLE 1—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS FINAL ACTION

NESHAP and source category	NAICS ^a code
Ferroalloys Production	331112

^aNorth American Industry Classification System.

Table 1 of this preamble is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by the final action for the source category listed. To determine whether your facility is affected, you should examine the applicability criteria in 40 CFR part 63, subpart XXX (National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production). If you have any questions regarding the applicability of this final action to a particular entity, consult either the air permitting authority for the entity or your EPA Regional representative as listed in 40 CFR 63.13 (General Provisions).

B. How do I obtain a copy of this document and other related information?

The docket number for this final action regarding the Ferroalloys Production NESHAP (40 CFR part 63, subpart XXX) is Docket ID No. EPA-HQ-OAR-2010-0895.

In addition to being available in the docket, an electronic copy of this document will also be available on the World Wide Web (WWW). Following signature, a copy of this document will

be posted at <https://www.epa.gov/stationary-sources-air-pollution/ferromanganese-and-silicomanganese-production-national-emission>.

C. Judicial Review and Administrative Reconsideration

Under Clean Air Act (CAA) section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by March 20, 2017. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” This section also provides a mechanism for the EPA to reconsider the rule “[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, EPA WJC Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

II. Background Information

The EPA published a final residual risk and technology review (RTR) rule for the Ferroalloys Production source category in the **Federal Register** on June 30, 2015 (80 FR 37366), which included, among other things, the following:

- Revisions to the emission limits for particulate matter (PM) from stacks for the electric arc furnaces, metal oxygen refining (MOR) processes, and crushing and screening operations to minimize PM emissions from these units;
- Emission limits for four previously unregulated hazardous air pollutants

(HAP): Formaldehyde, hydrogen chloride, mercury, and PAH;

- Requirements to capture process fugitive emissions using effective, enhanced local capture, and duct the captured emissions to control devices;

- An average opacity limit of 8 percent during a full furnace cycle and a maximum opacity limit of 20 percent for any two consecutive 6-minute periods to ensure effective capture and control of process fugitive emissions;

- A requirement to conduct opacity observations using the DCOT at least once per week for a full furnace cycle for each operating furnace and each MOR operation for at least 26 weeks. After 26 weeks, if all tests are compliant, facilities can decrease to monthly opacity observations;

- A requirement to use BLDS to monitor PM emissions from all furnace baghouses; and

- A requirement to conduct periodic performance testing to demonstrate compliance with the stack emission limits for the various HAP, including a requirement to conduct PAH performance testing every 3 months for furnaces producing FeMn with the opportunity to reduce to annual testing after the first year.

Following promulgation of the final rule, the EPA received two petitions for reconsideration of several provisions of the NESHAP pursuant to CAA section 307(d)(7)(B). The EPA received a petition dated August 25, 2015, from Eramet Marietta Inc. (Eramet) and a petition dated August 28, 2015, from Felman Production LLC (Felman). In the petition submitted by Eramet, the company requested the EPA reconsider the following issues: (1) The requirement to conduct PAH performance testing every 3 months for furnaces producing FeMn; (2) the requirement to demonstrate compliance weekly with shop building opacity limits using the American Society for Testing and Materials (ASTM) DCOT test method; and (3) the PAH emission limits for existing furnaces producing FeMn and SiMn. In addition, Eramet requested a stay of 90 days from the effective date of the final amendments pending completion of the reconsideration proceeding. In the petition submitted by Felman, the company stated that it supported and adopted the petition submitted by Eramet and requested reconsideration of the requirement to use BLDS to monitor emissions from positive pressure baghouses. Copies of the petitions are provided in the docket (see EPA Docket ID No. EPA-HQ-OAR-2010-0895).

On November 5, 2015, the EPA sent letters to the petitioners granting

reconsideration of two issues: The PAH testing compliance frequency issue raised by Eramet and the use of BLDS on positive pressure baghouses raised by Felman. In those letters, the EPA said it was still reviewing the other issues and intended to take final action on those when it took final action on BLDS and PAH testing frequency. The agency also stated in the letters that a proposed **Federal Register** notice would be issued initiating the reconsideration process for the issues that the EPA is granting reconsideration. The EPA published the proposed notice of reconsideration in the **Federal Register** on July 12, 2016 (81 FR 45089).

In addition to the two requirements mentioned above (*i.e.*, PAH testing frequency for furnaces producing FeMn and the use of BLDS to monitor PM emissions from positive pressure baghouses), the EPA also granted reconsideration of a third issue in the reconsideration proposal notice (81 FR 45089): the requirement to use DCOT in accordance with ASTM D7520-13 to demonstrate compliance with shop building opacity standards. However, for each of these three requirements, after further analyses, evaluation, and consideration, we explained in the reconsideration proposal notice that we continued to believe these requirements were appropriate. Therefore, we did not propose any changes to these requirements. Instead, we provided further discussion and explanation as to why we believed it was appropriate to maintain these requirements in the rule, provided additional technical information to the record, and requested comment on the three requirements for which the EPA granted reconsideration.

III. Summary of Final Action on Issues Reconsidered

After reviewing and considering all the public comments received in response to the reconsideration proposal, the EPA has decided to amend the baghouse monitoring requirements to allow existing facilities with positive pressure baghouses to perform visible emissions monitoring twice daily using Method 22 as an alternative to using BLDS. In addition, although EPA is maintaining the requirement to use DCOT to demonstrate compliance with the opacity standards, this final action amends the references to the ASTM DCOT test method in the opacity monitoring requirements to the recently updated version of the method (ASTM D7520-16). The EPA is also maintaining the quarterly PAH emission testing requirement for furnaces producing FeMn with an opportunity for facilities to request decreased compliance test

frequency from their permitting authority after the first year. Each of these issues is discussed in more detail in this section of the preamble.

A. Alternative Monitoring for Existing Positive Pressure Baghouses

In their petition for reconsideration, one petitioner (Felman) objected to the EPA's requirement to use BLDS for positive pressure baghouses. The petitioner pointed out that the EPA's own guidance¹ indicates that BLDS are not appropriate for use on a positive pressure baghouse, given the different configurations of these types of units. The petitioner commented that although the EPA stated that it had knowledge of BLDS in operation on positive pressure baghouses, the EPA did not provide any specific examples. In addition, the petitioner claimed the EPA had not evaluated the costs associated with the application of BLDS on positive pressure baghouses but instead simply estimated the cost to be comparable with BLDS for negative pressure baghouses.

In their comments on the reconsideration proposal (81 FR 45089), the petitioner stated that the EPA's supporting documents did not provide any examples of BLDS in operation on positive pressure baghouses comparable to those used at the petitioner's facility, which are low airflow and use natural-draft openings instead of stacks. The petitioner provided cost quotes from vendors of \$1.1 million to install the BLDS and make the necessary structural improvements (including a catwalk system) to support the operation of the BLDS.

In light of the petitioner's assertions, we re-evaluated the BLDS requirement for positive pressure baghouses. While we maintain that BLDS can be installed and operated on positive pressure baghouses, we agree that, due to their particular circumstances, it would be difficult to retrofit this facility based on the specific design of their positive pressure baghouses. Furthermore, we agree that installing BLDS and the associated infrastructure would not be cost effective. In our analysis for the proposal, we estimated the capital cost of installing BLDS on the three positive pressure baghouses to be \$269,100, with annualized costs of \$219,000. However, we did not include any additional costs for structural improvements to support BLDS on these baghouses. The petitioner provided a cost estimate of

¹ EPA Office of Air Quality Planning and Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, EPA-454/R-98-015, September 1997.

\$870,000 for structural improvements to install BLDS on their three baghouses. Given this additional information, we now estimate the capital costs would be about \$1.1 million, and annualized costs would be \$330,000. Because of the structural modifications needed to install BLDS, the higher annualized costs and the potential technical issues on this particular control configuration at Felman, it would be unreasonable to require BLDS as the sole method for monitoring positive pressure baghouses in this rule. Nevertheless, we believe the baghouses need to be monitored on a regular basis to ensure they are operating as intended and that there are no tears or holes in the bags. Therefore, we have revised the rule to allow for an alternative monitoring method to the BLDS requirement for positive pressure baghouses used to control emissions from an electric arc furnace. We are allowing twice daily visual monitoring of the outlet of each furnace baghouse using Method 22 for evidence of any visible emissions indicating abnormal operations as an alternative to BLDS. We believe this revision will reduce the cost burden associated with monitoring the positive pressure baghouses used to control emissions from the furnaces and avoid possible technical issues, but still provide assurance that the baghouses are functioning correctly and controlling metal HAP emissions from the furnaces. More details are available in the *Summary of Public Comments and Responses on Reconsideration of the Ferroalloys Production NESHAP Final Rule* in the docket for this rulemaking.

B. DCOT Compliance Demonstration and Revised DCOT Test Method

In the June 30, 2015, final rule (80 FR 37366), we finalized opacity standards for process fugitive emissions from the furnace buildings and required the use of DCOT and the ASTM D7520–13 test method to demonstrate compliance with the opacity standards. In their petitions for reconsideration, Eramet and Felman objected to the use of DCOT in lieu of EPA Method 9 and stated that the EPA did not propose DCOT as the only method for demonstrating compliance with the opacity standards. The petitioners argued that DCOT was an unproven substitute for EPA Method 9 to measure opacity from emission sources and that variability in plume location and orientation at the ferroalloy production buildings would make DCOT infeasible at their facilities. The petitioners also noted that the ASTM test method only applies to stack openings of 7 feet in diameter or less and that DCOT is only provided by one vendor.

In their comments on the reconsideration proposal (81 FR 45089), several commenters objected to the use of DCOT as the sole method for opacity compliance and stated that the EPA should allow the option of using EPA Method 9. The commenters argue that DCOT is limited to stationary point sources and not fugitive emissions, and they pointed out that the supporting data for DCOT are all from studies performed on stationary point sources and not long, open vent sources such as those at the Eramet facility. A few commenters had concerns with the timeliness of the opacity determinations and the accuracy of the results. The commenters were also concerned that there is currently only one vendor of DCOT and that the EPA should not choose vendors for an entire industry.

On the other hand, a few commenters were supportive of the use of the DCOT. In the opinion of one commenter, DCOT is comparable to Method 9 observations, on all shapes, sizes, types of sources, and that DCOT is configurable with all types of cameras to tailor the implementation at the shop/building level to support cost-effective and efficient observations.

Another commenter explained that strong monitoring, testing and compliance measures are an essential part of the emission standards, and that the use of these measures also increases the incentive for sources to comply with the standards. The commenter states that EPA's requirement for DCOT is consistent with an important way to implement EPA's "next generation compliance." The commenter notes that the EPA's next generation compliance policy includes, among other things, the following: (1) Use and promotion of advanced emissions/pollutant detection technology so that regulated entities, the government, and the public can more easily see pollutant discharges, environmental conditions, and noncompliance; (2) expanded transparency by making information more accessible to the public; and (3) development and use of innovative enforcement approaches (e.g., data analytics and targeting) to achieve more widespread compliance.

Other comments and responses on DCOT can be found in the *Summary of Public Comments and Responses on Reconsideration of the Ferroalloys Production NESHAP Final Rule* in the docket for this rulemaking.

Based on the information provided by the petitioners and the commenters, we re-evaluated the DCOT opacity monitoring requirement and determined that DCOT is still an appropriate method for determining opacity from

the shop buildings for this source category.

As explained in the initial proposal (76 FR 72508), supplemental proposal (79 FR 60238), and in the 2015 final rule (80 FR 37366), process fugitive emissions from the shop buildings are a significant source of risk from the production of ferroalloys. In each of these three actions, we concluded risks were unacceptable, largely driven by process fugitive emissions of air toxics metals.

To reduce risks to acceptable levels and protect the public with an ample margin of safety, in the initial proposal, we proposed facilities would need to install and operate full building enclosures to capture and control fugitive emissions. In response to the initial proposal, industry commented that full building enclosure requirement would be very costly and difficult to implement, and suggested an alternative approach using localized capture equipment to reduce fugitive emissions from the shop buildings. Modeling of the localized capture approach indicated that similar reductions in risk could be achieved, making this option more feasible and at significantly lower cost than full building enclosure. Based on these modeling results and consideration of costs and feasibility, we proposed the localized capture approach to significantly reduce fugitive emissions from the shop buildings in the supplemental proposal (79 FR 60238), and finalized this approach in the 2015 final rule (80 FR 37366). Specifically, the final rule requires facilities to install, maintain and operate a system designed to effectively capture and control process fugitive emissions. Furthermore, for this rule, opacity standards are the main compliance approach to ensure the process fugitive emissions are effectively captured and controlled on a continuous basis, and that the public is protected with ample margin of safety. Since process fugitive emissions were the main contributor to the unacceptable risks at baseline, and since opacity is the main tool to ensure these process fugitive emissions are effectively captured and controlled and that the public is protected with an ample margin of safety, we finalized requirements for the use of DCOT to demonstrate compliance with the opacity standard in the June 30, 2015, final rule (80 FR 37366).

The DCOT provides a photographic record of each of the opacity readings. In addition, the photographs are evaluated by a third party and the opacity is determined by the degree the plume reduces the transmitted light and obscures the background. While we

believe, based on validation studies, that EPA Method 9 and DCOT provide comparable opacity results, the DCOT provides better documentation, including a permanent re-analyzable photographic record of the opacity determinations, which we believe will be beneficial to both the industry and the public. There is an advantage of having better documentation in this specific case where fugitive emissions are driving the risk from the Ferroalloys Production source category. In addition, we disagree with the commenters' assertion that this methodology will not work with this source category. Fugitive emissions from this source category are emitted through roof vents at the top of the furnace buildings. Currently, the facilities in this source category use EPA Method 9 to measure opacity from the roof vents. The EPA Method 9 opacity method has procedures and requirements for determining opacity from roof vents and rectangular outlets, which are the same procedures and requirements used in the DCOT test method (ASTM D7520–16). Because the same procedures and requirements are used to measure opacity from roof vents from both these methods, we believe that opacity can be measured from this source category using the DCOT test method. Therefore, we are maintaining the requirement in the final rule that facilities in this source category must use the ASTM DCOT methodology to demonstrate compliance with the opacity standards and we are denying the petitioners' request to allow EPA Method 9 as an alternative method for determining compliance. However, we are revising the final rule language to replace the ASTM D7520–13 Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere with the latest revision of the method, ASTM D7520–16. The ASTM D7520–13 method was revised by removing the stack diameter scope limitation along with editorial corrections in April 2016. We believe that this change will address the commenter's concerns specifically with the 7 foot stack diameter scope limitation in the ASTM D7520–13 method because the updated ASTM D7520–16 method has removed that limitation. However, fugitive emissions from this source category are not emitted from stacks with a diameter greater than 7 feet, but from roof vents. Therefore, we do not believe that the 7-foot diameter limitation prevented us from requiring the use of the ASTM method for measuring opacity using DCOT. As stated earlier in this section, the ASTM D7520–16 method provides

the same approach for determining opacity from nontraditional point sources such as roof vents as would EPA Method 9.

C. Quarterly PAH Testing for Furnaces Producing FeMn

In the reconsideration proposal (81 FR 45089), the EPA also reconsidered the requirement for furnaces producing FeMn to conduct PAH performance testing every 3 months with an option following the first year, to do annual performance testing. The petitioner stated that the PAH testing frequency for furnaces producing FeMn in the supplemental proposal (79 FR 60238) was every 5 years and that the quarterly testing requirement was added in the final rule. The petitioner also noted that the change in PAH testing frequency represents an increase in compliance costs of \$75,000 in the first year of implementation and an increase of \$475,000 in compliance costs over the first 5 years (assuming the facility is not granted reduced frequency of testing after the first year), in comparison to the supplemental proposal PAH testing requirement. The petitioner also argued that if the EPA believes that the PAH emissions dataset is inadequate to establish a representative and reliable MACT floor, the proper solution is to collect additional data pursuant to CAA section 114(a), rather than collecting data through compliance tests. We granted reconsideration on this issue to provide an opportunity for public comment on the PAH testing frequency for furnaces producing FeMn. A summary of the comments received on this issue and the responses are provided in the *Summary of Public Comments and Responses on Reconsideration of the Ferroalloys Production NESHAP Final Rule* available in the docket for this rulemaking.

As we stated in the reconsideration proposal (81 FR 45089), we received additional PAH test data just 3 weeks prior to the signature of the supplemental proposal (which we were not able to include in our analyses in time for signature of the supplemental proposal) and yet more data during the comment period for the supplemental proposal. This new data showed PAH emissions from furnaces producing FeMn were over 12 times higher in concentration than previous test reports submitted by the petitioner. As we explained in the reconsideration proposal, this data thus demonstrates that PAH emissions from furnaces producing FeMn are highly variable. Moreover, PAH emissions are a major source of cancer risks from these

furnaces. In the risk assessment performed for the supplemental proposal (79 FR 60238), we estimated the maximum lifetime individual cancer risk posed by actual emissions from the ferroalloys production facilities was 20-in-1 million, with PAH contributing 49 percent of the cancer risk.

Testing frequency is part of verification that the limit is met. Stack testing is an important tool used to determine a facility's compliance with both initial and on-going compliance with the CAA requirements. A highly variable set of measurements on which the limit is based leads to us to want more certainty about the source's compliance with the limit, and such certainty can be provided by more frequent testing. Because of the variability of the PAH emissions during FeMn production, we believe that the quarterly testing is appropriate for ensuring compliance with the emission limit and protecting human health.

Furthermore, as we explained in the final rule and the reconsideration proposal, we believe the quarterly testing, along with the collection of process information that a facility may choose to collect voluntarily, could provide data that would help facilities learn what factors or conditions are contributing to the quantity and variation of PAH emissions. For example, we believe the collection and analyses of information about the amounts and types of input materials, types of electrodes used, electrode consumption rates, furnace temperature, and other furnace, process, or product information may help facilities understand what factors are associated with the higher PAH emissions and could provide insight regarding how to limit these emissions. Furthermore, as we described in the preamble of the final rule (80 FR 37383), if a facility decides to apply for a decreased frequency of performance testing from their permit authority, the type of information described above could be helpful input for such an application. For these reasons, the quarterly performance testing with an opportunity after the first year for facilities to request from their permitting authority a decreased frequency to annual performance testing is appropriate for ensuring compliance with the PAH emission limit and protecting human health. The option for decreased performance testing also provides an incentive for the facilities to achieve compliance with the PAH standards. Therefore, we are not making any changes to the PAH testing frequency for furnaces producing FeMn.

IV. Denial of Petition for Reconsideration of FeMn and SiMn PAH Emission Limits

In the final rule, the EPA set PAH limits of 0.130 milligrams per dry standard cubic meter (mg/dscm) for furnaces producing SiMn and 12 mg/dscm for furnaces producing FeMn. Both petitioners requested reconsideration of these emission limits and asserted that they did not have an opportunity to comment on the limits. The petitioners were concerned that achieving these PAH emission limits may require additional controls. The petitioners also argued with how the PAH emission limits were calculated. The petitioners claimed that the EPA used a normal data distribution to determine the upper prediction limit (UPL), but the data sets have lognormal distributions. The petitioners further claim that had the EPA used a lognormal distribution, it would have resulted in higher emission limits. In addition, one petitioner argued that EPA should not have excluded a 3-hour single test run.

As stated in the preamble for the final rule (80 FR 37366), the PAH emission limits were re-evaluated in the final rule to include PAH test data that were received just prior to publication of the supplemental proposal and during the comment period for the supplemental proposal. The expanded PAH test data set was analyzed using the same statistical procedures from the EPA's UPL memorandum used to calculate the PAH emissions limits in the supplemental proposal. Using the statistical procedures from this memorandum (which describes the EPA's established procedures for calculating MACT floor limits), the PAH data sets were determined to have a normal distribution. Therefore, the UPL equation for calculating the 99-percent UPL was used to determine the PAH emission limit. The EPA had already provided adequate notice of the analyses and application of the UPL in the memorandum in the supplemental proposal (79 FR 60238). With regard to the 3-hour single test run the petitioner referred to in their reconsideration petition, we determined there were quality assurance and control issues with the laboratory analysis, and therefore did not include these data in the UPL analysis. The results of every valid 3-run test provided by the industry were below the final PAH limits for both FeMn and SiMn production. Therefore, we believe both facilities should be able to comply with these limits without the need for additional add-on controls.

Furthermore, EPA calculated the limits using well established EPA policy and procedures. At the time the EPA published the supplemental proposal (79 FR 60238, October 6, 2014), the EPA made the existing PAH emissions data and the methodologies used to calculate the limits available for public comment. The limits in the final rule were a logical outgrowth of the limits in the supplemental proposal as EPA made no changes to the methodology used to calculate the limits and simply recalculated the limits after the addition of the newly available data with the previously received data. Therefore, we have decided to deny reconsideration of the PAH emission limits for both FeMn and SiMn production furnaces. More details are available in the *Summary of Public Comments and Responses on Reconsideration of the Ferroalloys Production NESHAP Final Rule* in the docket for this rulemaking.

V. Impacts Associated With This Final Rule

We project that this rule will result in no significant changes in costs, emission reductions or benefits. Even though there are changes to the costs, these changes are small relative to the overall costs and benefits of the 2015 final rule. However, the costs for monitoring baghouses will be lower than the costs in the final rule due to the additional option provided in this action to use visible emissions monitoring to monitor positive pressure baghouses as an alternative to installing and operating a BLDS.

A. What are the air impacts?

Even though we have allowed for an alternative monitoring method to the BLDS requirement for positive pressure baghouses, we believe that this change will result in no additional emissions from the baghouses used to control emissions from the furnace. Accordingly, we believe that the final rule will not result in significant changes in emissions of any of the regulated pollutants.

B. What are the energy impacts?

The changes to the final rule are anticipated to have minimal effect on the supply, distribution or use of energy. As previously stated, we are allowing for an alternative monitoring method to the BLDS requirement for positive pressure baghouses controlling emissions from the furnace. By allowing this alternative, we anticipate slightly lower energy usage by the one facility that uses this type of baghouse.

C. What are the compliance costs?

We believe there will be no significant change in compliance costs as a result of the changes to the final rule. However, as mentioned above, we anticipate that one facility will have moderately lower compliance costs due to allowing an alternative monitoring method for positive pressure baghouses. We anticipate that the alternative monitoring method will have an annual cost of \$38,000, whereas the annual operating cost for a BLDS was estimated to be \$219,000. Overall, we anticipate the Ferroalloys Production source category will not incur significant compliance costs or savings as a result of the changes to the final rule.

D. What are the economic and employment impacts?

We believe that there will be a slight economic benefit to one of the facilities due to allowing an alternative monitoring method for positive pressure baghouses. In the reconsideration proposal, we estimated the capital cost for the installation of BLDS for each facility would be \$269,100 and annualized costs would be \$219,000. For this final action, based on information received from the company, we now estimate capital costs for the BLDS for Felman would be \$1.1 million with annualized costs of \$330,000. We believe allowing an alternative monitoring method for positive pressure baghouses in this final action will reduce the cost of complying with the final rule for this facility. However, we believe this final action will not have any impacts on the price of electricity, employment or labor markets or the U.S. economy.

E. What are the benefits of the final standards?

We do not anticipate any emission changes, and therefore there are no direct monetized benefits or disbenefits associated with the changes to this final rule.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0676. This action adds an alternative monitoring requirement and a revised test method, but does not make revisions to the reporting requirements in the final rule. Therefore, this action does not change the information collection requirements previously finalized and, as a result, does not impose any additional burden on industry.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This final action will not impose any requirements on small entities. The agency has determined that neither of the companies affected by this action is considered to be a small entity.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. There are no ferroalloys production facilities that are owned or operated by tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this

action present a disproportionate risk to children. The health risk assessments completed for the final rule are presented in the *Residual Risk Assessment for the Ferroalloys Source Category in Support of the 2015 Final Rule* document, which is available in the docket for this action (EPA–HQ–OAR–2010–0895–0281), and are discussed in Section V.G of the preamble for the final rule (80 FR 37366).

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action involves technical standards. The EPA decided to use ASTM D7520–16, “Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere,” for measuring opacity from the shop buildings. The ASTM D7520–16 is a method to assess opacity whereby a Digital Still Camera is used to capture a set of digital images of a plume against a contrasting background. Each image is analyzed with software that determines plume opacity by comparing a user defined portion of the plume image where opacity is being measured in comparison to the background providing the contrasting values. The Analysis Software is used to average the opacities from the series of digital images taken of the plume over a fixed period of time. The software is also used to archive the image set utilized for each opacity determination including the portion of each image selected by the operator. Each DCOT vendor shall provide training for operators of their DCOT system. The training shall include the content of the “Principles of Visual Emissions Measurements and Procedures to Evaluate those Emissions Using the Digital Camera Optical Technique (DCOT)” and a description of how to operate that specific DCOT system that passed smoke school. This standard is an acceptable alternative to EPA Method 9 and is available from the American Society for Testing and Materials, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959. See <http://www.astm.org/>.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This action does not affect the level of protection provided to human health or the environment because it only provides an alternative monitoring provision and revised test method that will not affect the emission standards that were finalized on June 30, 2015.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 28, 2016.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency is amending title 40, chapter I, part 63 of the Code of Federal Regulations (CFR) as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart A—General Provisions

- 2. Section 63.14 is amended by:
- a. Redesignating paragraphs (h)(96) through (h)(104) as (h)(97) through (h)(105), respectively; and
 - b. Adding new paragraph (h)(96).

§ 63.14 Incorporations by reference.

* * * * *

(h) * * *

(96) ASTM D7520–16, Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere, approved April 1, 2016, IBR approved for §§ 63.1625(b).

* * * * *

Subpart XXX—National Emission Standards for Hazardous Air Pollutants for Ferroalloys Production: Ferromanganese and Silicomanganese

- 3. Section 63.1625 is amended by:
- a. Revising paragraphs (b)(9) introductory text, (b)(9)(i), (b)(9)(ii), and (b)(9)(v); and
- b. Revising paragraphs (d)(1)(ii) through (iv).

The revisions read as follows:

§ 63.1625 What are the performance test and compliance requirements for new, reconstructed, and existing facilities?

* * * * *

(b) * * *

(9) ASTM D7520–16 to determine opacity (incorporated by reference, see § 63.14) with the following conditions:

(i) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees and mixed backgrounds (clouds and/or a sparse tree stand).

(ii) You must have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

* * * * *

(v) Use of this method does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software and operator in accordance with ASTM D7520–16 and these requirements is on the facility, DCOT operator and DCOT vendor.

* * * * *

(d) * * *

(1) * * *

(ii) You must conduct the opacity observations according to ASTM D7520–16 (incorporated by reference, see § 63.14), for a period that includes at least one complete furnace process cycle for each furnace.

(iii) For a shop building that contains more than one furnace, you must conduct the opacity observations according to ASTM D7520–16 for a period that includes one tapping period from each furnace located in the shop building.

(iv) You must conduct the opacity observations according to ASTM D7520–16 for a 1-hour period that

includes at least one pouring for each MOR located in the shop building.

* * * * *

■ 4. Section 63.1626 is amended by:

- a. Revising paragraphs (c) introductory text and (c)(1);
- b. Redesignating paragraphs (d) through (o) as paragraphs (e) through (p), respectively;
- c. Adding new paragraph (d);
- d. Republishing the heading of redesignated paragraph (e), and revising paragraphs (e)(1), (e)(3) introductory text, (e)(4) introductory text, and (e)(4)(ii);
- e. Revising redesignated paragraph (h) introductory text;
- f. Revising redesignated paragraph (j) introductory text;
- g. Revising redesignated paragraph (k) introductory text; and
- h. Revising redesignated paragraph (p) introductory text.

The revisions and additions read as follows:

§ 63.1626 What monitoring requirements must I meet?

* * * * *

(c) For an existing positive pressure baghouse used to control emissions from an electric arc furnace that is not equipped with a bag leak detection system, you must specify in the standard operating procedures manual for inspections and routine maintenance, at a minimum, the requirements of paragraphs (c)(1) and (2) of this section.

(1) You must visually inspect the outlet of each baghouse using Method 22 on a twice daily basis (at least 4 hours apart) for evidence of any visible emissions indicating abnormal operations and must initiate corrective actions within 1 hour of any visible emissions that indicates abnormal operation. Corrective actions shall include, at a minimum, isolating, shutting down and conducting an internal inspection of the baghouse compartment that is the source of the visible emissions that indicate abnormal operations.

* * * * *

(d) For all other non-furnace baghouses that are not equipped with bag leak detection or CEMS, the procedures that you specify in the standard operating procedures manual for inspections and routine maintenance must, at a minimum, include the requirements of paragraphs (d)(1) and (2) of this section.

(1) You must observe the baghouse outlet on a daily basis for the presence of any visible emissions.

(2) In addition to the daily visible emissions observation, you must conduct the following activities:

- (i) Weekly confirmation that dust is being removed from hoppers through visual inspection, or equivalent means of ensuring the proper functioning of removal mechanisms.
- (ii) Daily check of compressed air supply for pulse-jet baghouses.
- (iii) An appropriate methodology for monitoring cleaning cycles to ensure proper operation.
- (iv) Monthly check of bag cleaning mechanisms for proper functioning through visual inspection or equivalent means.

(v) Quarterly visual check of bag tension on reverse air and shaker-type baghouses to ensure that the bags are not kinked (knead or bent) or lying on their sides. Such checks are not required for shaker-type baghouses using self-tensioning (spring loaded) devices.

(vi) Quarterly confirmation of the physical integrity of the baghouse structure through visual inspection of the baghouse interior for air leaks.

(vii) Semiannual inspection of fans for wear, material buildup and corrosion through visual inspection, vibration detectors, or equivalent means.

* * * * *

(e) *Bag leak detection system.* (1) For each baghouse used to control emissions from an electric arc furnace, you must install, operate, and maintain a bag leak detection system according to paragraphs (e)(2) through (4) of this section, unless a system meeting the requirements of paragraph (p) of this section, for a CEMS and continuous emissions rate monitoring system, is installed for monitoring the concentration of particulate matter, or an existing positive pressure baghouse used to control emissions from an electric arc furnaces that is subject to paragraph (c) of this section. You may choose to install, operate, and maintain a bag leak detection system for any other baghouse in operation at the facility according to paragraphs (e)(2) through (4) of this section.

* * * * *

(3) Each bag leak detection system must meet the specifications and requirements in paragraphs (e)(3)(i) through (viii) of this section.

* * * * *

(4) You must include in the standard operating procedures manual required by paragraph (a) of this section a corrective action plan that specifies the procedures to be followed in the case of a bag leak detection system alarm. The corrective action plan must include, at a minimum, the procedures that you

will use to determine and record the time and cause of the alarm as well as the corrective actions taken to minimize emissions as specified in paragraphs (e)(4)(i) and (ii) of this section.

* * * * *

(ii) The cause of the alarm must be alleviated by taking the necessary corrective action(s) that may include, but not be limited to, those listed in paragraphs (e)(4)(ii)(A) through (F) of this section.

* * * * *

(h) *Shop building opacity.* In order to demonstrate continuous compliance with the opacity standards in § 63.1623, you must comply with the requirements § 63.1625(d)(1) and one of the monitoring options in paragraphs (h)(1) or (2) of this section. The selected option must be consistent with that selected during the initial performance test described in § 63.1625(d)(2). Alternatively, you may use the provisions of § 63.8(f) to request approval to use an alternative monitoring method.

* * * * *

(j) *Requirements for sources using CEMS.* If you demonstrate compliance with any applicable emissions limit through use of a continuous monitoring system (CMS), where a CMS includes a continuous parameter monitoring system (CPMS) as well as a continuous emissions monitoring system (CEMS), you must develop a site-specific monitoring plan and submit this site-specific monitoring plan, if requested, at least 60 days before your initial performance evaluation (where applicable) of your CMS. Your site-specific monitoring plan must address the monitoring system design, data collection and the quality assurance and quality control elements outlined in this paragraph and in § 63.8(d). You must install, operate and maintain each CMS according to the procedures in your approved site-specific monitoring plan. Using the process described in § 63.8(f)(4), you may request approval of monitoring system quality assurance and quality control procedures alternative to those specified in paragraphs (j)(1) through (6) of this section in your site-specific monitoring plan.

* * * * *

(k) If you have an operating limit that requires the use of a CPMS, you must install, operate and maintain each continuous parameter monitoring system according to the procedures in paragraphs (k)(1) through (7) of this section.

* * * * *

(p) *Particulate Matter CEMS.* If you are using a CEMS to measure particulate matter emissions to meet requirements of this subpart, you must install, certify, operate and maintain the particulate matter CEMS as specified in paragraphs (p)(1) through (4) of this section.

* * * * *

■ 5. Section 63.1656 is amended by revising paragraphs (b)(7) introductory text, (b)(7)(i) and (ii), and (b)(7)(v) to read as follows:

§ 63.1656 Performance testing, test methods, and compliance demonstrations.

* * * * *

(b) * * *

(7) Method 9 of appendix A–4 of 40 CFR part 60 to determine opacity. ASTM D7520–16, “Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere” may be used (incorporated by reference, see § 63.14) with the following conditions:

(i) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, the owner or operator or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees and mixed backgrounds (clouds and/or a sparse tree stand).

(ii) The owner or operator must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

* * * * *

(v) Use of this approved alternative does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software and operator in accordance with ASTM D7520–16 and these requirements is on the facility, DCOT operator and DCOT vendor.

* * * * *

[FR Doc. 2017–00156 Filed 1–17–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0829; FRL–9956–85]

Acequinocyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of acequinocyl in or on multiple commodities which are identified and discussed later in this document. Interregional Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective January 18, 2017. Objections and requests for hearings must be received on or before March 20, 2017, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2015–0829, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: RDfrNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at http://www.ecfr.gov/cgi-bin/textidx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2015-0829 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before March 20, 2017. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA-HQ-OPP-2015-0829, by one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- **Mail:** OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001.

- **Hand Delivery:** To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of May 19, 2016 (81 FR 31581) (FRL-9946-02), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 5E8422) by Interregional Research Project Number 4 (IR-4), Rutgers University, 500 College Rd. East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.599 be amended by establishing tolerances for residues of the insecticide acequinocyl in or on avocado at 0.4 parts per million (ppm); bean, dry, seed at 0.03 ppm; vegetable, cucurbit, group 9 at 0.2 ppm; tea, plucked leaves at 40 ppm; cherry subgroup 12-12A at 1.0 ppm; fruit, citrus, group 10-10 at 0.20 ppm; fruit, pome, group 11-10 at 0.40 ppm; nut, tree, group 14-12 at 0.02 ppm; and vegetable, fruiting, group 8-10 at 0.70 ppm. The petition also requested that upon establishment of the above tolerances, to remove the existing tolerances for cucumber at 0.15 ppm; melon, subgroup 9A at 0.15 ppm; cherry, sweet at 0.50 ppm; cherry, tart at 1.0 ppm; fruit, citrus, group 10 at 0.20 ppm; fruit, pome, group 11 at 0.40 ppm; nut, tree, group 14 at 0.02 ppm; pistachio at 0.02 ppm; vegetable, fruiting, group 8 at 0.70 ppm; and okra at 0.70 ppm. That document referenced a summary of the petition prepared by Arysta LifeScience, the registrant, which is available in the docket, <http://www.regulations.gov>. Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA has modified the levels at which some of the tolerances are being established. The reason for these changes is explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section

408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for acequinocyl including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with acequinocyl follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The target organs of acequinocyl are the liver (hepatocyte vacuolization, brown pigmented cells and perivascular inflammatory cells in liver) and hematopoietic system (hemorrhage, increased clotting factor times and increased platelet counts). There was no evidence of neurotoxicity and immunotoxicity and there was no evidence of carcinogenic potential in either the rat or mouse, or in the genotoxicity and mutagenicity studies.

In rats and rabbits, there was no evidence of increased quantitative or qualitative fetal susceptibility. In both species there were clinical signs and gross necropsy findings seen in maternal animals at similar or lower doses than those producing resorptions. In rabbits, there were increased incidences of late resorptions at the highest dose tested. In the rat two-generation reproductive toxicity study, there was evidence of apparent increased quantitative postnatal susceptibility. Offspring effects at the mid- and high-doses consisted of swollen body parts, protruding eyes, clinical signs, delays in pupil development, and increased mortality occurring mainly after weaning. No parental effects were observed up to the highest dose tested; however, hematological parameters, such as changes in partial and activated partial

thromboplastin times, were not measured in parental animals and changes in these parameters would have been expected at the same doses as offspring effects based on rat studies in the acequinocyl toxicological database. There were no effects on reproductive parameters.

Specific information on the studies received and the nature of the adverse effects caused by acequinocyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at <http://www.regulations.gov> in the document titled “*Acequinocyl. Human Health Risk Assessment To Support the Petition for Tolerance for Residues in/on Dry Beans, Cucurbit Vegetables, Group 9, Avocado and Tea (Without U.S. Registration) and Crop Group Conversions for Citrus Fruit Group 10–10, Tree Nut Group 14–12, and Fruiting Vegetable Group 8–10*” at page 30 in docket ID number EPA–HQ–OPP–2015–0829.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any

amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides>.

Since the last assessment for acequinocyl (**Federal Register** of April 13, 2016, (81 FR 21752) (FRL–9944–34)), the endpoints for acequinocyl were revisited and updated based upon the available data. An acute dietary endpoint for the general population has been selected to be consistent with current Agency practices. A summary of the updated toxicological endpoints for acequinocyl used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ACEQUINOCYL FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	NOAEL = 7.3 mg/kg/day UF _A = 10× UF _H = 10× FQPA SF = 1×	Acute RfD = 0.073 mg/kg/day. aPAD = 0.073 mg/kg/day	Reproduction and fertility effects in rats Offspring LOAEL (M/F) = 58.9 based on hemorrhagic effects, swollen body parts, protruding eyes, clinical signs, delays in pupil development and increased mortality post weaning.
Chronic dietary (All populations)	NOAEL = 2.7 mg/kg/day UF _A = 10× UF _H = 10× FQPA SF = 1×	Chronic RfD = 0.027 mg/kg/day. cPAD = 0.027 mg/kg/day LOC for MOE = 100	18-month carcinogenicity study in mice; LOAEL = 7.0 mg/kg/day based on clinical chemistry and microscopic non-neoplastic lesions (brown pigmented cells and perivascular inflammatory cells in liver).
Dermal short-term (1 to 30 days).	Dermal study NOAEL = 200 mg/kg/day. UF _A = 10× UF _H = 10× FQPA SF = 1×		28-dermal toxicity in rats. LOAEL (M/F) = 1000 mg/kg/day based on increased clotting factor times in males.
Cancer (Oral, dermal, inhalation).	Classification: Not likely to be carcinogenic to humans.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population-adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to acequinocyl, EPA considered exposure under the petitioned-for tolerances as well as all existing acequinocyl tolerances in 40 CFR 180.599. EPA assessed dietary exposures from acequinocyl in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide,

if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for acequinocyl. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA assumed tolerance level residues and 100 percent

crop treated (PCT) for all proposed and registered uses.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 2003–2008 NHANES/WWEIA. As to residue levels in food, EPA assumed tolerance level residues and 100 PCT for all proposed and registered uses.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that acequinocyl does not pose a cancer risk to humans. Therefore,

a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue or PCT information in the dietary assessment for acequinocyl. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for acequinocyl in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of acequinocyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide>.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), Provisional Cranberry Model, and Screening Concentration in Ground Water (SCI-GROW) Model, the estimated drinking water concentrations (EDWCs) of acequinocyl for acute exposures are estimated to be 6.69 parts per billion (ppb) for surface water and 3.6×10^{-3} ppb for ground water, and for chronic exposures are estimated to be 6.69 ppb for surface water and $\geq 3.6 \times 10^{-3}$ ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 6.69 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 6.69 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term “residential exposure” is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Acequinocyl is currently registered for the following uses that could result in residential exposures: use on ornamentals for landscapes, gardens, and trees. EPA assessed residential exposure using the following assumptions: There is a potential for residential exposure associated with handler (i.e., mixing, loading and applying); however, all registered acequinocyl product labels with residential use sites (e.g., ornamentals for landscapes, gardens, and trees) require that handlers wear specific

clothing (e.g., long-sleeve shirt/long pants) and/or use personal protective equipment (PPE). Therefore, the Agency has made the assumption that these products are not for homeowner use, and has not conducted a quantitative residential handler assessment.

Only short-term post-application dermal exposure is anticipated for the registered residential uses. The quantitative exposure/risk assessment for residential post-application exposures assessed dermal exposures to adults for activities associated with gardening, dermal exposures to children (6 to <11 years old) for activities associated with playing in and around gardens and gardening, dermal exposures to adults associated with handling trees and retail plants, and dermal exposures to children (6 to <11 years old) for activities associated with playing in and around trees and retail plants.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide>.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider “available information” concerning the cumulative effects of a particular pesticide’s residues and “other substances that have a common mechanism of toxicity.”

EPA has not found acequinocyl to share a common mechanism of toxicity with any other substances, and acequinocyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that acequinocyl does not have a common mechanism of toxicity with other substances. For information regarding EPA’s efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA’s Web site at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides>.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the

completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no evidence of an increased quantitative or qualitative fetal susceptibility in rats or rabbits. In isolation, there was evidence of increased quantitative offspring susceptibility in the two-generation reproductive study; however, but the concern is low since: (1) The effects in pups are well characterized with a clear NOAEL; and (2) the effects are protected for by the selected endpoints. Therefore, there are no residual uncertainties for pre-/post-natal toxicity. Additionally, taking into consideration the full database, there would be no susceptibility to offspring since assessment of parental animals in the two-generation reproductive toxicity study were limited. If additional evaluations had been performed, including all hematological measurements, then it would be expected that effects on the hematopoietic system observed in the other oral rat studies would have been seen at the same doses eliciting offspring effects. Therefore, using a weight-of-evidence approach that puts the offspring findings in the two-generation reproductive toxicity study in context with the full toxicological database, there is no concern for susceptibility to offspring since parental toxicity would be anticipated at the same dose as offspring effects.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for acequinocyl is complete.

ii. There is no indication that acequinocyl is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence of an increased quantitative or qualitative fetal susceptibility in rats or rabbits, but in isolation there was evidence of increased quantitative offspring susceptibility in the two-generation reproductive study. However, the

concern is low for the reasons outlined above in section III.D.2.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to acequinocyl in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children. These assessments will not underestimate the exposure and risks posed by acequinocyl.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to acequinocyl will occupy 71% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to acequinocyl from food and water will utilize 70% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of acequinocyl is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Acequinocyl is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to acequinocyl.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and

residential exposures result in aggregate MOEs of 1200 for adults and 890 for children 6–12 years old. Because EPA's level of concern for acequinocyl is a MOE of 100 or below, these MOEs are not of concern.

4. Intermediate-term risk.

Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, acequinocyl is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for acequinocyl.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, acequinocyl is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to acequinocyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (two high-performance liquid chromatography methods with tandem mass-spectroscopy detection (HPLC/MS/MS) for determining residues in/on fruit and nut commodities (Morse Methods Meth-133 and Meth-135) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: residuemethods@epa.gov.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever

possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established any MRLs for acequinocyl.

C. Response to Comments

A comment was submitted by the Center for Biological Diversity and was primarily concerned about EPA's consideration of the impacts of acequinocyl on the environment, pollinators, and endangered species. This comment is not relevant to the Agency's evaluation of safety of the acequinocyl tolerances under section 408 of the FFDCA, which requires the Agency to evaluate the potential harms to human health, not effects on the environment.

Two other comments were submitted in response to the Notice of Filing that stated, in part, that this chemical “should not be used at all in America or anywhere in the world” and that “no residue should be permitted on any food or other plant.” The Agency understands the commenter's concerns and recognizes that some individuals believe that pesticides should be banned on agricultural crops. However, the existing legal framework provided by section 408 of the FFDCA states that tolerances may be set when persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute. The citizens' comments appear to be directed at the underlying statute and not EPA's implementation of it; the citizens have made no contention that EPA has acted in violation of the statutory framework.

D. Revisions to Petitioned-For Tolerances

The petitioned-for tolerance of 0.4 for residues on avocado is being increased to 0.50 ppm as EPA corrected some residue levels in the field trials for degradation during storage and declared two of the trials to be replicates. The

data that EPA used in Organization for Economic Co-operation and Development (OECD) Maximum Residue Limits (MRL) Tolerance Worksheet for avocado was thus slightly different from the petitioner's data. The tolerance level of 0.15 ppm for residues in dry beans is based upon the OECD MRL tolerance worksheet. The difference is based on EPA using slightly different residue levels that were corrected for degradation during storage. The tolerance level of 0.30 ppm for residues in/on cucurbit vegetables is based upon the OECD MRL tolerance worksheet. The difference is based on EPA using slightly different residue levels that were corrected for degradation during storage. The data that EPA used in MRL tolerance spreadsheet for summer squash was slightly different from the petitioner's data. Concerning the crop group conversions, the tolerance level for residues in/on citrus fruit was modified to be harmonized with the Canadian MRL.

V. Conclusion

Therefore, tolerances are established for residues of acequinocyl, including its metabolites and degradates, in or on avocado at 0.50 ppm; bean, dry, seed at 0.15 ppm; cherry, subgroup 12–12A at 1.0 ppm; fruit, citrus, group 10–10 at 0.35 ppm; fruit, pome, group 11–10 at 0.40 ppm; nut, tree, group 14–12 at 0.02 ppm; tea, plucked leaves at 40 ppm; vegetable, cucurbit, group 9 at 0.30 ppm; and vegetable, fruiting, group 8–10 at 0.70 ppm. In addition, the existing tolerances on cherry, sweet; cherry, tart; cucumber; fruit, citrus, group 10; fruit, pome, group 11; melon, subgroup 9A; nut, tree, group 14; okra; pistachio; and vegetable, fruiting, group 8 are removed as unnecessary since they are now covered by the new tolerances.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled “Regulatory Planning and Review” (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled “Protection of Children from Environmental Health

Risks and Safety Risks” (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal**

Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 15, 2016.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.599, in the table in paragraph (a);

■ a. Add alphabetically the entries “Avocado”; “Bean, dry, seed”; “Cherry, subgroup 12–12A”; “Fruit, citrus, group 10–10”; “Fruit, pome, group 11–10”; “Nut, tree, group 14–12”; “Tea, plucked leaves” (and a footnote); “Vegetable, cucurbit, group 9”; and “Vegetable, fruiting, group 8–10”; and

■ b. Remove the entries for “cherry, sweet”; “cherry, tart”; “cucumber”; “fruit, citrus, group 10”; “fruit, pome, group 11”; “melon, subgroup 9A”; “nut, tree, group 14”; “okra”; “pistachio”; and “vegetable, fruiting, group 8” from the table in paragraph (a).

The additions read as follows:

§ 180.599 Acequinocyl; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * *	*
Avocado	0.50
Bean, dry, seed	0.15
* * *	*
Cherry, subgroup 12–12A	1.0
* * *	*
Fruit, citrus, group 10–10	0.35
Fruit, pome, group 11–10	0.40
* * *	*
Nut, tree, group 14–12	0.02
* * *	*
Tea, plucked leaves ¹	40
Vegetable, cucurbit, group 9	0.30
Vegetable, fruiting, group 8–10	0.70

¹ There are no U.S. registrations as of January 18, 2017 for use on tea.

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[FR Doc. 2016–31823 Filed 1–17–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services****42 CFR Part 438****[CMS–2402–F]****RIN 0938–AT10****Medicaid Program; The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery Systems****AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.**ACTION:** Final rule.

SUMMARY: This rule finalizes changes to the pass-through payment transition periods and the maximum amount of pass-through payments permitted annually during the transition periods under Medicaid managed care contract(s) and rate certification(s). This final rule prevents increases in pass-through payments and the addition of new pass-through payments beyond those in place when the pass-through payment transition periods were established, in the final Medicaid managed care regulations effective July 5, 2016.

DATES: *Effective Date:* These regulations are effective on March 20, 2017.

FOR FURTHER INFORMATION CONTACT: John Giles, (410) 786–1255.

SUPPLEMENTARY INFORMATION:**I. Background**

In the June 1, 2015 **Federal Register** (80 FR 31098), we published the “Medicaid and Children’s Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, Medicaid and CHIP Comprehensive Quality Strategies, and Revisions Related to Third Party Liability” proposed rule (“June 1, 2015 proposed rule”). As part of the actuarial soundness proposals, we proposed to define actuarially sound capitation rates as those sufficient to provide for all reasonable, appropriate, and attainable costs that are required under the terms of the contract, including furnishing of covered services and operation of the managed care plan for the duration of the contract. Among the proposals was a general rule that the state may not direct the managed care organization’s (MCO’s), prepaid

inpatient health plan’s (PIHP’s), or prepaid ambulatory health plan’s (PAHP’s) expenditures under the contract.

In the May 6, 2016 **Federal Register** (81 FR 27498), we published the “Medicaid and Children’s Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions Related to Third Party Liability” final rule (“May 6, 2016 final rule”), which finalized the June 1, 2015 proposed rule. In the final rule, we finalized, with some revisions, the proposal which limited state direction of payments, including pass-through payments as defined below.

In the November 22, 2016 **Federal Register** (81 FR 83777), we published the “Medicaid Program; The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery Systems” proposed rule (“November 22, 2016 proposed rule”). This rule finalizes the November 22, 2016 proposed rule as discussed below. This final rule is consistent with the intent of the May 6, 2016 final rule to provide transition periods for states that already use pass-through payments—these transition periods allow states to implement changes to existing pass-through payments over a period of time to minimize disruption and to ensure continued financial support for safety-net providers. As we discussed in the November 22, 2016 proposed rule, this final rule is also consistent with the CMCS Informational Bulletin (CIB) concerning “The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery Systems,” which was published on July 29, 2016.

A. Summary of the Medicaid Managed Care May 6, 2016 Final Rule

We finalized a policy to limit state direction of payments, including pass-through payments, at § 438.6(c) and (d) in the May 6, 2016 final rule (81 FR 27587 through 27592). Specifically, under the final rule (81 FR 27588), we defined pass-through payments at § 438.6(a) as any amount required by the state (and considered in calculating the actuarially sound capitation rate) to be added to the contracted payment rates paid by the MCO, PIHP, or PAHP to hospitals, physicians, or nursing facilities that is not for the following purposes: A specific service or benefit provided to a specific enrollee covered under the contract; a provider payment methodology permitted under § 438.6(c)(1)(i) through (iii) for services and enrollees covered under the contract; a subcapitated payment

arrangement for a specific set of services and enrollees covered under the contract; graduate medical education (GME) payments; or federally-qualified health center (FQHC) or rural health clinic (RHC) wrap around payments. We noted that section 1903(m)(2)(A) of the Social Security Act (the Act) requires that capitation payments to managed care plans be actuarially sound; we interpret this requirement to mean that payments under the managed care contract must align with the provision of services to beneficiaries covered under the contract. We provided that these pass-through payments are not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services. The final rule contains a detailed description of the policy rationale (81 FR 27587 through 27592).

In an effort to provide a smooth transition for network providers, to support access for the beneficiaries they serve, and to provide states and managed care plans with adequate time to design and implement payment systems that link provider reimbursement with services covered under the contract or associated quality outcomes, we finalized transition periods related to pass-through payments for the specified provider types to which states make most pass-through payments under Medicaid managed care programs: Hospitals, physicians, and nursing homes (81 FR 27590 through 27592). As finalized, § 438.6(d)(2) and (3) provide a 10-year transition period for hospitals, subject to limitations on the amount of pass-through payments. For MCO, PIHP, or PAHP contracts beginning on or after July 1, 2027, states will not be permitted to require pass-through payments for hospitals. The final rule also provides a 5-year transition period for pass-through payments to physicians and nursing facilities. For MCO, PIHP, or PAHP contracts beginning on or after July 1, 2022, states will not be permitted to require pass-through payments for physicians or nursing facilities. These transition periods provide states, network providers, and managed care plans significant time and flexibility to integrate current pass-through payment arrangements into allowable payment structures under actuarially sound capitation rates, including enhanced fee schedules or the other approaches consistent with § 438.6(c).

As finalized in the May 6, 2016 final rule, § 438.6(d) limits the amount of pass-through payments to hospitals as a percentage of the “base amount,” which is defined in paragraph (a) and

calculated under rules in paragraph (d)(2). Section 438.6(d)(3) specifies a schedule for the phased reduction of the base amount, limiting the amount of pass-through payments to hospitals. For contracts beginning on or after July 1, 2017, the state may require pass-through payments to hospitals under the contract up to 100 percent of the base amount, as defined in the final rule. For subsequent contract years (contracts beginning on or after July 1, 2018 through contracts beginning on or after July 1, 2026), the portion of the base amount available for pass-through payments decreases by 10 percentage points per year. For contracts beginning on or after July 1, 2027, no pass-through payments to hospitals are permitted. The May 6, 2016 final rule noted that nothing would prohibit a state from eliminating pass-through payments to hospitals before contracts beginning on or after July 1, 2027. However, the final rule provided for a phased reduction in the percentage of the base amount that can be used for pass-through payments, because a phased transition would support the development of permissible and accountable payment approaches while mitigating any disruption to states and providers.

We believe that states will be able to more easily transition existing pass-through payments to physicians and nursing facilities to payment structures linked to services covered under the contract compared to the transition necessary for similar payments to hospitals. Consequently, the May 6, 2016 final rule, in § 438.6(d)(5), provided a shorter time period for eliminating pass-through payments to physicians and nursing facilities and did not prescribe a limit or phased reduction in these payments; states have the option to eliminate these payments immediately or phase down these payments over the 5 year transition period if they prefer. As noted in the May 6, 2016 final rule, the distinction between hospitals and nursing facilities and physicians was also based on the comments from stakeholders during the public comment period (81 FR 27590).

B. Questions About the May 6, 2016 Final Rule

Since publication of the May 6, 2016 final rule, we have received inquiries about states' ability to integrate new or increased pass-through payments into Medicaid managed care contracts. As explained in the CMCS Informational Bulletin (CIB) published on July 29, 2016,¹ adding new or increased pass-

through payments for hospitals, physicians, or nursing facilities complicates the required transition of these pass-through payments to permissible provider payment models.

The transition periods under the May 6, 2016 final rule provide states, network providers, and managed care plans significant time and flexibility to move existing pass-through payment arrangements (that is, those in effect when the final rule was published) into different, permissible payment structures under actuarially sound capitation rates, including enhanced fee schedules or the other approaches consistent with § 438.6(c). We did not intend for states, after the May 6, 2016 final rule was published, to begin additional or new pass-through payments, or to increase existing pass-through payments; such actions are contrary to and undermine the policy goal of eliminating pass-through payments. We proposed in the November 22, 2016 proposed rule and finalize here that we will not permit a pass-through payment amount to exceed the lesser of the amounts calculated under paragraph (d)(3) of this final rule. For states to add new or to increase existing pass-through payments is inconsistent with longstanding CMS policy, the proposal made in the June 1, 2015 proposed rule, and the May 6, 2016 final rule, which reflects the general policy goal to effectively and efficiently transition away from pass-through payments.

Under the May 6, 2016 final rule, we provided a delayed compliance deadline for § 438.6(c) and (d); we will enforce compliance with § 438.6(c) and (d) no later than the rating period for Medicaid managed care contracts beginning on or after July 1, 2017. Our exercise of enforcement discretion in this respect was not intended to create new opportunities for states to add or increase existing pass-through payments before July 1, 2017. This delay was intended to address concerns articulated by commenters, among them states and providers, that an abrupt end to directed pass-through payments could cause damaging disruption to safety-net providers. As discussed in the May 6, 2016 final rule and this final rule, pass-through payments are inconsistent with our interpretation and implementation of the statutory requirement for actuarially sound capitation rates because pass-through payments do not

tie provider payments to the provision of services under the contract (81 FR 27588). A distinguishing characteristic of a pass-through payment is that a managed care plan is contractually required by the state to pay providers an amount that is disconnected from the amount, quality, or outcomes of services delivered to enrollees under the contract during the rating period of the contract. When managed care plans only serve as a conduit for passing payments to providers independent of delivered services, such payments reduce managed care plans' ability to control expenditures, effectively use value-based purchasing strategies, implement provider-based quality initiatives, and generally use the full capitation payment to manage the care of enrollees. The May 6, 2016 final rule made clear our position on these payments and our intent that they be eliminated from Medicaid managed care delivery systems, except for the directed payment models permitted by § 438.6(c), or the payments excluded from the definition of a pass-through payment in § 438.6(a), such as FQHC wrap payments.

The transition periods provided under § 438.6(d) are for states to identify existing pass-through payments and begin either tying such payments directly to services and utilization covered under the contract or eliminating them completely in favor of other support mechanisms for providers that comply with the requirements in § 438.6(c). The transition periods for current pass-through payments minimize disruption to local health care systems and interruption of beneficiary access by permitting a gradual step down from current levels of pass-through payments: (1) At the schedule and subject to the limit announced in the May 6, 2016 final rule for hospitals under § 438.6(d)(3); and (2) at a schedule adopted by the state for physicians and nursing facilities under § 438.6(d)(5). By providing states, network providers, and managed care plans significant time and flexibility to integrate current pass-through payment arrangements into different payment structures (including enhanced fee schedules or the other approaches consistent with § 438.6(c)) and into actuarially sound capitation rates, we intended to address comments that the June 1, 2015 proposed rule would be unnecessarily disruptive and endanger safety-net provider systems that states have developed for Medicaid.

Questions from states following the May 6, 2016 final rule indicated that the transition period and delayed enforcement date have caused some

¹ The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery

Systems; available at <https://www.medicaid.gov/federal-policy-guidance/downloads/cib072916.pdf>. CMCS also noted in this CIB that it intended to further address in future rulemaking the issue of adding new or increased pass-through payments to managed care contracts.

confusion regarding our intent for increased and new pass-through payments for contracts prior to July 1, 2017, because the final rule did not explicitly prohibit such additions or increases. While we assumed such a prohibition was implicit in the May 6, 2016 final rule, as our discussion of § 438.6(d) made clear that pass-through payments were to be discontinued, we believe that this additional rulemaking is necessary to clarify this issue in light of the recent questions. Under this final rule, we are linking pass-through payments permitted during the transition period to the aggregate amounts of pass-through payments that were in place at the time the May 6, 2016 final rule became effective on July 5, 2016, which is consistent with the intent under the May 6, 2016 final rule to phase out pass-through payments under Medicaid managed care contracts.

II. Provisions of the Proposed Regulations and Analysis of and Responses to Public Comments

We received 46 timely comments from the public, including comments from hospitals, hospital associations, state Medicaid agencies, Medicaid managed care plans, and other healthcare providers and associations. The following sections, arranged by subject area, are a summary of the comments we received. In response to the November 22, 2016 proposed rule, some commenters chose to raise issues that were beyond the scope of our proposals. In this final rule, we are not summarizing or responding to those comments.

We proposed to revise § 438.6(d) to better effectuate the intent of the May 6, 2016 final rule. In the November 22, 2016 proposed rule, we first proposed to limit the availability of the transition periods in § 438.6(d)(3) and (5) (that is, the ability to continue pass-through payments for hospitals, physicians, or nursing facilities) to states that can demonstrate that they had such pass-through payments in either: (A) Managed care contract(s) and rate certification(s) for the rating period that includes July 5, 2016, and that were submitted for our review and approval on or before July 5, 2016; or (B) if the managed care contract(s) and rate certification(s) for the rating period that includes July 5, 2016 had not been submitted to us on or before July 5, 2016, the managed care contract(s) and rate certification(s) for a rating period before July 5, 2016 that had been most recently submitted to us for review and approval as of July 5, 2016.

Second, we proposed to prohibit retroactive adjustments or amendments

to managed care contract(s) and rate certification(s) to add new pass-through payments or increase existing pass-through payments defined in § 438.6(a). In the proposed rule, we noted that we would not permit a pass-through payment amount to exceed the lesser of the amounts calculated under paragraph (d)(3).

Third, we proposed to establish a new maximum amount of permitted pass-through payments for each year of the transition period. For hospitals, a state would be limited (in the total amount of permissible pass-through payments) during each year of the transition period to the lesser of either: (A) The percentage of the base amount applicable to that contract year; or (B) the pass-through payment amount identified in proposed paragraph (d)(1)(i). Thus, the amount of pass-through payments identified by the state in order to satisfy proposed paragraph (d)(1)(i) would be compared to the amount representing the applicable percentage of the base amount that is calculated for each year of the transition period. For pass-through payments to physicians and nursing facilities, we also proposed to limit the amount of pass-through payments during the transition period to the amount of pass-through payments to physicians and nursing facilities under the contract and rate certification identified in proposed paragraph (d)(1)(i).

In making these comparisons to the pass-through payments under the managed care contract(s) in effect for the rating period covering July 5, 2016 as identified in proposed paragraph (d)(1)(i)(A), or the rating period before July 5, 2016 as identified in proposed paragraph (d)(1)(i)(B), we noted that we would look at total pass-through payment amounts for the specified provider types. Past aggregate amounts of hospital pass-through payments will be used in determining the maximum amount for hospital pass-through payments during the transition period; past aggregate amounts of physician pass-through payments will be used in determining the maximum amount for physician pass-through payments during the transition period; and past aggregate amounts of nursing facility pass-through payments will be used in determining the maximum amount for nursing facility pass-through payments during the transition period.

Under the November 22, 2016 proposed rule, the aggregate amounts of pass-through payments in each provider category would be used to set applicable limits for the provider type during the transition period, without regard to the specific provider(s) that received a pass-

through payment. For example, if the pass-through payments in the contract identified under paragraph (d)(1)(i) were to 5 specific hospitals, the aggregate amount of pass-through payments to those hospitals would be relevant in establishing the limit during the transition period, but different hospitals could be the recipients of pass-through payments during the transition. We requested comment on our proposed approach as a whole, as well as our specific proposals to amend the existing regulation text and revise paragraph (d)(1) (adding new (d)(1)(i) and (ii)), revise paragraph (d)(3) (adding new (d)(3)(i) and (ii)), and revise paragraph (d)(5).

A. General Comments

Comment: Some commenters stated concerns with the overall proposal and stated that the current proposal would limit state flexibility for pass-through payments beyond what was finalized in the May 6, 2016 final rule; these commenters recommended that we not finalize the November 22, 2016 proposed rule and recommended that we ensure that states continue to have the flexibility permitted in the May 6, 2016 final rule for pass-through payments in Medicaid managed care programs.

Response: We do not agree with commenters that states should have more flexibility in this area than this final rule provides. We believe that this final rule flows from the intent of the May 6, 2016 final rule to phase out pass-through payments under Medicaid managed care contracts and ensure that the transition periods be used by states that had pass-through payments in their MCO, PIHP, or PAHP contracts when we finalized the May 6, 2016 final rule. While we recognize that the regulation text finalized in the May 6, 2016 final rule was not explicit on this point and have taken steps to amend this final rule here to rectify that, this final rule is consistent with the policy and goals of the May 6, 2016 final rule in adopting transition periods. This final regulation maintains the significant time and flexibility provided to states, network providers, and managed care plans during the transition periods to move existing pass-through payment arrangements (those in effect when the May 6, 2016 final rule was published) into different, permissible payment structures under actuarially sound capitation rates, including enhanced fee schedules or the other approaches consistent with § 438.6(c) that tie managed care payments to services and utilization (and outcomes) covered under the contract.

Comment: Some commenters recommended that we not finalize this rule and that we not further restrict or limit pass-through payments beyond what was included in the May 6, 2016 final rule to support safety-net providers that provide care to Medicaid managed care enrollees. These commenters stated that states and providers have already begun to plan for the transition periods beginning in July 2017 and that additional constraints will add significant burden on safety-net providers.

Response: We do not agree that the proposed provisions, finalized here, restrict or limit states from continuing to use pass-through payments to support safety-net providers that provide care to Medicaid managed care enrollees during the transition periods adopted in the May 6, 2016 final rule. The May 6, 2016 final rule provided transition periods designed and finalized to enable *affected* providers, states, and managed care plans—meaning those that already had pass-through payments in place—to transition away from existing pass-through payments and limit disruption to safety-net providers. We believe such payments can be transitioned into permissible and accountable payment models that are tied to covered services, value-based payment structures, or delivery system reform initiatives without undermining access for Medicaid managed care enrollees. This rule flows from and reinforces the intent of the May 6, 2016 final rule by ensuring that the transition periods are used by states that had pass-through payments in their MCO, PIHP, or PAHP contracts when we finalized the May 6, 2016 final rule. These are the states for which we were concerned, based on the comments to the June 1, 2015 proposed rule, that an abrupt end to pass-through payments could be disruptive to their health care delivery system and safety-net providers. While we recognize that the regulation text finalized in the May 6, 2016 final rule was not explicit on this point and have taken steps to amend this final rule here to rectify that, this final rule is consistent with the policy and goals of the May 6, 2016 final rule in adopting transition periods.

If states do not currently have pass-through payments in their managed care contracts, we believe that the transition periods are unnecessary to avoid disruption. States that do not have pass-through payments in their managed care contracts that wish to pursue delivery system and provider payment initiatives are already in a strong position to design and implement allowable payment structures under actuarially sound capitation rates, including enhanced fee

schedules or the other approaches consistent with § 438.6(c) that tie managed care payments to services and utilization covered under the contract.

We understand that states and providers have already begun to plan for the transition periods beginning in July 2017, but we do not believe that this rule will create substantially more constraints or add significant burden on safety-net providers. Under the May 6, 2016 final rule, we did not intend to permit or encourage states to add new pass-through payments or to ramp-up pass-through payments in ways that are not consistent with the elimination of pass-through payments during the transition periods. Adding new or increased pass-through payments would substantially complicate the required transition away from pass-through payments, potentially creating more disruption for safety-net providers by increasing dependence on these payments and then compressing the actual amount of time available to eliminate them.

Comment: Some commenters recommended that the proposed rule not be finalized until the new administration has the opportunity to review and ensure that the policy in the November 22, 2016 proposed rule is consistent with the new administration's Medicaid policy and goals. These commenters stated that such an approach is congruent with the general practice and policy that significant new rules should not be issued shortly before a change in the administration.

Response: A delay in finalizing this rule is contrary to our goals and policy so we do not accept this recommendation. This final rule flows from and reinforces the intent of the May 6, 2016 final rule to phase out pass-through payments under Medicaid managed care contracts; any delay would undermine the goals of that rule and make the transition to an actuarially sound approach more difficult. We discussed in the June 1, 2015 proposed rule, the May 6, 2016 final rule, the July 29, 2016 CIB, and the November 22, 2016 proposed rule the rationale for our position that pass-through payments are not consistent with our regulatory standards for actuarially sound rates; specifically, because they do not tie provider payments with the provision of services. While we recognize that the regulation text finalized in the May 6, 2016 final rule was not explicit on the point that this final rulemaking addresses (for example, that the transition periods were not for the initial adoption of and then elimination of new or increased pass-through

payments), this final rule is consistent with the policy and goals of the May 6, 2016 final rule in adopting transition periods. This final rule is congruent with established and published policy guidance, is not a new policy being implemented at the last minute, and is timely as states prepare for the July 1, 2017 implementation date.

In addition to comments on the proposal generally, we received comments about specific provisions in the proposal. We address and respond to those comments below.

B. Comments on § 438.6(d)(1)

We proposed to revise paragraph (d)(1) to clarify that a state may continue to require an MCO, PIHP, or PAHP to make pass-through payments (as defined in § 438.6(a)) to network providers that are hospitals, physicians, or nursing facilities under the contract, provided the requirements of paragraph (d) are met. We proposed retaining the regulation text that provides explicitly that states may not require MCOs, PIHPs, or PAHPs to make pass-through payments other than those permitted under paragraph (d). We received the following comments in response to our proposal to revise § 438.6(d)(1).

Comment: Some commenters recommended that we remove the regulation text that provides explicitly that states may not require MCOs, PIHPs, or PAHPs to make pass-through payments other than those permitted under paragraph (d); these commenters recommended that we reconsider the pass-through payment policy finalized in the May 6, 2016 final rule.

Response: Since commenters did not raise any new issues for our consideration in paragraph (d)(1), we do not agree with commenters that we should remove the regulation text that provides explicitly that states may not require MCOs, PIHPs, or PAHPs to make pass-through payments other than those permitted under paragraph (d). The May 6, 2016 final rule provided a detailed description of the policy rationale (81 FR 27587 through 27592) for why we established pass-through payment transition periods and limited pass-through payments to hospitals, physicians, and nursing facilities, and this policy rationale has not changed. With the proposal to amend the regulation text to more explicitly reflect our intent for the transition periods and the limits on pass-through payments, we did not intend to revisit our rationale for establishing the pass-through payment transition periods. We continue to believe that pass-through payments are not consistent with the statutory

requirements that capitation rates be actuarially sound.

After considering the comments, we are finalizing § 438.6(d)(1) as proposed without revision.

C. Comments on § 438.6(d)(1)(i)

Under proposed paragraph (d)(1)(i), a state would be able to use the transition period for pass-through payments to hospitals, physicians, or nursing facilities only if the state can demonstrate that it had pass-through payments for hospitals, physicians, or nursing facilities, respectively, in *both* the managed care contract(s) *and* rate certification(s) that meet the requirements in either proposed paragraph (d)(1)(i)(A) or (B).

We proposed in paragraph (d)(1)(i)(A) that the managed care contract(s) and rate certification(s) must be for the rating period that includes July 5, 2016 and have been submitted for our review and approval on or before July 5, 2016. If the state had not yet submitted MCO, PIHP, or PAHP contract(s) and rate certification(s) for the rating period that includes July 5, 2016, we proposed in paragraph (d)(1)(i)(B) that the state must demonstrate that it required the MCO, PIHP, or PAHP to make pass-through payments for a rating period before July 5, 2016 in the managed care contract(s) and rate certification(s) that were most recently submitted for our review and approval as of July 5, 2016.

We proposed to use the date July 5, 2016 for the purpose of identifying the pass-through payments in managed care contract(s) and rate certification(s) that are eligible for the pass-through payment transition period because it is consistent with the intent of the May 6, 2016 final rule that the transition period be used by states that had pass-through payments in their MCO, PIHP, or PAHP contracts when that rule was finalized. The transition period was intended to address concerns, articulated in the comments to the June 1, 2015 proposed rule, that an abrupt end to pass-through payments could be disruptive to state health care delivery systems and safety-net providers. We noted in the November 22, 2016 proposed rule that limiting the use of the transition period to states that had pass-through payments in effect as of the effective date of the May 6, 2016 final rule facilitates elimination of these types of payments. We did not intend for the May 6, 2016 final rule to incentivize or encourage states to add new pass-through payments, as we believe that these payments are inconsistent with actuarially sound rates. We received the following comments in response to our proposal to revise § 438.6(d)(1)(i),

including new paragraphs (d)(1)(i)(A) and (B).

Comment: Some commenters recommended that we not finalize paragraph (d)(1)(i) because this new provision will be administratively burdensome on states and has the potential to delay our approval of managed care contracts and rate certifications. Other commenters recommended that we add regulatory text to address scenarios in which states had not submitted managed care contracts or rate certifications to us by July 5, 2016, but states had already executed contracts with their managed care plans. These commenters recommended that we permit states to produce these executed contracts and allow these states to use these managed care contracts and rate certifications for the purpose of the transition period.

Response: We believe that the requirements under § 438.6(d)(1)(i) will not be significantly more burdensome on states and will not cause delays in the approval of managed care contracts and rate certifications. To the contrary, we believe that the proposed requirements under § 438.6(d)(1)(i) will streamline the process for documenting and demonstrating pass-through payments and will facilitate a quicker approval process because the pass-through payments will be more transparently identified. In addition, we currently review and work with states on managed care contracts and rates, and because pass-through payments exist today, any additional burden to state or federal governments should be minimal.

We also do not agree that additional regulatory text is necessary to address scenarios in which states had not submitted managed care contracts or rate certifications to us by July 5, 2016, but states had already executed contracts with their managed care plans. As proposed in § 438.6(d)(1)(i), we will permit states to demonstrate pass-through payments in two ways: (1) Pass-through payments for hospitals, physicians, or nursing facilities were in managed care contracts *and* rate certifications for the rating period that includes July 5, 2016 and were submitted for our review and approval before July 5, 2016; or (2) if the managed care contracts and rate certifications for the rating period that includes July 5, 2016 had not been submitted to us on or before July 5, 2016, pass-through payments for hospitals, physicians, or nursing facilities were in managed care contracts *and* rate certifications for a rating period before July 5, 2016 that had been most recently submitted for our review and approval as of July 5,

2016. We believe these requirements strike the appropriate balance between administrative simplicity and flexibility.

Comment: Some commenters recommended that we withdraw this proposal. These commenters stated that establishing value-based payment arrangements, delivery system reform, minimum fee schedules, and payment rate increases require substantial time and attention. These commenters believed that the fact that some states had established pass-through payments before the effective date of the May 6, 2016 final rule (July 5, 2016) should not preclude other states from receiving similar reasonable flexibilities to implement permissible payment arrangements under Medicaid managed care.

Response: We do not agree with commenters that we should withdraw this proposal. While we understand that establishing value-based payment arrangements, delivery system reform, minimum fee schedules, and payment rate increases require substantial time and attention, we see no rationale to provide transition periods for states to phase out and transition away from pass-through payments if they have not previously implemented such payments. Unlike states that already have pass-through payments in place and need to reverse those actions, states that have not already used such pass-through payments are starting from a clean slate in terms of adopting payment mechanisms and systems described in § 438.6(c). To permit new and increased pass-through payments is contrary to the policy adopted in the May 6, 2016 final rule of eliminating pass-through payments and is not consistent with our regulatory standards for actuarially sound rates. Further, encouraging or enabling states to add or increase such pass-through payments during the transition periods only exacerbates the challenges of eliminating them and transitioning to actuarially sound rates, or establishing value-based payment arrangements, delivery system reform, and fee schedule and payment rate reforms. For states with existing pass-through payments, the transition periods provide significant time and flexibility to integrate existing pass-through payment arrangements into permissible payment structures that tie provider payments to the provision of services (or outcomes) under the contract. For states that currently do not have pass-through payments in their managed care contracts that wish to pursue delivery system and provider payment initiatives, we believe such states are already in a better and superior position to design and

implement allowable payment structures within actuarially sound capitation rates, including enhanced fee schedules or the other approaches consistent with § 438.6(c) that tie managed care payments to services and utilization covered under the contract.

Comment: Some commenters did not agree with the use of the July 5, 2016 date and characterized the use of that date as finalizing a rule that applies retroactively. These commenters stated that the use of the July 5, 2016 date and retroactive rulemaking is not consistent with the intent of notice and comment rulemaking under the Administrative Procedure Act (APA) and makes it impossible for states and providers to plan for the potential impact of such rulemaking. Some commenters recommended that we withdraw the proposed rule immediately and stated that our proposals would significantly and retroactively change the compliance date for the pass-through payment phase-down and would effectively move-up the start of the phase-out period a full year from July 1, 2017 to July 5, 2016. These commenters stated that such a change in the compliance date would result in substantial new payment restrictions with little time for states and hospitals to make adjustments. These commenters stated concern that further limiting pass-through payments could adversely affect hospitals and the patients they serve.

Response: This final rule will not and does not apply retroactively to July 5, 2016, and we have followed all notice and comment procedures for rulemaking under the APA. This final rule only affects future action of states and does not penalize or invalidate past actions taken by states, which is permissible rulemaking.² We provided our detailed rationale in the proposed rule for using the July 5, 2016 date; we are only using the July 5, 2016 date for the purpose of identifying the pass-through payments in managed care contracts and rate certifications that are eligible for the pass-through payment transition period. That date was chosen because it is consistent with our intent that the transition period be used by states that had pass-through payments

in their MCO, PIHP, or PAHP contracts when we finalized that rule. Limiting the use of the transition period to states that had pass-through payments in effect as of the effective date of the May 6, 2016 final rule (July 5, 2016) supports the policy goal of eliminating these types of payments, while ensuring that an abrupt end to pass-through payments will not be disruptive to state health care delivery systems and safety-net providers. Using this past date as the point by which to determine eligibility for the transition period eliminates the possibility that the transition period itself encourages states to create new or increase pass-through payments.

For commenters concerned about compliance dates, we want to clarify that this rule does not change the original compliance date for § 438.6(d) from the May 6, 2016 final rule. We will still enforce compliance with the requirements in § 438.6(d) no later than the rating period for Medicaid managed care contracts beginning on or after July 1, 2017. As discussed in the November 22, 2016 proposed rule and this final rule, our exercise of enforcement discretion in permitting delayed compliance of the May 6, 2016 final rule with § 438.6(d) was not intended to create new opportunities for states to add or increase existing pass-through payments either before or after July 1, 2017. This delay was intended to address concerns articulated by commenters, among them states and providers, that an abrupt end to directed pass-through payments could cause damaging disruption to safety-net providers. The delay was also intended to give states and managed care plans time to appropriately address any contract or rate issues needed to implement and comply with § 438.6(d). This final rule amends the parameters for the transition periods that begin with rating periods for contracts starting on or after July 1, 2017. As that date is still several months in the future, this final rule is not retroactive.

We understand the need for states and providers to have adequate time to make adjustments in complying with the requirements at § 438.6(d)—that is why the May 6, 2016 final rule provided transition periods to phase-down pass-through payments. We agree and noted in the May 6, 2016 final rule (81 FR 27589) and the November 22, 2016 proposed rule (81 FR 83782) that the transition from one payment structure to another often requires robust provider and stakeholder engagement, agreement on approaches to care delivery and payment, establishing systems for measuring outcomes and quality, planning efforts to implement changes,

and evaluating the potential impact of change on Medicaid financing mechanisms. However, for states that do not currently have pass-through payments in their managed care contracts, transition periods are unnecessary. States that do not have pass-through payments in their managed care contracts that wish to pursue delivery system and provider payment initiatives can design and implement allowable payment structures under actuarially sound capitation rates tying managed care payments to services and utilization covered under the contract without concern that modifying existing pass-through payments could potentially undermine access for Medicaid managed care enrollees or adversely impact hospitals.

Comment: Some commenters stated that for many states, the capitation rates and contracts submitted as of or prior to July 5, 2016 were for prior rating periods when both enrollment numbers and the cost of providing care would be substantially less than the total enrollments and costs for current and future rating periods. These commenters stated that the limitation on setting pass-through payments based on a prior submitted date (July 5, 2016) of capitation rates and contracts deviates from the longstanding practice of states making retroactive adjustments and amendments to actuarially sound capitation rates. These commenters stated that the setting of an aggregate pass-through payment amount limit based on capitation rates and contracts submitted by states as of July 5, 2016 has the added effect of speeding up the transition periods established under the May 6, 2016 final rule and that states should be provided additional time to submit for our approval new managed care capitation rates, including pass-through payments, because states and providers had no notice prior to this cutoff date; some of these commenters recommended that we modify the rule to allow the use of the most recent rate year for demonstrating previous pass-through payments.

Response: We understand that for some states, the capitation rates and contracts submitted as of or prior to July 5, 2016 would be for prior rating periods; it is for this reason that under the proposed requirements in § 438.6(d)(1)(i), we permitted states to demonstrate pass-through payments in the two ways described in paragraphs (d)(1)(i)(A) and (B).

We do not believe that the limitation on setting pass-through payments based on a prior submitted date deviates from the practice of retroactive amendments

² Here, the rule only affects future action and limits future choices available to states. Retroactive rules “alter[] the past legal consequences of past actions.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219, 109 S. Ct. 468 (1988) (Scalia, J., concurring) (emphasis in original). When an agency takes action to alter the future effect but not the past legal consequences of an activity, the agency has not taken a retroactive action; similarly, when agency action upsets expectations for future activity that are based on prior law, it has not taken a retroaction action. *Mobile Relay Assocs. v. F.C.C.*, 457 F.3d 1, 10–11 (D.C. Cir. 2006).

to capitation rates. Under this final rule, we are not generally restricting states from adjusting or amending their actuarially sound capitation rates; the requirements for retroactive adjustments to capitation rates are specified at § 438.7(c)(2) and those requirements are not changed with this final rule. Since we will enforce compliance with the requirements of § 438.7(c)(2) for rating periods for contracts beginning July 1, 2017, we also note that before the May 6, 2016 final rule, states were permitted to adjust and amend actuarially sound capitation rates retroactively under § 438.6(c)(1). This final rule does not change these policies in permitting states to adjust and amend actuarially sound capitation rates retroactively.

Under paragraph (d)(1)(ii), as proposed and as finalized, we will not approve a retroactive adjustment or amendment to managed care contracts and rate certifications to add new pass-through payments or increase existing pass-through payments, as defined in § 438.6(a). This limit only applies to retroactive adjustments to capitation rates related to new or increased pass-through payments; other retroactive adjustments to rates are not affected by this final rule. The existing policy permitting states flexibility to make other changes in capitation rates, subject to the limits on filing claims for FFP under 45 CFR 95.7 and, for contracts for rating periods after July 1, 2017, subject to the requirements in § 438.7(c)(2), remains in effect for all other changes to capitation rates.

We also do not agree that this proposal has the added effect of speeding up the transition periods established under the May 6, 2016 final rule. We indicated in the proposed rule that we did not intend to speed up the rate of a state's phase down of pass-through payments; rather, the proposed rule intended only to prevent increases in pass-through payments and the addition of new pass-through payments beyond what was already in place when the pass-through payment limits and transition periods were finalized in the May 6, 2016 final rule. The length of the transition periods remains the same under this final rule: 10 years for hospital pass-through payments and 5 years for physician and nursing facility pass-through payments. States that were reliant on and using pass-through payments at the time we finalized the May 6, 2016 final rule will continue to be eligible for the full transition periods under this final rule. Further, this final rule will permit states to continue pass-through payments in the same amount as before the beginning of the transition period, unless and until, that amount

exceeds the percentage of the base amount available for the applicable year of the transition period for hospital pass-through payments. Our amendments to § 438.6(d) only serve to prevent states from adding new pass-through payments, or increasing the total amount of pass-through payments, in the Medicaid managed care context.

We also do not agree that states should be provided additional time to submit new managed care capitation rates to include new or increased pass-through payments, because such an approach is contrary to our policy goal of eliminating pass-through payments. We believe that limiting the use of the transition period to states that had pass-through payments in effect as of the effective date of the May 6, 2016 final rule (July 5, 2016) supports the policy goal of eliminating these types of payments, while ensuring that an abrupt end to already existing pass-through payments will not be disruptive to state health care delivery systems and safety-net providers. Using the date of July 5, 2016 as the point by which to determine eligibility for the transition period eliminates concern that the transition period itself encourages states to create new or increase pass-through payments despite our policy concerns that such payments are inconsistent with actuarial soundness and may compromise a managed care plan's ability to effectively direct care and implement quality improvement strategies.

Comment: Some commenters recommended that we include specific regulatory text at § 438.6(d)(1)(i) to also specify that in order to use a transition period described under paragraph (d), a state must demonstrate that it had pass-through payments for hospitals, physicians, or nursing facilities "in managed care contracts and rate certifications for the rating period beginning before October 1, 2016, regardless of the date of submission to CMS, if the state can demonstrate that funding for the pass-through payment was approved by the state's legislature prior to July 5, 2016, and that corresponding supplemental payments were made under Medicaid fee-for-service (FFS) or section 1115 demonstration programs for at least 10 consecutive years prior to July 5, 2016." These commenters stated that this language would ensure that a specific pass-through payment would meet the criteria under the proposed rule.

Response: We understand the commenters' concerns regarding a specific pass-through payment that was recently approved by their state legislature; however, including the commenters' suggested regulatory text at

§ 438.6(d)(1)(i) would not comport with our policy goals. The pass-through payment transition periods included in the May 6, 2016 final rule were intended to be used by states that already had pass-through payments in place and would face significant disruption if immediate compliance with § 438.6(c) were required. Under the proposed rule and this final rule, we are linking pass-through payments permitted during the transition period to the aggregate amounts of pass-through payments that were in place at the time the May 6, 2016 final rule became effective on July 5, 2016, which is consistent with the intent under the May 6, 2016 final rule to eliminate pass-through payments but provide a transition period to limit disruption to safety net providers. Changing our proposal to include "managed care contracts and rate certifications for the rating period beginning before October 1, 2016 regardless of the date of submission to CMS" is not consistent with the rationale in the May 6, 2016 final rule or the November 22, 2016 proposed rule and would permit certain new or increased pass-through payments beyond those already in place at the time the May 6, 2016 final rule became effective on July 5, 2016.

Further, we do not believe that we should allow new or increased pass-through payments for states with corresponding supplemental payments that were made under Medicaid FFS or section 1115 demonstration programs prior to July 5, 2016. As we have described throughout this rule, pass-through payments are not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services. For states with supplemental payments that were made under Medicaid FFS or section 1115 demonstration programs prior to July 5, 2016, we believe that as part of a state's transition to a managed care delivery system, the state needs to integrate such FFS supplemental payments into allowable payment structures that tie managed care payments to services and utilization covered under the contract. Integrating the FFS supplemental payments into allowable payment structures at the time of the transition will ensure that the state can hold managed care plans accountable for the cost and quality of services delivered under the contract.

After considering the comments, we are finalizing § 438.6(d)(1)(i) as proposed without revision.

D. Comments on § 438.6(d)(1)(ii)

We proposed in paragraph (d)(1)(ii) that we would not approve a retroactive adjustment or amendment to managed care contract(s) and rate certification(s) to add new pass-through payments or increase existing pass-through payments defined in § 438.6(a). We noted that we would not permit a pass-through payment amount for hospitals to exceed the lesser of the amounts calculated under paragraph (d)(3) in the proposed rule. We also proposed, in paragraph (d)(5), that pass-through payment amounts to physicians and nursing facilities would be limited to the amount in place in the managed care contracts and rate certifications submitted pursuant to paragraph (d)(1)(i). We proposed paragraph (d)(1)(ii) to prevent states from undermining the policy goal of limiting the use of the transition period to states that had pass-through payments in effect as of the effective date of the May 6, 2016 final rule. This proposed change also aligns with the policy rationale under the May 6, 2016 final rule and the July 29, 2016 CMCS Informational Bulletin (CIB) by prohibiting new or increased pass-through payments in Medicaid managed care contract(s), notwithstanding the adjustments to the base amount permitted in § 438.6(d)(2). We received the following comments in response to our proposal to revise § 438.6(d)(1)(ii).

Comment: Some commenters recommended that we address scenarios in which states are already paying pass-through payments through their managed care plans and were currently in the process of amending managed care contracts and rate certifications when the proposed rule was issued; these commenters recommended that we permit such retroactive adjustments and amendments. Some commenters provided that states have historically implemented retroactive rate adjustments to capitation rates and processed routine adjustments and amendments every year; these commenters recommended that we permit these adjustments and amendments and address how such routine activities would fit with this rule. Other commenters recommended that we permit retroactive adjustments and amendments through July 1, 2017 to account for potential increases in pass-through payments that were put into place before this rule was issued.

Response: We do not agree that additional regulatory text is needed to address scenarios in which states are already paying pass-through payments through their managed care plans and

were in the process of amending managed care contracts and rate certifications at the time of the May 6, 2016 final rule or the November 22, 2016 proposed rule. It is unclear to us what standard we could use to implement this recommendation while preventing new or increased pass-through payments. We note that § 438.6(d)(1)(ii), as proposed and as finalized here, will not be a barrier to the approval of retroactive changes to managed care contracts and rate certifications when the retroactive change does not purport to add or increase a pass-through payment to hospitals, physicians, or nursing facilities. Therefore, states that were in the process of amending contracts or rates for other purposes should not be affected by § 438.6(d)(1)(ii).

States will need to meet the requirements in § 438.6(d)(1)(i) in order to use a transition period described in § 438.6(d). That means that states must be able to demonstrate pass-through payments in managed care contracts and rate certifications under the requirements in proposed § 438.6(d)(1)(i)(A) and (B). For commenters concerned about general adjustments and amendments unrelated to new or increased pass-through payments, this rule does not impact those routine activities that states undertake each year; the requirements in § 438.6(d)(1)(ii), as proposed and finalized here, only limit retroactive adjustments and amendments intended to add new pass-through payments or increase existing pass-through payments defined in § 438.6(a). Without this provision limiting retroactive changes to pass-through payments, a state could retroactively change a prior, submitted managed care contract and rate certification to increase or add pass-through payments and eliminate the restrictions on the use of the transition periods that were proposed in the November 22, 2016 proposed rule and finalized in this rule. Further, the adjustments to the base amount under § 438.6(d)(2) are still permitted upon finalization of this rule; therefore, the base amount will be calculated annually and increases in Medicaid and Medicare FFS rates will be taken into account even though a smaller percentage of the base amount will be available for pass-through payments. However, we would not permit a pass-through payment amount to exceed the lesser of the amounts calculated under paragraph (d)(3) in this rule. We are not generally restricting states from adjusting or amending their actuarially sound capitation rates that are unrelated to

new or increased pass-through payments; the general requirements for retroactive adjustments to capitation rates are specified at § 438.7(c)(2) and those requirements are not changed with this final rule. Only contract actions to add or increase pass-through payments on a retroactive basis will be denied under § 438.6(d)(1)(ii); other retroactive rate changes will be evaluated and approved pursuant to other applicable rules adopted prior to this rulemaking.

Finally, we do not believe that we should permit retroactive adjustments and amendments through July 1, 2017 to account for potential increases in pass-through payments that were put into place before this rule. This approach is not consistent with our policy, which has been discussed in the May 6, 2016 final rule and throughout this final rule, to eliminate pass-through payments, which are inconsistent with our regulatory standards for actuarially sound capitation rates.

After considering the comments, we are finalizing § 438.6(d)(1)(ii) as proposed without revision.

E. Comments on § 438.6(d)(3)

In paragraph (d)(3), we proposed to amend the cap on the amount of pass-through payments to hospitals that may be incorporated into managed care contract(s) and rate certification(s) during the transition period for hospital payments, which will apply to rating periods for contract(s) beginning on or after July 1, 2017. Specifically, we proposed to revise § 438.6(d)(3) to require that the limit on pass-through payments each year of the transition period be the lesser of: (A) The sum of the results of paragraphs (d)(2)(i) and (ii),³ as modified under the schedule in this paragraph (d)(3); or (B) the total dollar amount of pass-through payments to hospitals identified by the state in the managed care contract(s) and rate certification(s) used to meet the requirement in paragraph (d)(1)(i). This proposed language would limit the amount of pass-through payments each contract year to the lesser of the calculation adopted in the May 6, 2016 final rule (the “base amount”), as decreased each successive year under

³ The portion of the base amount calculated in § 438.6(d)(2)(i) is analogous to performing UPL calculations under a FFS delivery system, using payments from managed care plans for Medicaid managed care hospital services in place of the state's payments for FFS hospital services under the state plan. The portion of the base amount calculated in § 438.6(d)(2)(ii) takes into account hospital services and populations included in managed care during the rating period that includes pass-through payments which were in FFS two years prior.

the schedule in this paragraph (d)(3), or the total dollar amount of pass-through payments to hospitals identified by the state in managed care contract(s) and rate certification(s) described in paragraph (d)(1)(i). For example, if a state had \$10 million in pass-through payments to hospitals in the contract and rate certification used to meet the requirement in paragraph (d)(1)(i), that \$10 million figure would be compared each year to the base amount as reduced on the schedule described in this paragraph (d)(3); the lower number would be used to limit the total amount of pass-through payments to hospitals allowed for that specific contract year.

We noted that this proposed language would prevent increases of aggregate pass-through payments for hospitals during the transition period beyond what was already in place when the pass-through payment limits and transition periods were finalized in the May 6, 2016 final rule. We also noted that our proposal was not intended to speed up the rate of a state's phase down of pass-through payments; rather, the proposed rule intended to prevent increases in pass-through payments and the addition of new pass-through payments beyond what was already in place when the pass-through payment limits and transition periods were finalized given that this was the final rule's intent.

In addition, we proposed to amend paragraph (d)(3) to provide that states must meet the requirements in paragraph (d)(1)(i) to make pass-through payments for hospitals during the transition period. We noted that this additional text was necessary to be consistent with our intent, explained above, for the proposed revisions to paragraph (d)(1). As in the May 6, 2016 final rule, we noted that pass-through payments to hospitals must be phased out no longer than on the 10-year schedule, beginning with rating periods for contracts that start on or after July 1, 2017. We proposed to add the phrase "rating periods" to be consistent with our approach in the May 6, 2016 final rule; we made this revision throughout proposed paragraphs (d)(3) and (d)(5). We received the following comments in response to our proposal to revise § 438.6(d)(3), including new paragraphs (d)(3)(i) and (ii).

Comment: Some commenters recommended that we not finalize proposed paragraph (d)(3). Some commenters recommended that we permit increases in pass-through payments over the 10-year transition period to give states the maximum amount of flexibility in phasing down pass-through payments for hospitals.

Some commenters recommended that we permit new or increased pass-through payments for states that are currently in the process of moving hospital FFS supplemental payments into managed care, or that we provide states that had received federal approval to transition to managed care before this rule, the opportunity to implement their managed care programs using the pass-through payment transition periods and amounts established in the May 6, 2016 final rule. Some commenters similarly recommended that we permit new or increased pass-through payments for states with Medicaid state plan approved UPL payments for hospitals as of July 5, 2016 and allow such states to utilize the transition periods and amounts outlined in the May 6, 2016 final rule.

Response: We do not agree with commenters that we should not finalize proposed paragraph (d)(3). We have explained throughout this rule our rationale to prevent increases of pass-through payments for hospitals during the transition period beyond what was already in place when the pass-through payment limits and transition periods were finalized in the May 6, 2016 final rule.

We also do not believe that we should permit increased pass-through payments through the 10-year transition period. The 10-year transition period provides states with significant flexibility and time to phase down existing pass-through payments for hospitals. We believe that we should not allow new or increased pass-through payments for states that are currently in the process of moving hospital FFS supplemental payments into managed care, and that we should not permit new or increased pass-through payments for states with Medicaid state plan approved UPL payments for hospitals as of July 5, 2016. As we have reiterated throughout this rule, pass-through payments are not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services. When pass-through payments guarantee a portion of a provider's payment and divorce the payment from service delivery, there is little accountability for the payment and it is more challenging for managed care plans to negotiate provider contracts with incentives focused on outcomes and managing individuals' overall care. Consequently, for states that are currently in the process of moving hospital FFS supplemental payments into managed care, we believe that integrating the FFS supplemental payments into allowable payment structures at the time of the transition

will facilitate a state's ability to hold managed care plans accountable for the cost and quality of services delivered under the contract. To date, we have already provided technical assistance to states who are seeking to implement these types of allowable payment structures and remain available to provide future technical assistance. We will work with states to integrate FFS supplemental payments into allowed payment structures as states undertake transitions to managed care.

Comment: Some commenters recommended that we withdraw all caps and limits on the "base amount" for hospitals and allow states the flexibility to adjust pass-through payment amounts to reflect significant programmatic changes and increases in the managed care population. These commenters provided that if the base amount increases from one year to the next, the "total dollar amount" limit should also be permitted to increase at the same percentage. Some commenters similarly recommended a "per-member per-month" (PMPM) basis rather than a total dollar amount limitation on the maximum amount of pass-through payments for hospitals. Other commenters stated the concern that this proposed rule is effectively limiting the maximum amount of pass-through payments to the amount in place prior to the final rule's compliance date and would give state Medicaid programs and hospitals no time to transition these payments.

Response: We do not agree that we should withdraw all caps and limits on the base amount for hospitals, and we do not agree that the "total dollar amount" limit should be permitted to increase, or that we should permit PMPM increases, as these approaches could have the effect of permitting increased pass-through payments for hospitals, which would be counter to our stated policy goals. We believe that adopting these recommendations would complicate the required transition of pass-through payments to permissible provider payment models and delay the development of permissible and accountable payment approaches that are based on the utilization and delivery of services or the quality and outcomes of services. We also note that states can implement allowed payment structures to reflect significant programmatic changes and increases in the managed care population.

In the June 1, 2015 proposed rule and the May 6, 2016 final rule, we discussed how the payment structures permitted under § 438.6(c) tied payments to services while permitting states to reward quality in the provision of

services, assure minimum payment rates, or develop delivery system reform. One advantage of using an allowed payment mechanism to address changes in the managed care population is that such a structure would allow states and managed care plans to link payments to significant programmatic changes. Linking provider payments to utilization and outcomes under a managed care plan's control facilitates a state's ability to hold managed care plans accountable for the quality, utilization, and cost of care provided to beneficiaries.

We agree with commenters that this final rule limits the maximum amount of pass-through payments to the amount in place on the effective date of the May 6, 2016 final rule (July 5, 2016). However, we do not agree that this final rule eliminates the transition period for existing pass-through payments. This final rule does not change the transition periods established under the May 6, 2016 final rule. This final rule provides a new maximum amount of pass-through payments for hospitals in order to prevent new or increased pass-through payments. States that were reliant on and using pass-through payments at the time we finalized the May 6, 2016 final rule will continue to be eligible for the full transition periods under this final rule. This final rule does not accelerate the transition period for states compared to the May 6, 2016 final rule.

Comment: Some commenters stated that § 438.6(d) of the May 6, 2016 final rule allowed for specific calculations and adjustments to the base amount to determine the upper limit of pass-through payments for hospitals. These commenters stated that § 438.6(d) allowed states to account for changes in the demographics, service mix, enrollment, and utilization of Medicaid managed care beneficiaries beginning July 1, 2017. These commenters stated concerns that the proposed rule eliminates these flexibilities by artificially limiting "the total dollar amount" of pass-through payments without accounting for the permitted adjustments in the May 6, 2016 final rule.

Response: We understand commenters' concerns regarding the base amount calculations and permitted adjustments at § 438.6(d)(2) in the May 6, 2016 final rule. This final rule does not modify the adjustments to the base amount permitted under § 438.6(d)(2); however, this final rule does not permit a pass-through payment amount to exceed the lesser of the amounts calculated under paragraph (d)(3) in this final rule, as we believe such a

flexibility could have the effect of permitting increased pass-through payments for hospitals. We believe that increasing pass-through payments will complicate the required transition of pass-through payments to permissible provider payment models and delay the development of permissible and accountable payment approaches that are based on the utilization and delivery of services or the quality and outcomes of services.

Under § 438.6(d)(2), states can account for changes in the demographics, service mix, enrollment, and utilization in their Medicaid managed care programs (see 81 FR 27591). States can also account for changes in the demographics, service mix, enrollment, and utilization through permissible payment mechanisms. One advantage of using an allowed payment mechanism to address changes in the managed care population (such as demographics, service mix, enrollment, or utilization) is that such a structure would allow states and managed care plans to link new and increased funding to the corresponding increase in services that result from the programmatic changes or increased population. Linking provider payments to utilization and outcomes under a managed care plan's control facilitates a state's ability to hold managed care plans accountable for the quality, utilization, and cost of care provided to beneficiaries. Therefore, we do not agree that the proposed rule, which is finalized here, eliminates these flexibilities. Also, as described throughout this final rule, the "total dollar amount" limit for pass-through payments was established under paragraphs (d)(3) and (d)(5) for hospitals, physicians, and nursing facilities because we did not intend states to begin additional or new pass-through payments, or to increase existing pass-through payments.

After considering the comments, we are finalizing § 438.6(d)(3) as proposed without revision.

F. Comments on § 438.6(d)(5)

We proposed to revise § 438.6(d)(5) to be consistent with the proposed revisions in § 438.6(d)(1)(i) and to limit the total dollar amount of pass-through payments that is available each contract year for physicians and nursing facilities. We noted that we were not proposing to implement a phase-down for pass-through payments to physicians or nursing facilities. We proposed that for states that meet the requirements in paragraph (d)(1)(i), rating periods for contracts beginning on or after July 1, 2017 through rating periods for

contracts beginning on or after July 1, 2021, may continue to require pass-through payments to physicians or nursing facilities under the MCO, PIHP, or PAHP contract; such pass-through payments may be no more than the total dollar amount of pass-through payments for each category identified in the managed care contracts and rate certifications used to meet the requirement in paragraph (d)(1)(i). We proposed to add the phrase "rating periods" to be consistent with our approach in the May 6, 2016 final rule; we made this revision throughout proposed paragraphs (d)(3) and (d)(5). We received the following comments in response to our proposal to revise § 438.6(d)(5).

Comment: Some commenters recommended that we not finalize the "total dollar amount" limit on pass-through payments over the 5-year transition period for physicians and nursing facilities because such a limit does not recognize significant programmatic changes and increases in the managed care population. Commenters recommended that we continue to allow increases over the 5-year transition period to give states the maximum amount of flexibility in phasing down pass-through payments. Some commenters also recommended that we permit new or increased pass-through payments for states that are currently in the process of moving physician or nursing facility FFS supplemental payments into managed care, or that we provide states that had received federal approval to transition to managed care before this rule, the opportunity to implement their managed care programs using the pass-through payment transition periods and amounts established in the May 6, 2016 final rule.

Response: As noted above, we believe the lack of an affirmative limit on pass-through payments at the total amount of prior pass-through payments identified under paragraph (d)(1)(i) will permit states to increase pass-through payments to physicians and nursing facilities, which is contrary to our policy goals for eliminating these types of payments. This final rule will encourage states to use the other, permissible payment types described in § 438.6(c) in directing payments to nursing facilities and physicians. We explained throughout this final rule our rationale for prohibiting increases of pass-through payments during the transition period beyond what was already in place when the pass-through payment limits and transition periods were finalized in the May 6, 2016 final rule. We reiterate that states can

implement allowed, accountable payment structures to reflect significant programmatic changes and increases in the managed care population. One advantage of using an allowed payment mechanism to address the changes is that such a structure would allow states and managed care plans to link new and increased funding to the corresponding increased utilization resulting from the programmatic changes or increased population. Additionally, the 5-year transition period provides states with significant flexibility and time to phase down existing pass-through payments for physicians and nursing facilities.

Consistent with our response for hospital FFS supplemental payments, we do not believe that we should allow new or increased pass-through payments for states that are currently in the process of moving physician or nursing facility FFS supplemental payments into managed care. As we have provided throughout this rule, pass-through payments are not consistent with our interpretation of the statutory requirement for actuarial soundness and our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services. For states that are currently in the process of moving physician or nursing facility FFS supplemental payments into managed care, we believe that integrating the FFS supplemental payments into allowable payment structures at the time of the transition will ensure that the state can hold managed care plans accountable for the cost and quality of services delivered under the contract.

We did not receive any comments on our proposal to use the phrase “rating period” in § 438.6(d)(3) and (5). After considering the comments, we are finalizing § 438.6(d)(5) as proposed without revision.

III. Provisions of the Final Regulations

As a result of the public comments received under the proposed rule, this final rule incorporates the provisions of the proposed rule without revision.

IV. Collection of Information Requirements

This final rule will not impose any new or revised information collection, reporting, recordkeeping, or third-party disclosure requirements or burden. Our revision of § 438.6(d) will not impose any new or revised IT system requirements or burden because the existing regulation at § 438.7 requires the rate certification to document special contract provisions under § 438.6. Consequently, there is no need for review by the Office of Management

and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Regulatory Impact Analysis

A. Statement of Need

As discussed in the May 6, 2016 final rule, the proposed rule, and this final rule, we have significant concerns that pass-through payments have negative consequences for the delivery of services in the Medicaid program. The existence of pass-through payments may affect the amount that a managed care plan is willing or able to pay for the delivery of services through its base rates or fee schedule. In addition, pass-through payments may make it more difficult to implement quality initiatives or to direct beneficiaries' utilization of services to higher quality providers because a portion of the capitation rate under the contract is independent of the services delivered and outside of the managed care plan's control. Put another way, when the fee schedule for services is set below the normal market, or negotiated rate, to account for pass-through payments, moving utilization to higher quality providers can be difficult because there may not be adequate funding available to incentivize the provider to accept the increased utilization. When pass-through payments guarantee a portion of a provider's payment and divorce the payment from service delivery, it is more challenging for managed care plans to negotiate provider contracts with incentives focused on outcomes and managing individuals' overall care.

We realize that some pass-through payments have served as a critical source of support for safety-net providers who provide care to Medicaid beneficiaries. Several commenters raised this issue in response to the June 1, 2015 proposed rule.⁴ Therefore, in response to some commenters' request for a delayed implementation of the limitation on directed payments and to address concerns that an abrupt end to these payments could create significant disruptions for some safety-net providers who serve Medicaid managed care enrollees, we included in the May 6, 2016 final rule a delay in the compliance date and a transition period for existing pass-through payments to hospitals, physicians, and nursing facilities. These transition periods begin with the compliance date, and were designed and finalized to enable affected providers, states, and managed care plans to transition away from

existing pass-through payments. Such payments could be transitioned into payments tied to covered services, value-based payment structures, or delivery system reform initiatives without undermining access for the beneficiaries; alternatively, states could step down such payments and devise other methods to support safety-net providers to come into compliance with § 438.6(c) and (d).

However, as noted previously, the transition period and delayed enforcement date caused some confusion regarding increased and new pass-through payments. The May 6, 2016 final rule inadvertently created a strong incentive for states to move swiftly to put pass-through payments into place in order to take advantage of the pass-through payment transition periods established in the May 6, 2016 final rule. Contrary to our discussion in the May 6, 2016 final rule regarding the statutory requirements in section 1903(m) of the Act and regulations for actuarially sound capitation rates, some states expressed interest in developing new and increased pass-through payments for their respective Medicaid managed care programs as a result of the May 6, 2016 final rule. In response to this interest, we published the July 29, 2016 CMCS Informational Bulletin (CIB) to quickly address questions regarding the May 6, 2016 final rule's intent regarding states' ability to increase or add new pass-through payments under Medicaid managed care plan contracts and capitation rates, and to describe our plan for monitoring the transition of pass-through payments to approaches for provider payment under Medicaid managed care programs that are based on the delivery of services, utilization, and the outcomes and quality of the delivered services.

We noted in the CIB that the transition from one payment structure to another requires robust provider and stakeholder engagement, agreement on approaches to care delivery and payment, establishing systems for measuring outcomes and quality, planning efforts to implement changes, and evaluating the potential impact of change on Medicaid financing mechanisms. Whether implementing value-based payment structures, implementing other delivery system reform initiatives, or eliminating pass-through payments, there will be transition issues for states coming into compliance; adequately working through transition issues, including ensuring adequate base rates, is central to both delivery system reform and to strengthening access, quality, and efficiency in the Medicaid program. We

⁴ Available at: <https://www.gpo.gov/fdsys/pkg/FR-2015-06-01/pdf/2015-12965.pdf>.

stressed that the purpose and intention of the transition periods is to acknowledge that pass-through payments existed prior to the May 6, 2016 final rule and to provide states, network providers, and managed care plans time and flexibility to integrate existing pass-through payment arrangements into permissible payment structures.

As we noted in the CIB and throughout this final rule, we believe that adding new or increased pass-through payments for hospitals, physicians, or nursing facilities, beyond what was included as of July 5, 2016, into Medicaid managed care contracts exacerbates a problematic practice that is inconsistent with our interpretation of statutory and regulatory requirements, complicates the required transition of these pass-through payments to permissible and accountable payment approaches that are based on the utilization and delivery of services to enrollees covered under the contract, or the quality and outcomes of such services, and reduces managed care plans' ability to effectively use value-based purchasing strategies and implement provider-based quality initiatives. In the CIB, we signaled the possible need, and our intent, to further address this policy in future rulemaking and link pass-through payments through the transition period to the amounts of pass-through payments in place at the time the Medicaid managed care rule was effective on July 5, 2016.

B. Overall Impact

We have examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) Having an annual

effect on the economy of \$100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). We estimate that this final rule is “economically significant” as measured by the \$100 million threshold, and hence a major rule under the Congressional Review Act.

The May 6, 2016 final rule included a RIA (81 FR 27830). During that analysis, we did not project a significant fiscal impact for § 438.6(d). When we reviewed and analyzed the May 6, 2016 final rule, we concluded that states would have other mechanisms to build in the amounts currently provided through pass-through payments in approvable ways, such as approaches consistent with § 438.6(c). If a state was currently building in \$10 million in pass-through payments to hospitals under their current managed care contracts, we assumed that the state would incorporate the \$10 million into their managed care rates in permissible ways rather than spending less in Medicaid managed care. While it is possible that this would be more difficult for states with relatively larger amounts of pass-through payments, the long transition period provided under the May 6, 2016 final rule to phase out pass-through payments should help states to integrate existing pass-through payments into actuarially sound capitation rates through permissible Medicaid financing structures, including enhanced fee schedules or the other approaches consistent with § 438.6(c) that tie managed care payments to services and utilization covered under the contract.

A number of states have integrated some form of pass-through payments into their managed care contracts for hospitals, nursing facilities, and physicians. In general, the size and number of the pass-through payments

for hospitals has been more significant than for nursing facilities and physicians. We noted in the May 6, 2016 final rule (81 FR 27589) a number of reasons provided by states for using pass-through payments in their managed care contracts. As of the effective date of the May 6, 2016 final rule, we estimate that at least eight states have implemented approximately \$105 million in pass-through payments for physicians annually; we estimate that at least three states have implemented approximately \$50 million in pass-through payments for nursing facilities annually; and we estimate that at least 16 states have implemented approximately \$3.3 billion in pass-through payments for hospitals annually. These estimates are somewhat uncertain, as before the final rule, we did not have regulatory requirements for states to document and describe pass-through payments in their managed care contracts or rate certifications. The amount of pass-through payments often represents a significant portion of the overall capitation rate under a managed care contract. We have seen pass-through payments that have represented 25 percent, or more, of the overall managed care contract and 50 percent of individual rate cells. The rationale for these pass-through payments in the development of the capitation rates is often not transparent, and it is not clear what the relationship of these pass-through payments is to the provision of services or the requirement for actuarially sound rates.

Since the publication of the May 6, 2016 final rule, we received a formal proposal from one state regarding \$250 to \$275 million in pass-through payments to hospitals; we have been working with the state to identify permissible implementation options for their proposal, including under § 438.6(c), and tie such payments to the utilization and delivery of services (as well as the outcomes of delivered services). We heard informally that two additional states are working to develop pass-through payment mechanisms to increase total payments to hospitals by approximately \$10 billion cumulatively. We also heard informally from one state regarding a \$200 million proposal for pass-through payments to physicians. We also continue to receive inquiries from states, provider associations, and consultants who are developing formal proposals to add new pass-through payments, or increase existing pass-through payments, and incorporate such payments into Medicaid managed care rates. These state proposals have not been approved to date. While it is

difficult for us to conduct a detailed quantitative analysis given this considerable uncertainty and lack of data, we believe that without this final rulemaking, states will continue to ramp-up pass-through payments in ways that are not consistent with the pass-through payment transition periods established in the May 6, 2016 final rule.

Since we cannot produce a detailed quantitative analysis, we have developed a qualitative discussion for this RIA. We believe there are many benefits with this regulation, including consistency with our interpretation and implementation of the statutory requirements in section 1903(m) of the Act and regulations for actuarially sound capitation rates, improved transparency in rate development processes, permissible and accountable payment approaches that are based on the utilization and delivery of services to enrollees covered under the contract, or the quality and outcomes of such services, and improved support for delivery system reform that is focused on improved care and quality for Medicaid beneficiaries. We believe that the costs of this regulation to state and federal governments will not be significant; we currently review and work with states on managed care contracts and rates, and because pass-through payments exist today, any additional costs to state or federal governments should be negligible.

Relative to the current baseline, this final rule builds on the May 6, 2016 final rule and may further reduce the likelihood of increases in or the development of new pass-through payments, which could reduce state and federal government transfers to hospitals, physicians, and nursing facilities. However, states may instead increase or develop actuarially sound payments that link provider reimbursement with services covered under the contract or associated quality outcomes. Because we lack sufficient information to forecast the eventual overall impact of the May 6, 2016 final rule on state pass-through payments, we provide only a qualitative discussion of the impact of this final rule on avoided transfers. Given the potential for avoided transfers, we believe this final rule is economically significant as defined by Executive Order 12866.

We received the following comment on the proposed overall impact and regulatory impact analysis.

Comment: One commenter stated concern that we did not provide, in the proposed rule and to the public, a careful and transparent analysis of the anticipated quantitative consequences

of this economically significant regulatory action. This commenter recommended that we withdraw the proposed rule until such a quantitative analysis is completed.

Response: The commenter did not provide any substantive information with which to conduct such an analysis. As stated in the proposed rule, it is difficult for us to conduct a detailed quantitative analysis given the considerable uncertainty and lack of data discussed above; however we continue to believe that without this final rulemaking, states will continue to ramp-up pass-through payments in ways that are not consistent with the pass-through payment transition periods established in the May 6, 2016 final rule. We solicited and received no substantive suggestions on doing such an analysis. Since we cannot produce a detailed quantitative analysis, we have developed a qualitative discussion for this final rule.

After considering the comments, we are finalizing the regulatory impact analysis as proposed without revision.

C. Anticipated Effects

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Small entities are those entities, such as health care providers, having revenues between \$7.5 million and \$38.5 million in any 1 year. Individuals and states are not included in the definition of a small entity. We do not believe that this final rule will have a significant economic impact on a substantial number of small businesses.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 100 beds. We do not anticipate that the provisions in this final rule will have a substantial economic impact on small rural hospitals. We are not preparing analysis for either the RFA or section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural

hospitals in comparison to total revenues of these entities.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that is approximately \$146 million. This final rule does not mandate any costs (beyond this threshold) resulting from (A) imposing enforceable duties on state, local, or tribal governments, or on the private sector, or (B) increasing the stringency of conditions in, or decreasing the funding of, state, local, or tribal governments under entitlement programs.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a rule that imposes substantial direct requirements or costs on state and local governments, preempts state law, or otherwise has federalism implications. Since this final rule does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable. In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

We did not receive comments on the proposed anticipated effects for the revisions to § 438.6(d) and finalize our analysis in this rule.

D. Alternatives Considered

During the development of this final rule, we assessed all regulatory alternatives and discussed in the preamble of the proposed rule a few alternatives that we considered. First, in discussing our revisions to paragraphs (d)(1)(i) and (ii) in the proposed rule, we considered linking eligibility for the transition period to those states with pass-through payments for hospitals, physicians, or nursing facilities that were in approved (not just submitted for our review and approval) managed care contract(s) and rate certification(s) only for the rating period covering July 5, 2016. We noted in the proposed rule that we believed such an approach was not administratively feasible for states or us because it did not recognize the nuances of the timing and approval processes. We believe our approach under this final rule provides the appropriate parameters and conditions for pass-through payments in managed care contract(s) and rate certification(s) during the transition period.

Second, in discussing our revisions to paragraphs (d)(3) and (d)(5) in the proposed rule, we described that the

aggregate amounts of pass-through payments in each provider category would be used to set applicable limits for the provider type during the transition period, without regard to the specific provider(s) that received a pass-through payment. We considered proposing that the state should be limited by amount and recipient during

the transition period; however, this narrower policy would be more limiting than originally intended under the May 6, 2016 final rule when the pass-through payment transition periods were finalized. We requested comment on our alternative proposals.

We did not receive comments on the alternative proposals to revise § 438.6(d)

and, as noted above, are finalizing the proposed amendments to § 438.6(d).

E. Accounting Statement

As discussed in this RIA, the benefits, costs, and transfers of this final regulation are identified in table 1 as qualitative impacts only.

TABLE 1—ACCOUNTING STATEMENT

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate	Period covered	
Benefits							
Non-Quantified	Benefits include: Consistency with the statutory requirements in section 1903(m) of the Act and regulations for actuarially sound capitation rates; improved transparency in rate development processes; greater incentives for payment approaches that are based on the utilization and delivery of services to enrollees covered under the contract, or the quality and outcomes of such services; and improved support for delivery system reform that is focused on improved care and quality for Medicaid beneficiaries.						
Costs							
Non-Quantified	Costs to state or federal governments should be negligible.						
Transfers							
Non-Quantified	Relative to the current baseline, this final rule builds on the May 6, 2016 final rule and may further reduce the likelihood of increases in or the development of new pass-through payments, which could reduce state and federal government transfers to hospitals, physicians, and nursing facilities. Given the potential for avoided transfers, we believe this final rule is economically significant as defined by Executive Order 12866.						

List of Subjects in 42 CFR Part 438

Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 438—MANAGED CARE

■ 1. The authority citation for part 438 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 438.6 is amended by revising paragraphs (d)(1), (3), and (5) to read as follows:

§ 438.6 Special contract provisions related to payment.

* * * * *

(d) * * * (1) *General rule.* States may continue to require MCOs, PIHPs, and PAHPs to make pass-through payments (as defined in paragraph (a) of this section) to network providers that are hospitals, physicians, or nursing facilities under the contract, provided the requirements of this paragraph (d) are met. States may not require MCOs, PIHPs, and PAHPs to make pass-through payments other than those permitted under this paragraph (d).

(i) In order to use a transition period described in this paragraph (d), a State must demonstrate that it had pass-through payments for hospitals, physicians, or nursing facilities in:

(A) Managed care contract(s) and rate certification(s) for the rating period that includes July 5, 2016, and were submitted for CMS review and approval on or before July 5, 2016; or

(B) If the managed care contract(s) and rate certification(s) for the rating period that includes July 5, 2016 had not been submitted to CMS on or before July 5, 2016, the managed care contract(s) and rate certification(s) for a rating period before July 5, 2016 that had been most recently submitted for CMS review and approval as of July 5, 2016.

(ii) CMS will not approve a retroactive adjustment or amendment, notwithstanding the adjustments to the base amount permitted in paragraph (d)(2) of this section, to managed care contract(s) and rate certification(s) to add new pass-through payments or increase existing pass-through payments defined in paragraph (a) of this section.

* * * * *

(3) *Schedule for the reduction of the base amount of pass-through payments for hospitals under the MCO, PIHP, or PAHP contract and maximum amount of permitted pass-through payments for*

each year of the transition period. For States that meet the requirement in paragraph (d)(1)(i) of this section, pass-through payments for hospitals may continue to be required under the contract but must be phased out no longer than on the 10-year schedule, beginning with rating periods for contract(s) that start on or after July 1, 2017. For rating periods for contract(s) beginning on or after July 1, 2027, the State cannot require pass-through payments for hospitals under a MCO, PIHP, or PAHP contract. Until July 1, 2027, the total dollar amount of pass-through payments to hospitals may not exceed the lesser of:

(i) A percentage of the base amount, beginning with 100 percent for rating periods for contract(s) beginning on or after July 1, 2017, and decreasing by 10 percentage points each successive year; or

(ii) The total dollar amount of pass-through payments to hospitals identified in the managed care contract(s) and rate certification(s) used to meet the requirement of paragraph (d)(1)(i) of this section.

* * * * *

(5) *Pass-through payments to physicians or nursing facilities.* For States that meet the requirement in paragraph (d)(1)(i) of this section, rating

periods for contract(s) beginning on or after July 1, 2017 through rating periods for contract(s) beginning on or after July 1, 2021, may continue to require pass-through payments to physicians or nursing facilities under the MCO, PIHP, or PAHP contract of no more than the total dollar amount of pass-through payments to physicians or nursing facilities, respectively, identified in the managed care contract(s) and rate certification(s) used to meet the requirement of paragraph (d)(1)(i) of this section. For rating periods for contract(s) beginning on or after July 1, 2022, the State cannot require pass-through payments for physicians or nursing facilities under a MCO, PIHP, or PAHP contract.

Dated: January 3, 2017.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: January 10, 2017.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2017-00916 Filed 1-17-17; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 160811726-6999-02]

RIN 0648-XE809

Pacific Island Fisheries; 2016–17 Annual Catch Limit and Accountability Measures; Main Hawaiian Islands Deep 7 Bottomfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final specifications.

SUMMARY: In this final rule, NMFS specifies an annual catch limit (ACL) of 318,000 lb of Deep 7 bottomfish in the main Hawaiian Islands (MHI) for the 2016–17 fishing year. As an accountability measure (AM), if the ACL is projected to be reached, NMFS would close the commercial and non-commercial fisheries for MHI Deep 7 bottomfish for the remainder of the fishing year. The ACL and AM support the long-term sustainability of Hawaii bottomfish.

DATES: The final specifications are effective from February 17, 2017, through August 31, 2017.

ADDRESSES: The environmental assessment and finding of no significant impact for this action, identified as NOAA–NMFS–2016–0112, is available at www.regulations.gov, or from Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd. Bldg. 176, Honolulu, HI 96818.

The Fishery Ecosystem Plan for the Hawaiian Archipelago is available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, or www.wpcouncil.org.

FOR FURTHER INFORMATION CONTACT: Sarah Ellgen, NMFS PIR Sustainable Fisheries, 808–725–5173.

SUPPLEMENTARY INFORMATION: Through this action, NMFS is specifying an ACL of 318,000 lb of Deep 7 bottomfish in the MHI for the 2016–17 fishing year. The fishing year began September 1, 2016, and ends on August 31, 2017. The Council recommended this ACL, based on the best available scientific, commercial, and other information, taking into account the associated risk of overfishing. This ACL is 8,000 lb lower than the ACL that NMFS specified for the 2015–16 fishing year, and is the second annual reduction in a phased approach to lower the ACL incrementally over three years, as recommended by the Council.

The MHI Management Subarea is the portion of U.S. Exclusive Economic Zone around the Hawaiian Archipelago east of 161°20' W. The Deep 7 bottomfish are onaga (*Etelis coruscans*), ehu (*E. carbunculus*), gindai (*Pristipomoides zonatus*), kalekale (*P. sieboldii*), opakapaka (*P. filamentosus*), lehi (*Aphareus rutilans*), and hapuupuu (*Hyporthodus quernus*).

The MHI bottomfish fishing year started September 1, 2016, and is currently open. NMFS will monitor the fishery and, if we project that the fishery will reach the ACL before August 31, 2017, we would, as an AM authorized in 50 CFR 665.4(f), close the non-commercial and commercial fisheries for Deep 7 bottomfish in Federal waters through August 31, 2017. During a fishery closure for Deep 7 bottomfish, no person may fish for, possess, or sell any of these fish in the MHI Management Subarea. There is no prohibition on fishing for, possessing, or selling other (*non-Deep 7*) bottomfish during such a closure. All other management measures continue to apply in the MHI bottomfish fishery. If NMFS and the Council determine that the final 2016–17 Deep 7 bottomfish catch exceeds the ACL, NMFS would

reduce the Deep 7 bottomfish ACL for 2017–18 by the amount of the overage.

You may review additional background information on this action in the preamble to the proposed specifications (81 FR 75803; November 1, 2016); we do not repeat that information here.

Comments and Responses

The comment period for the proposed specifications ended on November 16, 2016. NMFS received comments from four individuals, and responds, as follows:

Comment 1: The 2016–2017 ACL serves as a precautionary measure for bottomfish stocks that supports healthy fisheries. The proposed ACL is greater than recent annual catches, so it would not significantly inconvenience fishermen.

Response: NMFS agrees. We assessed the potential beneficial and adverse impacts of the ACL and AM on the environment, including the fishery itself, and concluded that the action is necessary to prevent overfishing while supporting the long-term sustainability of Hawaii bottomfish.

Comment 2: We need to punish anyone who harms the ocean and any of our waters.

Response: While the comment is not specific to the proposed action, violations of Federal fishery regulations are subject to penalties pursuant to Section 308 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Comment 3: Legislation is needed to reduce overfishing and to protect marine life in Hawaiian waters.

Response: Federal laws and regulations already protect Hawaii fish stocks from overfishing pressure. The Magnuson-Stevens Act includes requirements for ACLs and AMs and other provisions for preventing and ending overfishing and rebuilding fisheries. Unless exempted by law, all fisheries in Federal waters must have ACLs and AMs. Fishery scientists and managers use the best scientific information available, including catch, fishing effort, biological information, etc., to determine the maximum catch that would not harm the conservation needs of the fish stock, and ACLs must be set at or below the levels that account for uncertainty about the fishery information.

AMs are management controls to prevent ACLs from being exceeded, and to correct or mitigate overages when they occur. For the MHI bottomfish fishery, one AM would close the fishery before the scheduled end of the fishing year to prevent exceeding the ACL, and

another AM would reduce next year's ACL by the amount of any overage. These measures help to ensure sustainable harvests.

The reader may find more information on fishing regulations in Hawaii at http://www.fpir.noaa.gov/SFD/SFD_regs_index.html.

Comment 4: The MHI Deep 7 bottomfish stock assessment does not account for fish biomass within the State of Hawaii Bottomfish Restricted Fishing Areas (BRFA), marine protected areas (MPA), and the Kahoolawe Island Reserve.

Response: The 2011 MHI Deep 7 bottomfish stock assessment, as updated with three additional years of data, treats the MHI as a single fishing area and calculates the biomass required to produce the catch and catch per unit effort (CPUE) according to commercial fishery data. The assessment does not make a distinction between biomass inside and outside of protected areas, such as the BRFA, MPA, and Kahoolawe Island Reserve. Nevertheless, the 2011 MHI Deep 7 bottomfish stock assessment, as updated, represents the best scientific information available for this stock complex.

NMFS and the Council are working with the State and the fishing industry to obtain accurate information needed for stock assessments, including data on bottomfish distribution, relative abundance, stock structure, size, and age. Current efforts include working with bottomfish fishermen to conduct scientific surveys using standardized fishing gears and underwater video cameras.

Although stock assessments will likely continue to treat the MHI as a single fishing area, both the State and NMFS continue to try to quantify the effects of the BRFA, MPA, and Kahoolawe Island Reserve on unfished biomass for the MHI Deep 7 bottomfish stock. In Fall 2016, with the cooperation of the State of Hawaii and help from cooperative research fishing partners, NMFS sampled bottomfish inside these protected areas as part of a scientific

survey. NMFS will take into account information from this survey in future stock assessments, as appropriate.

Comment 5: Fishing prohibitions in BFRA and MPA result in more concentrated fishing in unrestricted areas, leading to decreased fish size and lower CPUE.

Response: Because the State catch reporting statistical area boundaries do not match the BRFA boundaries, it is not currently possible to determine if concentrated fishing that may be occurring in unrestricted areas could lead to decreased fish size and lower CPUE in those unrestricted areas. NMFS continues to evaluate the effect of the protected areas on the MHI bottomfish stock (see response to *Comment 4*).

Comment 6: The recent El Niño and unpredictable winds and seas have adversely affected the 2015–16 and 2016–17 MHI Deep 7 fishing seasons, resulting in uncaught fish. How would NMFS consider uncaught biomass in future ACLs?

Response: Councils recommend ACLs in consideration of all relevant information and scientific recommendations concerning stock status. The newly revised National Standard 1 guidelines (81 FR 71858, October 18, 2016) allow councils to develop an acceptable biological catch control rule that would allow for changes in the catch limit to account for the carry-over of some of the unused portion of the ACL from one year to the next, in certain circumstances. The 2016–17 ACL of 318,000 lb is the second annual reduction in a three-year phased approach to prevent overfishing, while supporting the long-term sustainability of Hawaii bottomfish. Therefore, in developing future ACL recommendations, the Council could evaluate a carry-over provision for MHI Deep 7 bottomfish, if the Council determines that such a provision is appropriate and desirable.

Comment 7: The MHI Deep 7 bottomfish fishery is experiencing ongoing problems with shark predation. How is NMFS addressing this issue?

Response: This comment is beyond the scope of the ACL and AM specifications, and NMFS is not currently studying shark predation in the bottomfish fishery. Interested persons may inquire about the availability of fisheries research project funding through, among other sources, the Saltonstall-Kennedy Grant Program (information at http://www.fisheries.noaa.gov/mb/financial_services/skhome.htm).

Changes From the Proposed Specifications

There are no changes in the final specifications from the proposed specifications.

Classification

The Regional Administrator, NMFS PIR, determined that this action is necessary for the conservation and management of MHI Deep 7 bottomfish, and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed specification stage that this action would not have a significant economic impact on a substantial number of small entities. NMFS published the factual basis for the certification in the proposed specifications, and does not repeat it here. NMFS did not receive comments regarding this certification. As a result, a final regulatory flexibility analysis is not required, and one was not prepared.

This action is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 9, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2017–00622 Filed 1–17–17; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 82, No. 11

Wednesday, January 18, 2017

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–16–0052; NOP–16–03]

RIN 0581–AD52

National Organic Program (NOP); Sunset 2017 Amendments to the National List

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would address recommendations submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) following their October 2015 meeting. These recommendations pertain to the 2017 Sunset Review of substances on the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List). Consistent with the recommendations from the NOSB, this proposed rule would remove eleven substances from the National List for use in organic production and handling.

DATES: Comments must be received by March 20, 2017.

ADDRESSES: Interested persons may comment on the proposed rule using the following procedures:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Robert Pooler, Standards Division, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave. SW., Room 2642–So., Ag Stop 0268, Washington, DC 20250–0268.

Instructions: All submissions received must include the docket number AMS–NOP–16–0052; NOP–16–03, and/or Regulatory Information Number (RIN) 0581–AD52 for this rulemaking. You should clearly indicate the topic and section number of this proposed rule to which your comment refers. You should clearly indicate whether you support

the action being proposed for the substances in this proposed rule. You should clearly indicate the reason(s) for your position. You should also supply information on alternative management practices, where applicable, that support alternatives to the proposed action. You should also offer any recommended language change(s) that would be appropriate to your position. Please include relevant information and data to support your position (e.g. scientific, environmental, manufacturing, industry, impact information, etc.). Only relevant material supporting your position should be submitted. All comments received and any relevant background documents will be posted without change to <http://www.regulations.gov>.

Document: For access to the document and to read background documents or comments received, go to <http://www.regulations.gov>. Comments submitted in response to this proposed rule will also be available for viewing in person at USDA–AMS, National Organic Program, Room 2642—South Building, 1400 Independence Ave. SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT:

Robert Pooler, Standards Division, email: bob.pooler@ams.usda.gov, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

The National Organic Program (NOP) is authorized by the Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501–6522). The USDA Agricultural Marketing Service (AMS) administers the NOP. Final regulations implementing the NOP, also referred to as the USDA organic regulations, were published December 21, 2000 (65 FR 80548), and became effective on October 21, 2002. Through these regulations, the AMS oversees national standards for the production, handling, and labeling of organically produced agricultural products. Since becoming effective, the USDA organic

regulations have been frequently amended, mostly for changes to the National List in 7 CFR 205.601–205.606.

This National List identifies the synthetic substances that may be used and the nonsynthetic substances that may not be used in organic production. The National List also identifies synthetic, nonsynthetic nonagricultural, and nonorganic agricultural substances that may be used in organic handling. The OFPA and the USDA organic regulations, as indicated in § 205.105, specifically prohibit the use of any synthetic substance in organic production and handling unless the synthetic substance is on the National List. Section 205.105 also requires that any nonorganic agricultural substance and any nonsynthetic nonagricultural substance used in organic handling appear on the National List.

As stipulated by the OFPA, recommendations to propose amendment of the National List are developed by the NOSB, operating in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2 *et seq.*), to assist in the evaluation of substances to be used or not used in organic production and handling, and to advise the Secretary on the USDA organic regulations. The OFPA also requires a sunset review of all substances by the NOSB included on the National List within five years of their addition to or renewal on the list. If a listed substance is not reviewed by the NOSB and renewed by the USDA within the five-year period, its allowance or prohibition on the National List is no longer in effect. Under the authority of the OFPA, the Secretary can amend the National List through rulemaking based upon proposed amendments recommended by the NOSB.

The NOSB's review of existing exemptions and prohibitions include the NOSB's evaluation of technical information, public comments, and supporting evidence that demonstrate whether the substance is: (a) Harmful to human health or the environment; (b) no longer necessary for organic production due to the availability of alternative wholly nonsynthetic substitute products or practices; or (c) inconsistent with organic farming and handling practices (7 U.S.C. 6517(c)).

In accordance with the sunset review process published in the **Federal Register** on September 16, 2013 (78 FR

61154), this proposed rule would amend the National List to reflect 2017 sunset review recommendations submitted to the Secretary by the NOSB on October 29, 2015, to amend the National List to remove eleven substances allowed as substances used in organic production or as ingredients in or on processed products labeled as “organic.” The exemptions of each substance appearing on the National List for use in organic production and handling are evaluated by the NOSB using the evaluation criteria specified in the OFPA (7 U.S.C. 6517–6518).

II. Overview of Proposed Amendments

Nonrenewals

At the completion of their 2017 sunset review of National List substances with five year review periods ending in 2017, the NOSB recommended the removal of eleven substances from the National List. During this sunset review, the NOSB determined that one substance exemption each in § 205.601(a), § 205.603(a), § 205.605(b) and eight substance exemptions in § 205.606 are no longer necessary for organic production or handling. AMS has reviewed and proposes to accept the eleven NOSB recommendations for removal. Based upon these NOSB recommendations, this action proposes to amend the National List to remove the exemptions for lignin sulfonate, furosemide, magnesium carbonate, Chia, dillweed oil, frozen galangal, inulin, frozen lemongrass, chipotle chile peppers, turkish bay leaves, and whey protein concentrate.

Lignin Sulfonate

The USDA organic regulations include an exemption on the National List for lignin sulfonate for use as a floating agent in postharvest handling at § 205.601(l)(1) as follows: Lignin sulfonate. In April 1995, lignin sulfonate was recommended by the NOSB for addition onto the National List as a plant or soil amendment for use as a chelating agent, dust suppressant, or floatation agent in organic crop production. AMS accepted this NOSB recommendation and included lignin sulfonate in the proposed rule and the final rule establishing the National Organic Program and the original National List that was published in the **Federal Register** on December 21, 2000 (65 FR 80548). Lignin sulfonate was included on the National List in § 205.601(j)(4) as a chelating agent, dust suppressant, or floatation agent, and in § 205.601(l)(1) as a floating agent in post-harvest handling. This proposed rule only addresses the listing of lignin

sulfonate in § 205.601(l)(1). As required by OFPA, the NOSB recommended the renewal of lignin sulfonate during the 2007 and 2012 sunset reviews which was renewed by the Secretary on October 16, 2007 (72 FR 58469) and June 6, 2012 (77 FR 33290).

Subsequently, the NOSB completed their 2017 sunset review of the exemption for lignin sulfonate at their October 2015 meeting. Two notices of the public meetings on the 2017 sunset review, with request for comments, were published in **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to notify the public that the lignin sulfonate exemption discussed in this proposed rule would expire on September 12, 2016, if not reviewed by the NOSB and renewed by the Secretary. During their 2017 sunset review deliberation, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS–NOP–15–0002 (April 2015 public meeting) and AMS–NOP–15–0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB’s recommendation on lignin sulfonate is available on the NOP Web site at <http://www.ams.usda.gov/nop>. During their sunset review of lignin sulfonate the NOSB considered two lignin sulfonate technical reports that were requested by and developed for the NOSB in 2011 and 2013. The latter technical report reviewed lignin sulfonate use in aquaculture production. Both technical reports are available for review in the petitioned substance database on the NOP Web site, <https://www.ams.usda.gov/rules-regulations/organic/national-list>.

Public comments received by the NOSB on lignin sulfonate in § 205.601(l)(1) indicated public support for removing lignin sulfonate as a floating agent in postharvest handling from the National List. Based upon these comments, the NOSB determined that the exemption for lignin sulfonate on the National List in § 205.601(l)(1) is no longer necessary or essential for organic postharvest handling. Subsequently, the NOSB recommended removal of lignin sulfonate from § 205.601(l)(1) from the National List at their October 2015 public meeting.

AMS accepts the NOSB’s recommendation on removing lignin sulfonate from the National List. This proposed rule would amend National

List § 205.601 by removing the substance exemption for lignin sulfonate listed in § 205.601(l)(1). This amendment is proposed to be effective on the current sunset date for lignin sulfonate, which is June 27, 2017.

Furosemide

The USDA organic regulations include an exemption on the National List for furosemide for use as medical treatment at § 205.603(a)(10) as follows: Furosemide (CAS #–54–31–9) in accordance with approved labeling; except that for use under 7 CFR part 205, the NOP requires a withdrawal period of at least two-times that required by the FDA. In December 2000, furosemide was petitioned for addition to § 205.603(a) for use as a medical treatment—a diuretic that reduces edema. In May 2003, the NOSB recommended adding furosemide to the National List in § 205.603(a). The NOSB included a restrictive annotation for twice the required FDA furosemide withdrawal time within their recommendation to add furosemide to the National List.

AMS accepted the NOSB’s recommendation and furosemide was added to the National List on December 12, 2007 (72 FR 70479). As required by OFPA, the NOSB recommended the renewal of furosemide during their 2012 sunset review. The Secretary accepted the NOSB’s recommendation and published a notice renewing the furosemide exemption on the National List on June 6, 2012 (77 FR 33290). Subsequently, the exemption for furosemide as included on the National List was considered during the NOSB’s 2017 sunset review. Two notices of the public meetings on the 2017 sunset review with request for comments were published in **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to notify the public that the furosemide exemption discussed in this proposed rule would expire on June 27, 2017, if not reviewed by the NOSB and renewed by the Secretary.

During their 2017 sunset review, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS–NOP–15–0002 (April 2015 public meeting) and AMS–NOP–15–0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB’s recommendation on

furosemide is available on the NOP Web site at <http://www.ams.usda.gov/nop>. During their sunset review of furosemide the NOSB considered a furosemide technical report that were requested by and developed for the NOSB in 2003. This technical report is available for review in the petitioned substance database on the NOP Web site, <https://www.ams.usda.gov/rules-regulations/organic/national-list>.

Public comments received by the NOSB on furosemide indicated alternatives to furosemide are available to organic livestock producers. Based upon these comments, the NOSB determined that the exemption for furosemide in § 205.603(a)(10) is no longer necessary or essential for organic livestock production. Subsequently, the NOSB recommended the removal of furosemide from § 205.603(a)(10) from the National List at their October 2015 public meeting.

AMS accepts the NOSB's recommendation on removing furosemide from the National List. This proposed rule would amend National List § 205.603 by removing the substance exemption for furosemide sulfonate listed in § 205.603(a)(10). This amendment is proposed to be effective on the current sunset date for furosemide, which is June 27, 2017.

Magnesium Carbonate

The USDA organic regulations include an exemption on the National List for magnesium carbonate as a synthetic ingredient for use in or on processed products at § 205.605(b) as follows: Magnesium carbonate—for use only in agricultural products labeled “made with organic (specified ingredients or food group(s)),” prohibited in agricultural products labeled “organic.” In September 1996, magnesium carbonate was petitioned for addition to the National List under § 205.605(b). The NOSB recommended that magnesium carbonate be added to the National List under § 205.605(b) with an annotation limiting its use to products labeled “made with organic (specified ingredients or food group(s))”. AMS accepted this recommendation and included magnesium carbonate in the proposed and the final rule establishing the National Organic Program and the original National List that was published in the **Federal Register** on December 21, 2001 (65 FR 80548). In this final rule, magnesium carbonate was included on the National List under § 205.605(b)(16).

As required by OFPA, the NOSB recommended the renewal of magnesium carbonate during the 2007

and 2012 sunset reviews, which were renewed by the Secretary on October 16, 2007 (72 FR 58469) and June 6, 2012 (77 FR 33290). The NOSB completed their 2017 sunset review of the exemption for magnesium carbonate at their October 2015 meeting. Two notices of the public meetings on the 2017 sunset review with request for comments were published in the **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to alert the public that the exemption for magnesium carbonate would expire on June 27, 2017 if not reviewed and recommended by the NOSB and renewed by the Secretary. During their 2017 sunset review, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS–NOP–15–0002 (April 2015 public meeting) and AMS–NOP–15–0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on magnesium carbonate is available on the NOP Web site at <http://www.ams.usda.gov/nop>.

Public comments received by the NOSB regarding magnesium carbonate under § 205.605 (b) indicated that the material is not a necessity and recommended its removal from the National List. Based on the review of the material and the public comments received, the NOSB determined that magnesium carbonate is no longer necessary for organic production. As a result, the NOSB recommended the removal of magnesium carbonate from the National List at their October 2015 meeting.

AMS accepts the NOSB's recommendation to remove magnesium carbonate from the National List. This proposed rule would amend National List § 205.605 by removing the substance exemption for magnesium carbonate at § 205.605 (b). This amendment is proposed to be effective on the current sunset date for magnesium carbonate, which is June 27, 2017.

Chia

The USDA organic regulations include an exemption on the National List for Chia for use as an ingredient in or on processed products labeled as “organic” at § 205.606 (c) as follows: Chia (*Salvia hispanica* L.). In January 2007, Chia was petitioned for addition to § 205.606 as an ingredient due to the

lack of availability of certified organic Chia. In April 2007, the NOSB recommended that Chia be added to the National List under § 205.606. AMS accepted this recommendation and included Chia in the proposed rule and the final rule amending the National List that was published in the **Federal Register** on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of Chia during the 2012 sunset review, which was renewed by the Secretary on June 6, 2012 (77 FR 33290). The NOSB completed their 2017 sunset review of the exemption for Chia at their October 2015 meeting. Two notices of the public meetings on the 2017 sunset review with request for comments were published in the **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to alert the public that the exemption for Chia would expire on June 27, 2017 if not reviewed and recommended by the NOSB and renewed by the Secretary. During their 2017 sunset review deliberation, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <http://www.regulations.gov> by searching for the document ID numbers: AMS–NOP–15–0002 (April 2015 public meeting) and AMS–NOP–15–0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on Chia is available on the NOP Web site at <http://www.ams.usda.gov/nop>.

Regarding Chia, the NOSB requested information from the public related to (1) commercial demand, (2) commercial availability, (3) alternatives, and (4) necessity and use. Several comments from a cross-section of the organic community were received in support of delisting Chia noting its wide commercial availability. No specific comments received supported relisting or addressed commercial unavailability of Chia. Based on the review of Chia and the public comments received, the NOSB determined that this material is now widely available from organic sources. Subsequently, the NOSB recommended the removal of Chia from § 205.606 of the National List at their October 2015 meeting. AMS accepts the NOSB's recommendation to remove Chia from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for Chia at

§ 205.606 (c). This amendment is proposed to be effective on the current sunset date for Chia, which is June 27, 2017.

Dillweed Oil

The USDA organic regulations include an exemption on the National List for dillweed oil for use as an ingredient in or on processed products labeled as “organic” at § 205.606 (e) as follows: Dillweed oil (CAS #458–37–7). In December 2006, dillweed oil was petitioned for addition to § 205.606. In April 2007, the NOSB recommended that dillweed oil be added to the National List under § 205.606. AMS accepted this recommendation and included dillweed oil in the proposed rule and the final rule amending the National List that was published in the **Federal Register** on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of dillweed oil during the 2012 sunset review, which was renewed by the Secretary on June 6, 2012 (77 FR 33290). The NOSB completed their 2017 sunset review of the exemption for dillweed oil at their October 2015 meeting. Two notices of the public meetings on the 2017 sunset review with request for comments were published in the **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to alert the public that the exemption for dillweed oil would expire on June 27, 2017 if not reviewed and recommended by the NOSB and renewed by the Secretary. During their 2017 sunset review, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <http://www.regulations.gov> by searching for the document ID numbers: AMS–NOP–15–0002 (April 2015 public meeting) and AMS–NOP–15–0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB’s recommendation on dillweed oil is available on the NOP Web site at <http://www.ams.usda.gov/nop>.

In the review of dillweed oil, the NOSB requested information from the public related to (1) commercial demand, (2) commercial availability, (3) alternatives, and (4) necessity and use. No specific comments were received that supported relisting or addressed commercial unavailability of dillweed oil. Based on the NOSB’s review of dillweed oil and the public comments received, the NOSB determined that this substance is now available from organic

sources. Subsequently, the NOSB recommended the removal of dillweed oil from § 205.606 of the National List at their October 2015 meeting. AMS accepts the NOSB’s recommendation to remove dillweed oil from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for dillweed oil at § 205.606 (e). This amendment is proposed to be effective on the current sunset date for dillweed oil, which is June 27, 2017.

Galangal, Frozen

The USDA organic regulations include an exemption on the National List for galangal for use as an ingredient in or on processed products labeled as “organic” at § 205.606 (h) as follows: Galangal (frozen). In November 2006, galangal was petitioned for addition to § 205.606. In April 2007, the NOSB recommended that galangal be added to the National List under § 205.606. AMS accepted this recommendation and included galangal in the proposed rule and the final rule amending the National List that was published in the **Federal Register** on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of galangal during the 2012 sunset review, which was renewed by the Secretary on June 6, 2012 (77 FR 33290). The NOSB completed their 2017 sunset review of the exemption for galangal at their October 2015 meeting. Two notices of the public meetings on the 2017 sunset review with request for comments were published in the **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to alert the public that the exemption for galangal would expire on June 27, 2017 if not reviewed and recommended by the NOSB and renewed by the Secretary. During their 2017 sunset review deliberation, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <http://www.regulations.gov> by searching for the document ID numbers: AMS–NOP–15–0002 (April 2015 public meeting) and AMS–NOP–15–0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB’s recommendation on galangal is available on the NOP Web site at <http://www.ams.usda.gov/nop>.

In its review of galangal, the NOSB requested information from the public related to (1) commercial demand, (2) commercial availability, (3) alternatives,

and (4) necessity and use. No specific comments were received that supported relisting or addressed commercial unavailability of frozen galangal. Based on the NOSB’s review of galangal and the public comments received, the NOSB determined that this material is now available from organic sources. Subsequently, the NOSB recommended the removal of galangal from § 205.606 of the National List at their October 2015 meeting. AMS accepts the NOSB’s recommendation to remove galangal from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for galangal at § 205.606 (h). This amendment is proposed to be effective on the current sunset date for galangal, which is June 27, 2017.

Inulin—Oligofructose Enriched

The USDA organic regulations include an exemption on the National List for inulin—oligofructose enriched, allowed as an ingredient in or on processed products labeled as “organic” in § 205.606 (i) as follows: inulin—oligofructose enriched (CAS # 9005–80–5). In January 2007, inulin was petitioned for addition to § 205.606 for use as an ingredient in or on organic processed products. In April 2007, the NOSB recommended adding inulin—oligofructose enriched to the National List in § 205.606.

AMS accepted the NOSB’s recommendation and inulin—oligofructose enriched was added to the National List on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of inulin—oligofructose enriched during their 2012 sunset review. The Secretary accepted the NOSB’s recommendation and published a notice renewing the inulin—oligofructose enriched exemption on the National List on June 6, 2012 (77 FR 33290). Subsequently, the exemption for inulin—oligofructose enriched on the National List was considered during the NOSB’s 2017 sunset review. Two notices of the public meetings on the 2017 sunset review with request for comments were published in **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to notify the public that the inulin—oligofructose enriched exemption discussed in this proposed rule would expire on June 27, 2017, if not reviewed by the NOSB and renewed by the Secretary.

During their 2017 sunset review, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review.

These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS-NOP-15-0002 (April 2015 public meeting) and AMS-NOP-15-0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on inulin—oligofructose enriched is available on the NOP Web site at <http://www.ams.usda.gov/nop>. During their sunset review of inulin—oligofructose enriched the NOSB considered an inulin—oligofructose enriched technical report that was requested by and developed for the NOSB in 2015. This technical report is available for review in the petitioned substance database on the NOP Web site, <https://www.ams.usda.gov/rules-regulations/organic/national-list>.

Public comments on inulin—oligofructose enriched received by the NOSB during their 2017 Sunset review indicated that organic inulin—oligofructose enriched sources are available to organic processors. Based upon these comments, the NOSB determined that the exemption for inulin—oligofructose enriched in § 205.606(l) is no longer necessary or essential for organic handling/processing. From this determination, the NOSB recommended the removal of inulin—oligofructose enriched from § 205.603(l) from the National List at their October 2015 public meeting. AMS accepts the NOSB's recommendation on removing inulin—oligofructose enriched from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for inulin—oligofructose enriched as listed in § 205.606(l). This amendment is proposed to be effective on the current sunset date for inulin—oligofructose enriched, which is June 27, 2017.

Lemon Grass, Frozen

The USDA organic regulations include an exemption on the National List for lemon grass, allowed as an ingredient in or on processed products labeled as “organic” in § 205.606(p) as follows: lemon grass, frozen. In November 2006, lemon grass was petitioned for addition onto § 205.606 for use as an ingredient in or on organic processed products. In March 2007, the NOSB recommended adding lemon grass to the National List in § 205.606.

AMS accepted the NOSB's recommendation and lemon grass was added to the National List on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of lemon grass during their

2012 sunset review. The Secretary accepted the NOSB's recommendation and published a notice renewing the lemon grass exemption on the National List on June 6, 2012 (77 FR 33290). Subsequently, the exemption for lemon grass was considered during the NOSB's 2017 sunset review. Two notices of the public meetings on the 2017 sunset review with request for comments were published in **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to notify the public that the lemon grass exemption discussed in this proposed rule would expire on June 27, 2017, if not reviewed by the NOSB and renewed by the Secretary.

During their 2017 sunset review, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS-NOP-15-0002 (April 2015 public meeting) and AMS-NOP-15-0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on lemon grass is available on the NOP Web site at <http://www.ams.usda.gov/nop>. Since the NOSB has not requested the development of a technical review on lemon grass, either for the original lemon grass petition process or for sunset reviews, the NOSB did not review a technical report on lemon grass during their 2017 sunset review.

Public comments on lemon grass received by the NOSB during their 2017 Sunset review indicated that sources of organic lemon grass are available to organic processors. Based upon these comments, the NOSB determined that the exemption for lemon grass in § 205.606(p) is no longer necessary or essential for organic handling/processing. From this determination, the NOSB recommended the removal of lemon grass from § 205.606(p) from the National List at their October 2015 public meeting. AMS accepts the NOSB's recommendation on removing lemon grass from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for lemon grass as listed in § 205.606(p). This amendment is proposed to be effective on the current sunset date for lemon grass, which is June 27, 2017.

Peppers (Chipotle Chile)

The USDA organic regulations include an exemption on the National

List for chipotle chile peppers for use as an ingredient in or on processed products labeled as “organic” at § 205.606 (s) as follows: Peppers (Chipotle chile). Chipotle chile peppers were petitioned for addition to § 205.606 in November 2006 and January 2007. In April 2007, the NOSB recommended that chipotle chile peppers be added to the National List under § 205.606. AMS accepted this recommendation and included chipotle chile peppers in the proposed rule and the final rule amending the National List that was published in the **Federal Register** on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of chipotle chile peppers during the 2012 sunset review, which was renewed by the Secretary on June 6, 2012 (77 FR 33290). The NOSB completed their 2017 sunset review of the exemption for chipotle chile peppers at their October 2015 meeting. Two notices of the public meetings on the 2017 sunset review with request for comments were published in the **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to alert the public that the exemption for chipotle chile peppers would expire on June 27, 2017 if not reviewed and recommended by the NOSB and renewed by the Secretary. During their 2017 sunset review deliberation, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <http://www.regulations.gov> by searching for the document ID numbers: AMS-NOP-15-0002 (April 2015 public meeting) and AMS-NOP-15-0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on chipotle chile peppers is available on the NOP Web site at <http://www.ams.usda.gov/nop>.

Regarding chipotle chile, the NOSB requested information from the public related to (1) commercial demand, (2) commercial availability, (3) alternatives, and (4) necessity and use. Several comments from a cross-section of the organic community were received in support of delisting chipotle chiles noting commercial availability. No specific comments received supported relisting or addressed commercial unavailability of chipotle chiles. Based on the NOSB's review of chipotle chile peppers and the public comments received, the NOSB determined that this

material is now available from organic sources. Subsequently, the NOSB recommended the removal of chipotle chile peppers from § 205.606 of the National List at their October 2015 meeting. AMS accepts the NOSB's recommendation to remove chipotle chile peppers from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for chipotle chile peppers at § 205.606 (s). This amendment is proposed to be effective on the current sunset date for chipotle chile peppers, which is June 27, 2017.

Turkish Bay Leaves

The USDA organic regulations include an exemption on the National List for Turkish bay leaves, allowed as an ingredient in or on processed products labeled as "organic" in § 205.606(w) as follows: Turkish bay leaves. In November 2006, Turkish bay leaves was petitioned for addition to § 205.606 for use as an ingredient in or on organic processed products. In April 2007, the NOSB recommended adding Turkish bay leaves to the National List in § 205.606. AMS accepted the NOSB's recommendation and Turkish bay leaves was added to the National List on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of Turkish bay leaves during their 2012 sunset review. The Secretary accepted the NOSB's recommendation and published a notice renewing the Turkish bay leaves exemption on the National List on June 6, 2012 (77 FR 33290). Subsequently, the exemption for Turkish bay leaves on the National List was considered during the NOSB's 2017 sunset review. Two notices of the public meetings on the 2017 sunset review with request for comments were published in **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to notify the public that the Turkish bay leaves exemption discussed in this proposed rule would expire on June 27, 2017, if not reviewed by the NOSB and renewed by the Secretary.

During their 2017 sunset review, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS-NOP-15-0002 (April 2015 public meeting) and AMS-NOP-15-0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on

Turkish bay leaves is available on the NOP Web site at <http://www.ams.usda.gov/nop>. During their sunset review of Turkish bay leaves the NOSB did not review a technical report on Turkish bay leaves since the NOSB has not requested the development of a Turkish bay leaves technical report for the original petition review or any subsequent sunset reviews.

Public comments on Turkish bay leaves received by the NOSB during their 2017 Sunset review indicated that organic Turkish bay leaves sources are available to organic handlers/processors. The original petitioner of Turkish bay leaves also commented they now use organic Turkish bay leaves for their products. Based upon these comments, the NOSB determined that the exemption for Turkish bay leaves in § 205.606(w) is no longer necessary or essential for organic handling/processing. From this determination, the NOSB recommended the removal of Turkish bay leaves from § 205.606(w) from the National List at their October 2015 public meeting. AMS accepts the NOSB's recommendation on removing Turkish bay leaves from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for Turkish bay leaves listed in § 205.606(w). This amendment is proposed to be effective on the current sunset date for Turkish bay leaves, which is June 27, 2017.

Whey Protein Concentrate

The USDA organic regulations include an exemption on the National List for whey protein concentrate, allowed as an ingredient in or on processed products labeled as "organic" in § 205.606(y) as follows: whey protein concentrate. In February 2007, whey protein concentrate was petitioned for addition to § 205.606 for use as an ingredient in or on organic processed products. In April 2007, the NOSB recommended adding whey protein concentrate to the National List in § 205.606. AMS accepted the NOSB's recommendation and whey protein concentrate was added to the National List on June 27, 2007 (72 FR 35137). As required by OFPA, the NOSB recommended the renewal of whey protein concentrate during their 2012 sunset review. The Secretary accepted the NOSB's recommendation and published a notice renewing the whey protein concentrate exemption on the National List on June 6, 2012 (77 FR 33290). Subsequently, the exemption for whey protein concentrate on the National List was considered during the NOSB's 2017 sunset review. Two notices of the public meetings on the

2017 sunset review with request for comments were published in **Federal Register** on March 12, 2015 (80 FR 12975) and September 8, 2015 (80 FR 53759). The purpose of these notices was to notify the public that the whey protein concentrate exemption discussed in this proposed rule would expire on June 27, 2017, if not reviewed by the NOSB and renewed by the Secretary.

During their 2017 sunset review deliberation, the NOSB considered written comments received prior to and during the public meetings on all substance exemptions included in the 2017 sunset review. These written comments can be viewed at <https://www.regulations.gov> by searching for the document ID numbers: AMS-NOP-15-0002 (April 2015 public meeting) and AMS-NOP-15-0037 (October 2015 public meeting). The NOSB also considered oral comments received during these public meetings. The NOSB's recommendation on whey protein concentrate is available on the NOP Web site at <http://www.ams.usda.gov/nop>. During their sunset review of whey protein concentrate the NOSB considered a whey protein concentrate technical report that were requested by and developed for the NOSB in 2015. This technical report is available for review in the petitioned substance database on the NOP Web site, <https://www.ams.usda.gov/rules-regulations/organic/national-list>.

Public comments on whey protein concentrate received by the NOSB during their 2017 Sunset review indicated that organic whey protein concentrate sources are available to organic processors. Based upon these comments, the NOSB determined that the exemption for whey protein concentrate in § 205.606(y) is no longer necessary or essential for organic handling/processing. From this determination, the NOSB recommended the removal of whey protein concentrate from § 205.606(y) from the National List at their October 2015 public meeting. AMS accepts the NOSB's recommendation on removing whey protein concentrate from the National List. This proposed rule would amend National List § 205.606 by removing the substance exemption for whey protein concentrate listed in § 205.606(y). This amendment is proposed to be effective on the current sunset date for whey protein concentrate, which is June 27, 2017.

III. Related Documents

Two notices of public meetings with request for comments were published in

Federal Register on March 12, 2015 (80 FR 12975) and on September 8, 2015 (80 FR 53759) in order to notify the public that the 2017 sunset review listings discussed in this proposed rule would expire on June 27, 2017, if not reviewed by the NOSB and renewed by the Secretary.

IV. Statutory and Regulatory Authority

OFPA, as amended (7 U.S.C. 6501–6522), authorizes the Secretary to make amendments to the National List based on proposed recommendations developed by the NOSB. Sections 6518(k)(2) and 6518(n) of OFPA authorize the NOSB to develop proposed amendments to the National List for submission to the Secretary and establish a petition process by which persons may petition the NOSB for the purpose of having substances evaluated for inclusion on or deletion from the National List. The National List petition process is implemented under § 205.607 of the USDA organic regulations. The current petition process was published on March 10, 2016 (81 FR 12680) and can be accessed through the NOP Web site at <http://www.ams.usda.gov/nop>.

A. Executive Order 12866

This action has been determined to be not significant for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This proposed rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in section 2115(b) of OFPA (7 U.S.C. 6514(b)). States are also preempted under section 2104 through 2108 of OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of OFPA.

Pursuant to section 2108(b)(2) of OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically

produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of OFPA, (b) not be inconsistent with OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to section 2120(f) of OFPA (7 U.S.C. 6519(f)), this proposed rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601–624), the Poultry Products Inspection Act (21 U.S.C. 451–471), or the Egg Products Inspection Act (21 U.S.C. 1031–1056), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301–399), nor the authority of the Administrator of EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136–136(y)).

Section 2121 of OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). AMS has also considered

the economic impact of this action on small entities. The impact on entities affected by this proposed rule would not be significant. The effect of this proposed rule would be to prohibit the use of eleven non-organic non-agricultural or non-organic agricultural substances that have limited public support and may no longer be used since alternatives to these substances may have been developed and implemented by organic producers or organic handlers (food processors). AMS concludes that the economic impact of removing lignin sulfonate, furosemide, magnesium carbonate, Chia, dillweed oil, frozen galangal, inulin, frozen lemongrass, chipotle chile peppers, Turkish bay leaves, and whey protein concentrate from the National List would be minimal to small agricultural firms since alternative products or ingredients may be commercially available. As such, these substances are proposed to be removed from the National List under this rule. Accordingly, AMS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000 and small agricultural producers are defined as those having annual receipts of less than \$750,000.

According to USDA, National Agricultural Statistics Service (NASS), certified organic acreage exceeded 3.6 million acres in 2014.¹ According to NOP's Accreditation and International Activities Division, the number of certified U.S. organic crop and livestock operations totaled over 21,764 in March 2016. The list of certified operations is available on the NOP Web site at <http://apps.ams.usda.gov/nop/>. AMS believes that most of these entities would be considered small entities under the criteria established by the SBA. U.S. sales of organic food and non-food have grown from \$1 billion in 1990 to \$43 billion in 2015.² In addition, the USDA has 80 accredited certifying agents who provide certification services to producers and handlers. A complete list of names and addresses of accredited certifying agents may be found on the AMS NOP Web site, at <http://>

¹ U.S. Department of Agriculture, National Agricultural Statistics Service. 2014 Organic Survey, https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Organics/organics_1_001_001.pdf.

² Organic Trade Association. 2015. Organic Industry Survey. www.ota.com.

www.ams.usda.gov/nop. AMS believes that most of these accredited certifying agents would be considered small entities under the criteria established by the SBA.

D. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this proposed rule. Accordingly, OMB clearance is not required by section 350(h) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, Chapter 35, or OMB's implementing regulations at 5 CFR part 1320.

E. Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

F. General Notice of Public Rulemaking

This proposed rule reflects recommendations submitted to the Secretary by the NOSB for substances on the National List of Allowed and Prohibited Substances that, under the Sunset review provisions of OFPA, would otherwise expire on June 27, 2017. A 60-day period for interested persons to comment on this rule is provided. Sixty days is deemed appropriate because the review of these listings was widely publicized through two NOSB meeting notices; the use or prohibition of these substances, as applicable, are critical to organic production and handling; and this rulemaking must be completed before the sunset date of June 27, 2017.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

For the reasons set forth in the preamble, 7 CFR part 205 is proposed to be amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

■ 1. The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

■ 2. Amend § 205.601 by revising paragraph (l) to read as follows:

§ 205.601 Synthetic substances allowed for use in organic crop production.

* * * * *

(l) As floating agents in postharvest handling. Sodium silicate—for tree fruit and fiber processing.

* * * * *

§ 205.603 [Amended]

■ 3. Amend § 205.603 by removing paragraph (a)(10) and redesignating paragraphs (a)(11) through (a)(23) as paragraphs (a)(10) through (a)(22).

§ 205.605 [Amended]

■ 4. Amend § 205.605 by removing the entry “Magnesium carbonate—for use only in agricultural products labeled “made with organic (specified ingredients or food group(s)),” prohibited in agricultural products labeled “organic” from paragraph (b).

§ 205.606 [Amended]

■ 5. Amend § 205.606 by removing paragraphs (c), (e), (h), (k), (o), (s), (w) and (y) and redesignating paragraphs (d), (f), (g), (i), (j), (l), (m), (n), (p), (q), (r), (t), (u) and (x) as paragraphs (c) through (q).

Dated: January 9, 2017.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2017–00586 Filed 1–17–17; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1255

[Document Number AMS–SC–16–0112; PR–B]

RIN 0581–AD55

Organic Research, Promotion, and Information Order; Referendum Procedures

AGENCY: Agricultural Marketing Service, Department of Agriculture.

ACTION: Proposed rule.

SUMMARY: This proposed rule invites comments on procedures for conducting a referendum to determine whether the issuance of a proposed Organic Research, Promotion, and Information Order (proposed Order) is favored by certified organic producers, certified organic handlers, and importers of certified organic products. The organic market includes a range of agricultural commodities such as fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and

packaged and prepared foods, as well as non-food items such as fiber (linen and clothing), personal care products, pet food, and flowers. The procedures would also be used for any subsequent referendum under the proposed Order. The proposed Order is being published separately in this issue of the **Federal Register**. This document also announces the Agricultural Marketing Service's (AMS) intent to request approval by the Office of Management and Budget (OMB) of new information collection requirements to implement the program.

DATES: Comments must be received by March 20, 2017. Pursuant to the Paperwork Reduction Act (PRA), comments on the information collection burden that would result from this proposal must be received by March 20, 2017.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments may be submitted on the Internet at: <http://www.regulations.gov> or to the Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Room 0632–S, Stop 0244, Washington, DC 20250–0244; facsimile: (202) 205–2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection, including name and address, if provided, in the above office during regular business hours or it can be viewed at <http://www.regulations.gov>.

Pursuant to the PRA, comments regarding the accuracy of the burden estimate, ways to minimize the burden, including the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information, should be sent to the above address. In addition, comments concerning the information collection should also be sent to the Desk Office for Agriculture, Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street NW., Room 725, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT:

Heather Pichelman, Division Director, Promotion and Economics Division, Specialty Crops Programs, AMS, USDA, 1400 Independence Avenue SW., Room 0632–S, Stop 0244, Washington, DC 20250–0244; facsimile: (202) 205–2800; or electronic mail: Heather.Pichelman@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425).

Executive Order 12866 and Executive Order 13563

This rule has been determined to be not significant for purposes of Executive Order 12866, as supplemented by Executive Order 13563, and therefore has not been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

What is the purpose of this action?

This proposed rule invites comments on procedures for conducting a referendum to determine whether covered domestic certified organic producers, certified organic handlers and importers of organic products favor issuance of a proposed Order.¹ Accordingly, this rule would add subpart B to part 1255 that would establish procedures for conducting the referendum. The procedures would cover definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information. The U.S. Department of Agriculture (USDA) would conduct the referendum. The program would be implemented if it is favored by a majority of domestic certified organic producers, certified organic handlers and importers of organic products voting in the referendum. The procedures would be applicable for the initial referendum and future referenda under the proposed Order.

This document also announces AMS's intent to request approval by the OMB of new information collection requirements to implement the program. The proposed Order is being published separately in this issue of the **Federal Register**.

What are the key statutes and regulations governing this action?

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425) (Act) provides that it shall not affect or preempt any other Federal or state law authorizing promotion or research relating to an agricultural commodity.

The Act authorizes USDA to establish agricultural commodity research and promotion orders which may include a

combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. To date, there are 10 commodity promotion programs (*i.e.*, research and promotion programs or R&P programs) operating under the authority of the Act. On February 7, 2014, section 10004 of the Agricultural Act of 2014 (2014 Farm Bill) (Pub. L. 113–79) amended section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401), which authorizes generic commodity promotion programs under the various commodity promotion laws, to allow for an organic commodity promotion order. Specifically, the definition of “agricultural commodity” under section 513(1)(E) of the Act was amended to include “products, as a class, that are produced on a certified organic farm (as defined in 7 U.S.C. 6502); and certified to be sold or labeled as “organic” or “100 percent organic” (as defined in part 205 of title 7, Code of Federal Regulations (or a successor regulation)). Should this proposed rule become final, pursuant to section 10004 of the 2014 Farm Bill, the regulatory language currently exempting organic commodities from assessment by generic commodity promotion programs created under the various commodity promotion laws (7 U.S.C. 7401(e)) shall no longer be in effect. Such commodities would then become “dual-covered commodities”, and persons producing, handling and importing them would need to elect to pay assessments to the commodity-specific program, or the organic commodity promotion program.

The 2014 Farm Bill amendments to the Act allowed the organic industry to submit a proposal for an organic R&P program. As the membership-based business association for the organic industry in North America, the Organic Trade Association (OTA) took on the role as a proponent group in the development of an organic R&P program proposal. OTA represents businesses across the organic supply chain and addresses all things organic, including food, fiber/textiles, personal care products, and new sectors as they develop. To develop the proposal, OTA established and collaborated with the 7-member GRO Organic Core Committee. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee. It included OTA subcommittee chairs and other industry

leaders who built on the outreach and input from the larger committee to guide the development of a proposed Order.

Under section 519 of the Act, a person subject to an order may file a written petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

What are organic products?

To make an organic claim or use the USDA Organic Seal, the final product must follow the applicable production, handling and labeling regulations and go through the organic certification process specified at 7 CFR part 205. To become certified, producers and handlers must apply to a USDA-accredited certifying agent, develop and implement an organic system plan, and be inspected. Organic certification allows producers and handlers to sell their raw, processed, and multi-ingredient products as organic. Each production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the USDA organic regulations (7 CFR part 205).²

¹ For clarification, the phrase “organic products” used throughout the proposed Order and referendum procedures is synonymous with the terms: “certified products” or “certified organic products”. The words “certified organic” are used to modify the terms “certified organic handler” at section 1255.9 and “certified organic producer” at section 1255.10 for the purpose of reiterating the concept that certified products originate from certified entities.

² USDA organic regulations at 7 CFR 205.101 provides for some exclusions and exemptions from certification. For example, a production or handling operation that sells agricultural products as “organic” but whose gross agricultural income from organic sales totals \$5,000 or less annually is exempt from organic certification but must comply with the applicable organic production and handling requirements as specified at 7 CFR 205.101(a)(1).

Who would be assessed under this program?

Consistent with the definition of “covered person” at 7 U.S.C. 7401, which describes who may be subject to an organic commodity promotion order as “a producer, handler, marketer, or importer of an organic agricultural commodity”, the definition for “assessed entity” at section 1255.4 states that this order is applicable to any certified organic producer or certified organic handler that has gross organic sales in excess of \$250,000 for the previous marketing year, any importer with a transaction value greater than \$250,000 in organic products during the previous marketing year, and any voluntarily assessed entity. The proposed Order would provide for an initial assessment rate of one-tenth of one percent of net organic sales for domestic certified organic producers and certified organic handlers with gross organic sales greater than \$250,000 in the previous marketing year. Net organic sales would be equal to total gross sales in certified organic products minus (a) the cost of certified organic ingredients, feed, and inputs used in the production of certified products, and (b) the cost of any non-organic agricultural ingredients used in the production of certified products.³ Certified organic handlers may also deduct the cost of certified organic products purchased from producers. Importers with transaction value that exceeds \$250,000 in organic products during the prior

year would remit one-tenth of one percent of the declared transaction value of those certified organic products at the time of importation. This means that importers would remit assessments to the Board upon taking ownership of the imported product.

Under the permissive terms under section 516 of the Act, the term “assessed entity” also allows orders to provide exemptions for covered persons. More specifically, certified organic producers and certified organic handlers with gross organic sales less than or equal to \$250,000 of certified organic products for the previous marketing year would be exempt, and have the option to choose to pay assessments into the program as “voluntarily assessed” entities. Importers with \$250,000 or less in transaction value of imported organic products during the prior marketing year are exempt from remitting assessments to the board, and could also opt to be voluntarily assessed. Finally, certified organic producers, certified organic handlers, and importers of dual-covered commodities would be eligible to apply for an exemption.⁴ Such entities also have the option to choose to pay assessments into the program as “voluntarily assessed” entities, which would make them eligible to participate in the referendum. The purpose of the program would be to strengthen the position of certified organic products in the marketplace, support research to benefit the organic industry, and

improve access to information and data across the organic sector.

What products would be covered under this program?

Understanding that section 7412(1)(E)(ii) of the Act specified that the scope of an “agricultural commodity” as limited to products that are “certified to be sold or labeled as “organic” or “100 percent organic”, this proposal would assess only the value added of the certified organic ingredient content of “made with organic” products rather than the entire certified product. Consequently, the scope of covered products spans a range of agricultural commodities such as fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods, as well as non-food items such as fiber (linen and clothing), personal care products, pet food, and flowers. While the USDA organic regulations do not detail standards specific to non-food items, items that are agricultural products (e.g., pet food) and that meet the certification requirements of the USDA organic regulations can be certified and labeled “organic”, irrespective of the end use of the product.⁵ There are currently 38 Harmonized Tariff Schedule (HTS) codes representative of imported organic agricultural products. These codes and their product descriptions are listed in the table below.

HTS Code	HTS Description
0409000005	NATURAL, HONEY, CERTIFIED FOR ORGANIC.
0703200005	GARLIC, FRESH WHOLE BULBS, CERTIFIED ORGANIC.
0709604015	SWT BELL PEPPER, FRT OF CAPSICUM/PIMENTA, GRNHSE, CERT ORGANIC.
0709604065	SWT BELL PEPPER, OTH, FRUIT, CAPSICUM/PIMENTA, CERT ORGANIC, OTHER.
0802120005	SHELLED ALMONDS, CERTIFIED ORGANIC
0803900025	FRESH BANANAS, CERTIFIED ORGANIC
0804400020	AVOCADOS, HASS&HASS LIKE, CERTIFIED ORGANIC
0804504045	FRESH MANGOES ENTERED SEPT 1 TO MAY 31, CERTIFIED ORGANIC
0804506045	FRESH MANGOES ENTERED JUNE 1 TO AUG 31, CERTIFIED ORGANIC
0808100045	APPLES, FRESH, VALUED> \$0.22 PER KG, CERTIFIED ORGANIC
0808302015	PEARS, ORGANIC, ENTERED 4/1–6/30, FRESH
0808304015	PEARS, ORGANIC, ENTERED 7/1–3/31, FRESH
0808402015	QUINCES; FRESH, APR 1 THRU JUNE 30, CERTIFIED ORGANIC
0808404015	QUINCES; ORGANIC, ENTERED 7/1–3/31, FRESH
0810400026	BLUEBERRIES, FRESH, CULTIVATED, CERTIFIED ORGANIC
0901110015	ARABICA COFFEE NOT ROAST/DECAFFEINATED, CERTIFIED ORGANIC
0901110045	COFFEE, NOT ROASTED, NOT DECAFFEINATED, OTHER, CERTIFIED ORGANIC
0901120015	COFFEE, DECAFFEINATED, NOT ROASTED, CERTIFIED ORGANIC
0901210035	COFFEE, ROASTED; NOT DECAFFEINATED, <=2KG RET CONT, CERT ORGANIC
0901210055	COFFEE, ROASTED, N/DECAFFEINATED, NOT 2KG OR LESS, CERT ORGANIC

³ Examples of organic input costs that may be deducted from gross sales include fertilizer, lime, and soil conditioners; agricultural chemicals and other organic materials for pest control; seeds, plants, vines and trees; livestock purchased or leased; and feed purchased for livestock and poultry.

⁴ The 2014 Farm Bill amendments to 7 U.S.C. 7401 also included a requirement for an organic

research and promotion order to allow covered persons (which can include producers, handlers, and importers, depending upon the order) to elect whether to be assessed under the organic commodity promotion order or another applicable agricultural commodity promotion order. For example, an organic blueberry producer would have the option to pay into the blueberry program or the organic program.

⁵ In August 2005, the NOP issued a Policy Memorandum 11–2 to certifying agents, stating that agricultural products which meet the NOP certification standards can be certified and labeled “organic,” irrespective of the end use of the product. Policy Memo 11–2 is available on the AMS Web site in the NOP Handbook at: <http://www.ams.usda.gov/rules-regulations/organic/handbook>.

HTS Code	HTS Description
0901220035	COFFEE, ROASTED, DECAFFEINATED, <=2KG RETAIL CONT, CERT ORGANIC
0902101015	FLAVORED GREEN TEA IMMED PACKING NOT EXCEED 3KG, CERT ORGANIC
0902109015	GREEN TEA (NOT FERM) IMMED PACKINGS NTE 3KG, N/FLVR, CERT ORGNC
0902209015	OTHER GREEN TEA (NOT FERMENTED), N/FLAVORED, CERTIFIED ORGANIC
0902300015	BLACK TEA FERMENT/PRT FRMNTD, IN TEA BAGS, <=3KG, CERT ORGANIC
0910110010	GINGER, NOT GROUND, CERTIFIED ORGANIC
1001190025	DURUM WHEAT, CERTIFIED ORGANIC, EXCEPT SEED
1005902015	CORN (MAIZE) - YELLOW DENT CORN, CERTIFIED ORGANIC
1006309015	RICE: OTHER SEMI OR WHOLLY MILLED POL/GLZ OR NOT, CERT ORGANIC
1201900010	SOYBEANS, ORGANIC, WHETHER OR NOT BROKEN, NESOI
1204000025	FLAXSEED (LINSEED), FOR USE AS OIL STOCK, W/N BROKEN, ORGANIC
1509102030	CER OR LB EX VRGN OLVE OIL N/CHEM MOD CON LT 18KG
1509102040	OLIV OIL, NOT CHEM. MOD. VIRGIN, WT<8KG, ORG, OTH THAN XTRA VIR
1509104030	OLIVE OIL, NOT CHEM MOD, VIRGIN, OTH, CERT ORG, LAB EXTRA VIRGIN
1509104040	OLIVE OIL, NOT CHEM MOD, VIRGIN, OTH CERT ORG, NT LAB EXTRA VIR
2204100065	SPARKLING WINE, OR FRESH GRAPES VALUED >\$1.59 PER LITER, ORG
2204215035	RED WINE, >\$1.05 PER L, ALCHL STRGTH BY VOLM <=14% CONT<=2L, ORG
2204215050	WHITEWINE >\$1.05 L, ALCHOL STRNGTH BY VOLUM <=14% CONT<=2L, ORG

Initial Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of the proposed rule on small entities. Accordingly, AMS has considered the economic impact of this action on these entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration (SBA) defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural support services firms (handlers and importers) as those having annual receipts of no more than \$7.5 million.

In 2014, there were a total of 19,466 certified organic operations in the U.S. and its territories.⁶ This total includes both certified organic producers and certified organic handlers. The number of operations that were certified solely as organic handlers, according to NOP, totaled 8,327 entities. The remaining 11,139 certified organic entities include operations that are certified only as producers and operations that are certified as both producers and handlers. Organic producers are also required to be certified as organic handlers in order to sell, process, or package agricultural products, except in such cases where a producer is simply selling, transporting or delivering crops or livestock to a handler (7 CFR 205.2).

Data from USDA's National Agricultural Statistics Service (NASS) 2014 Organic Survey show that about 91 percent of certified organic producers

had 2014 organic sales value of \$750,000 or less. Applying this proportion to the 11,139 certified organic producers referenced earlier results in 10,126 producing entities being considered small.

There is no one catch-all definition by the SBA of what constitutes a small handler of agricultural products. Therefore, to maintain consistency with other federal programs and marketing orders, AMS defines a small handler as one which has no more than \$7.5 million in annual receipts as defined by the SBA under subsector 115 of the North American Industry Classification System (NAICS), "Support Activities for Agriculture and Forestry".⁷ According to the 2012 County Business Patterns and 2012 Economic Census released June 22, 2015, about 95 percent of firms classified under subsector 115 of NAICS had less than \$7.5 million in annual receipts and would be considered small. Applying this proportion to the number of certified organic handlers results in an estimated 7,895 handler operations out of 8,327 being considered small under the SBA definition.

According to data from the U.S. Customs and Border Protection (CBP), there were 2,135 importers of organic products with codes in the HTS in 2014. Of these, about 98 percent had annual sales revenue of less than \$7.5 million in 2014. Adding the 2,135 number of organic importers to the 19,466 combined number of certified organic producers and handlers results in a total of 21,601 operations with sales of certified organic products in the U.S. Of this total, 20,121 entities, or 93 percent, would be considered to be small under the SBA definitions.

⁷ U.S. Small Business Administration, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes", February 26, 2016.

The Organic Industry Survey, which was carried out by the Nutrition Business Journal (NBJ) on behalf of OTA, reported 2014 retail sales of all organic commodities at \$39.1 billion. Imports of the 38 organic products with HTS codes listed previously amounted to more than \$1.2 billion in 2014. In 2014, NASS, which collects data on farm-level production and sales, reported total certified organic sales of nearly \$5.5 billion, up 54 percent from three years previously.⁸

This proposed rule invites comments on procedures for conducting a referendum to determine whether issuance of a proposed Order is favored by domestic certified producers, certified handlers and importers of certified organic products. Organic agricultural ingredients are used in a range of products (e.g. food items (fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods), and non-food items (fiber (linen and clothing), supplements, personal care products, pet food, household products, and flowers)). The procedures would also be used for any subsequent referendum under the proposed Order. USDA would conduct the referendum.

The Act provides for alternatives within the terms of a variety of provisions. Paragraph (e) of section 518 of the Act provides three options for determining industry approval of a new research and promotion program: (1) By a majority of those persons voting; (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) by a

⁸ National Agricultural Statistics Service, 2014 Organic Survey, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>.

⁶ NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/integrity/>.

majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity. In addition, section 518 of the Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under an order. OTA recommended that the program be implemented if it is favored by a majority of assessed entities voting in the referendum. For example, if 10,000 certified organic producers, certified organic handlers, and importers voted in a referendum, 5,001 would have to vote in favor of the proposed Order for it to pass in the referendum. It is proposed that a single assessed entity may cast one vote in the referendum. A single entity is recognized by its individual tax identification number. This is a modification from the proponent's proposal, which recommended a single assessed entity would have one vote for each organic certificate held.

Regarding the economic impact of this rule on affected entities, eligible domestic certified producers, certified handlers and importers of certified organic products would have the opportunity to participate in the referendum. The proposed Order would exempt: (a) Producers and handlers with gross sales of \$250,000 or less of certified organic products for the previous marketing year, (b) importers with \$250,000 or less in transaction value of imported organic products during the prior marketing year, and (c) certified organic producers, certified organic handlers, and importers of dual-covered commodities who select to pay into the commodity-specific program instead of the organic program. Entities under the \$250,000 thresholds stated above would have the option to choose to pay assessments into the program as "voluntarily assessed" entities, which would make them eligible to participate in the referendum. Certified producers, certified handlers and importers of certified organic products exercising their exemptions would not be eligible to participate in the referendum.

AMS used 2014 data from multiple sources, such as the USDA Economic Research Service (ERS), USDA NASS, USDA Foreign Agricultural Service (FAS), USDA National Organic Program (NOP), U.S. Customs and Border Protection (CBP), and OTA industry surveys for consistency in estimating potential assessment income at producer, handler and importer levels. Based on an assumption that there is no participation by voluntarily assessed entities, of the 11,139 producers, 8,327

handlers, and 2,135 importers, it is estimated that about 2,691 producers, 5,015 handlers, and 326 importers would pay assessments under the proposed Order and thus be eligible to vote in the referendum. Assessment revenue that would be collected at the proposed exemption level of \$250,000 in gross annual revenue from organic sales would be \$25.3 million.⁹ Of this assessment revenue, about 14 percent would come from producers, 81 percent would come from handlers, and 5 percent would be from importers. In terms of the total value of exempt sales and the total number of exempt entities at the proposed exemption level, AMS estimates that about 5 percent of gross organic sales value would be exempt, and 63 percent of certified organic producers and handlers and organic importers, combined, would be exempt. At the producer level, 12 percent of certified organic sales value would be exempt, and 76 percent of entities would be exempt. For handlers, 3 percent of certified organic sales value and 40 percent of entities would be exempt. Of the total importers of organic products, 4 percent of organic sales value would be exempt, and 85 percent of entities would be exempt.

Voting in the referendum is optional. If domestic certified organic producers, certified organic handlers and importers choose to vote, the burden of voting would be offset by the benefits of having the opportunity to vote on whether or not they favor the proposed program.

Regarding alternatives, USDA considered requiring voters to vote in person at various USDA offices across the country. USDA also considered electronic voting, but the use of computers is not universal. Conducting the referendum from one central location by mail ballot would be more cost effective and reliable. USDA would provide easy access to information for potential voters through a toll free telephone line.

This action would impose an additional reporting burden on assessed entities. Those who would be assessed would have the opportunity to complete and submit a ballot to USDA indicating whether or not they favor implementation of the proposed Order. The specific burden for the ballot is detailed later in this document in the section titled Paperwork Reduction Act. As with all Federal promotion

⁹ No expense data exists for handlers, so input costs have not been deducted from total sales at the handler level. This means that handler assessable sales is likely lower than what is reported; however, all assumptions made in estimating potential assessment revenue have been made to generate a conservative figure.

programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, USDA would keep these individuals informed throughout the program implementation and referendum process to ensure that they are aware of and are able to participate in the program implementation process. USDA would also publicize information regarding the referendum process so that trade associations and related industry media can be kept informed.

USDA has performed this initial RFA analysis regarding the impact of this proposed rule on small businesses.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the referendum ballot, which represents the information collection and recordkeeping requirements that may be imposed by this rule, has been submitted to OMB for approval.

Title: Organic Research, Promotion, and Information Order.

OMB Number: 0581-NEW.

Expiration Date of Approval: 3 years from OMB date of approval.

Type of Request: New information collection for an organic research, promotion, and information program.

Abstract: The information collection requirements in the request are essential to carry out the intent of the Act. The information collection concerns a proposal received by USDA for a national research and promotion program for the organic industry. The program would be financed by an assessment on importers and domestic certified organic producers and certified organic handlers of organic products, and would be administered by a board of industry members selected by the Secretary. The program would exempt: (a) Certified organic producers and certified organic handlers with gross sales \$250,000 or less of certified organic products for the previous marketing year, (b) importers with \$250,000 or less in transaction value of imported organic products during the prior marketing year, and (c) certified

organic producers, certified organic handlers, and importers of dual-covered commodities, as applicable. Exports of certified organic products from the United States would also be exempt from assessments. A referendum would be held among eligible domestic certified organic producers, certified organic handlers and importers of certified organic products to determine whether they favor implementation of the program prior to it going into effect. The purpose of this program would be to: (1) Develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintain and expand existing markets for organic commodities.

The information collection requirements in this rule concern the referendum that would be held to determine whether the program is favored by the industry. Domestic certified organic producers and certified organic handlers with gross organic sales greater than \$250,000, importers with transaction value that exceeds \$250,000 in organic products during the prior year, and "voluntarily assessed" entities would be eligible to participate in the referendum. The ballot would be completed by eligible domestic certified organic producers, certified organic handlers, and importers who want to indicate whether or not they support implementation of the program. The following burden estimate assumes 0% voluntarily assessed participation.

Referendum Ballot

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

Respondents: Domestic certified organic producers, certified organic handlers, and importers.

Estimated Number of Respondents: 8,032 (7,706 domestic producers and handlers and 326 importers).

Estimated Number of Responses per Respondent: 1 every 7 years (0.14).

Estimated Total Annual Burden on Respondents: 281.12 hours.

The ballot would be added to the other information collections approved under OMB No. 0581-NEW.

An estimated 8,032 respondents would provide information to the Board (7,706 domestic producers and handlers and 326 importers). The estimated cost of providing the information to the Board by respondents would be \$9,754.99. This total has been estimated by the adding the cost of the hours required for producer and handling reporting (269.71 hours multiplied by

\$33.60 (the average mean hourly earnings of certified producers and handlers) and importer reporting (11.41 hours multiplied by \$30.85, the average mean hourly earnings of importers). Data for computation of the hourly rate for producers and handlers (Occupation code 11-9013: Farmers, Ranchers, and other Agricultural Managers) and importers (Occupation code 13-1020: Buyers and Purchasing Agents) was obtained from the U.S. Department of Labor, Bureau of Labor Statistics.

The proposed Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs.

Request for Public Comment Under the Paperwork Reduction Act

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and USDA's oversight of the proposed Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal organic production areas in the United States; (d) the accuracy of USDA's estimate of the number of domestic certified organic producers, certified organic handlers, and importers of organic products that would be covered under the program (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments concerning the information collection requirements contained in this action should reference OMB No. 0581-NEW. In addition, the docket number, date, and page number of this issue of the **Federal Register** also should be referenced. Comments should be sent to the same addresses referenced in the **ADDRESSES** section of this rule.

A 60-day comment period is provided to allow interested persons to comment on this proposed information collection. All written comments received will be summarized and included in the request

for OMB approval. All comments will also become a matter of public record.

List of Subjects in 7 CFR Part 1255

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Organic, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that Title 7, Chapter XI of the Code of Federal Regulations, as proposed to be amended elsewhere in this issue of the **Federal Register**, be further amended as follows:

PART 1255—ORGANIC RESEARCH AND PROMOTION ORDER

■ 1. The authority citation for part 1255 continues to read as follows:

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

■ 2. Add Subpart B to read as follows:

Subpart B—Referendum Procedures

Sec.	General.
1255.100	General.
1255.101	Definitions.
1255.102	Voting.
1255.103	Instructions.
1255.104	Subagents.
1255.105	Ballots.
1255.106	Referendum report.
1255.107	Confidential information.
1255.108	OMB Control number.

Subpart B—Referendum Procedures

§ 1255.100 General.

Referenda to determine whether eligible certified organic producers, certified organic handlers and importers of organic products favor the issuance, continuance, amendment, suspension, or termination of the Organic Research, Promotion, and Information Order shall be conducted in accordance with this subpart.

§ 1255.101 Definitions.

For the purposes of this subpart:

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to delegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Assessed entity* means any certified organic producer or certified organic handler that has gross organic sales in excess of \$250,000 for the previous marketing year, any importer with a transaction value greater than \$250,000 in organic products during the previous marketing year, and any voluntarily assessed entity.

(c) *Certification or certified*. A determination made by a USDA-

accredited certifying agent that a production or handling operation is in compliance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto, and which is documented by a certificate of organic operation.

(d) *Certified operation*. A crop or livestock production, wild-crop harvesting or handling operation, or portion of such operation that is certified by a USDA-accredited certifying agent as utilizing a system of organic production or handling as described by the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205.

(e) *Certified organic handler* means a person who handles certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.270 through 7 CFR 205.272, and all other applicable requirements of part 205 and receives, sells, consigns, delivers, or transports certified organic products into the current of commerce in the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(f) *Certified organic producer* means a person who produces certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.202 through 7 CFR 205.207 or 7 CFR 205.236 through 7 CFR 205.240, and all other applicable requirements of part 205.

(g) *Customs or CBP* means the U.S. Customs and Border Protection, an agency of the U.S. Department of Homeland Security.

(h) *Department* means the U.S. Department of Agriculture or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

(i) *Dual-covered commodity* means an agricultural commodity that is produced on a certified organic farm and is covered under this part and any other agricultural commodity promotion order issued under a commodity promotion law.

(j) *Gross organic sales* means the total amount the person received for all organic products during the fiscal year without subtracting any costs or expenses.

(k) *Importer* means any person who imports certified organic products from outside the United States for sale in the United States as a principal or as an

agent, broker, or consignee of any person who produces organic products outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such organic products. Organic importers can be identified through organic certificates, import certificates, HTS codes, or any other demonstration that they meet the definition above.

(l) *Ingredient*. Any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

(m) *National Organic Program* means the program authorized by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) for the purpose of implementing its provisions.

(n) *Net organic sales* means total gross sales in organic products minus:

(1) The cost of certified organic ingredients, feed, and agricultural inputs used in the production of certified products; and

(2) The cost of any non-organic agricultural ingredients used in the production of certified products.

(o) *Order* means the Organic Research, Promotion, and Information Order.

(p) *Organic* means a labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205.

(q) *Organic products* means products produced and certified under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto.

(r) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term “partnership” includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in organic production, organic handling or organic import entity as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So called “joint ventures” wherein one or more parties to an agreement, informal or otherwise, contributed land, facilities, capital, labor, management, equipment, or other services, or any variation of such contributions by two or more parties, so that it results in the production, handling or importation of organic products and the authority to transfer title to the organic products.

(s) *Referendum agent or agent* means the individual or individuals designated

by the Secretary to conduct the referendum.

(t) *United States* means collectively the 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

(u) *Voluntarily assessed entity* means any covered person with gross organic sales or transaction value of \$250,000 or less for the previous marketing year and thus not subject to assessment under this part, but elects to participate in the Order by remitting an assessment pursuant to § 1255.52

§ 1255.102 Voting.

(a) Each assessed entity shall be entitled to cast one ballot in the referendum. Organic importers shall be entitled to request one ballot per business entity that meets the definition of importer.

(b) Proxy voting is not authorized, but an officer or employee of an assessed entity, or an administrator, executor, or trustee of an assessed entity may cast a ballot on behalf of such entity. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the assessed entity, or an administrator, executive, or trustee of an assessed entity and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) Each assessed entity may cast one ballot in the referendum.

(d) All ballots are to be cast by mail, in person at a local Farm Services Agency office, or by other means, as instructed by the Department.

(e) All assessed entities in good standing shall be eligible to vote in a subsequent referendum. To be in good standing, an entity must carry a valid (not revoked) organic certificate and:

(1) A dual-covered entity must demonstrate that it has paid into the organic research and promotion program for a majority of the years since the most recent referendum; or

(2) A voluntarily-assessed entity must demonstrate that it has paid into the organic research and promotion program for a majority of the years since the most recent referendum; or

(3) An entity must demonstrate that it attained its organic certification since the most recent referendum; or

(4) An assessed entity that does not meet any of the above descriptions must demonstrate that it has paid into the organic research and promotion program every year since the most recent referendum.

§ 1255.103 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this subpart, under the supervision of the Administrator. The Administrator may prescribe additional instructions, consistent with the provisions of this subpart, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the period during which ballots may be cast;

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an assessed entity;

(c) Give reasonable public notice of the referendum:

(1) By using available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) The Secretary must provide public notice of instructions on voting and a summary of the terms and conditions of the Order. All assessed entities may request and receive by mail a ballot. No person who claims to be an assessed entity shall be refused a ballot;

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process;

(f) Prepare a report on the referendum; and

(g) Announce the results to the public.

§ 1255.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing such agent's functions of this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

§ 1255.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged,

the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots deemed invalid under this subpart shall not be counted.

§ 1255.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

§ 1255.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

§ 1255.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0581-NEW.

* * * * *

Dated: January 9, 2017.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2017-00599 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-02-P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC-2016-0255]

Regulatory Issue Summary Regarding Certificate of Compliance Corrections and Revisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory issue summary; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is seeking public comment on draft regulatory issue summary (RIS) 2016-xx, "Administration of 10 CFR part 72 Certificate of Compliance Corrections and Revisions." The NRC is issuing this RIS to inform addressees of the processes to revise an initial certificate of compliance (CoC) and subsequent amendments (hereafter referred to as CoCs, whether initial CoCs or subsequent amendments) to make

administrative corrections and technical changes using the existing regulatory framework.

DATES: Submit comments by March 20, 2017. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID: NRC-2016-0255. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: OWFN-12-H08, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: John Goshen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-6933, email: John.Goshen@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC-2016-0255 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0255.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov. The RIS 2016-0255, "Administration of 10 CFR

part 72 Certificate of Compliance Corrections and Revisions” is available in ADAMS under Accession No. ML14107A510.

- **NRC’s PDR:** You may examine and purchase copies of public documents at the NRC’s PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2016–0255 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <http://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background.

The NRC is issuing this RIS to inform addressees of the processes to revise an initial CoC and subsequent amendments (hereafter referred to as CoCs, whether initial CoCs or subsequent amendments) to make administrative corrections and technical changes using the existing regulatory framework in 10 CFR part 72.

The NRC issues RISs to communicate with stakeholders on a broad range of matters.

III. Proposed Action

The NRC is requesting public comments on the draft RIS. All comments that are to receive consideration in the final RIS must still be submitted electronically or in writing as indicated in the **ADDRESSES** section of this document. The NRC staff will make a final determination regarding issuance of the RIS after it considers any public comments received in response to this request.

Dated at Rockville, Maryland, this 20th day of December 2016.

For the Nuclear Regulatory Commission.

John McKirgan,

Chief, Spent Fuel Licensing Branch, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2016–31986 Filed 1–17–17; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket Number EERE–2015–BT–STD–0008]

RIN 1904–AD52

Energy Conservation Program: Energy Conservation Standards for Dedicated-Purpose Pool Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking (NOPR).

SUMMARY: The Energy Policy and Conservation Act of 1975 (EPCA), as amended, sets forth a variety of provisions designed to improve energy efficiency. Part C of Title III establishes the “Energy Conservation Program for Certain Industrial Equipment.” The covered equipment includes pumps. In this document, DOE proposes amended energy conservation standards for dedicated-purpose pool pumps identical to those set forth in a direct final rule published elsewhere in the **Federal Register**. If DOE receives an adverse comment and determines that such comment may provide a reasonable basis for withdrawing the direct final rule, DOE will publish a notice withdrawing the direct final rule and will proceed with this proposed rule.

DATES: DOE will accept comments, data, and information regarding the proposed standards no later than May 8, 2017.

Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in the **ADDRESSES** section before February 17, 2017.

ADDRESSES: If DOE withdraws the direct final rule published elsewhere in the **Federal Register**, DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any public meeting in the **Federal Register**.

Instructions: Any comments submitted must identify the NOPR on Energy Conservation Standards for Dedicated-Purpose Pool Pumps, and provide docket number EERE–2015–BT–STD–0008 and/or regulatory

information number (RIN) 1904–AD52. Comments may be submitted using any of the following methods:

1) **Federal eRulemaking Portal:** www.regulations.gov. Follow the instructions for submitting comments.

2) **Email:** PoolPumps2015STD0008@ee.doe.gov. Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

3) **Postal Mail:** Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC, 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4) **Hand Delivery/Courier:** Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza, SW., 6th Floor, Washington, DC, 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section III of this document (“Public Participation”).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Office of Energy Efficiency and Renewable Energy through the methods listed above and by email to Chad_S_Whiteman@omb.eop.gov.

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Division at energy.standards@usdoj.gov before February 17, 2017. Please indicate in the “Subject” line of your email the title and Docket Number of this rulemaking notice.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at www.regulations.gov. All documents in the docket are listed in

the www.regulations.gov index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure.

The docket Web page can be found at <https://www.regulations.gov/docket?D=EERE-2015-BT-STD-0008>. The docket Web page contains simple instructions on how to access all documents, including public comments, in the docket. See section III, “Public Participation,” for further information on how to submit comments through www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue SW., Washington, DC, 20585-0121. Telephone: (202) 586-9507. Email: ApplianceStandardsQuestions@ee.doe.gov.

Ms. Johanna Jochum, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW., Washington, DC, 20585-0121. Telephone: (202) 287-6307. Email: Johanna.Jochum@hq.doe.gov.

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 586-6636 or by email: ApplianceStandardsQuestions@ee.doe.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
 - A. Authority
 - B. Background
- II. Proposed Standards
 - 1. Benefits and Burdens of Standards Considered for Dedicated-Purpose Pool Pumps
 - 2. Summary of Annualized Benefits and Costs of the Proposed Standards
- III. Other Prescriptive Requirements
- IV. Procedural Issues and Regulatory Review
- V. Public Participation
 - A. Submission of Comments
 - B. Public Meeting
- VI. Approval of the Office of the Secretary

I. Introduction

A. Authority

Title III, Part C¹ of the Energy Policy and Conservation Act of 1975 (EPCA), (42 U.S.C. 6311–6317, as codified) established the Energy Conservation Program for Certain Industrial Equipment, a program covering certain

industrial equipment.² “Pumps” are listed as a type of covered industrial equipment. (42 U.S.C. 6311(1)(A))

While pumps are listed as a type of covered equipment, EPCA does not define the term “pump.” To address this, in January 2016, DOE published a test procedure final rule (January 2016 general pumps test procedure final rule) that established a definition for the term “pump.” 81 FR 4086, 4147 (January 25, 2016). In the December, 2016 test procedure final rule (“test procedure final rule”),³ DOE noted the applicability of the definition of “pump” and associated terms to dedicated-purpose pool pumps.

Pursuant to EPCA, DOE’s energy conservation program for covered equipment consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of covered equipment. (42 U.S.C. 6295(o)(3)(A) and 6316(a)) Manufacturers of covered equipment must use the prescribed DOE test procedure as the basis for certifying to DOE that their equipment complies with the applicable energy conservation standards adopted under EPCA, and when making representations to the public regarding their energy use or efficiency. (42 U.S.C. 6314(d)) Similarly, DOE must use these test procedures to determine whether the equipment complies with standards adopted pursuant to EPCA. *Id.* The DOE test procedures for dedicated-purpose pool pumps appear at title 10 of the Code of Federal Regulations (CFR) part 431, subpart Y, appendix B.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered equipment, including dedicated-purpose pool pumps. Any new or amended standard for covered equipment must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(C), 6295(o), and 6316(a)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) and 6316(a))

Moreover, DOE may not prescribe a standard (1) for certain equipment, including dedicated-purpose pool pumps, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o) and 6316(a)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

1. The economic impact of the standard on manufacturers and consumers of the equipment subject to the standard;
2. The savings in operating costs throughout the estimated average life of the covered equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered equipment that are likely to result from the standard;
3. The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;
4. Any lessening of the utility or the performance of the covered equipment likely to result from the standard;
5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;
6. The need for national energy and water conservation; and
7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII) and 6316(a))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) and 6316(a))

EPCA also contains what is known as an “anti-backsliding” provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) and 6316(a)) Also, the Secretary may not prescribe an amended or new standard

¹ For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

² All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015).

³ See https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=41.

if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4) and 6316(a))

Additionally, EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. DOE must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that equipment within such group (a) consumes a different kind of energy from that consumed by other covered equipment within such type (or class); or (b) has a capacity or other performance-related feature that other equipment within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1) and 6316(a)) In determining whether a performance-related feature justifies a different standard for a group of equipment, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2) and 6316(a))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c) and 6316(a)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d).

With particular regard to direct final rules, the Energy Independence and Security Act of 2007 (EISA 2007), Pub. Law 110–140 (December 19, 2007), amended EPCA, in relevant part, to grant DOE authority to issue a type of final rule (*i.e.*, a “direct final rule”) establishing an energy conservation standard for a product or equipment (including dedicated-purpose pool pumps) on receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered equipment, States, and efficiency advocates), as determined by the Secretary. (42 U.S.C. 6295(p)(4)(A))

and 6316(a)) That statement must contain recommendations with respect to an energy or water conservation standard that are in accordance with the provisions of 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(A)(i)) A notice of proposed rulemaking (NOPR) that proposes an identical energy efficiency standard must be published simultaneously with the direct final rule and a public comment period of at least 110 days provided. (42 U.S.C. 6295(p)(4)(A)–(B)) Not later than 120 days after issuance of the direct final rule, if DOE receives one or more adverse comments or an alternative joint recommendation relating to the direct final rule, the Secretary must determine whether the comments or alternative joint recommendation may provide a reasonable basis for withdrawal under 42 U.S.C. 6295(o) or other applicable law. (42 U.S.C. 6295(p)(4)(C)(i)) If the Secretary makes such a determination, DOE must withdraw the direct final rule and proceed with the simultaneously published NOPR, and publish in the **Federal Register** the reason why the direct final rule was withdrawn. (42 U.S.C. 6295(p)(4)(C)(ii))

B. Background

DOE began the separate rulemaking for dedicated-purpose pool pumps on May 8, 2015, when it issued a Request for Information (RFI) (May 2015 DPPP RFI). 80 FR 26475. Consistent with feedback from these interested parties, DOE began a process through the ASRAC to charter a working group to recommend energy conservation standards and a test procedure for dedicated-purpose pool pumps rather than continuing down the traditional notice and comment route that DOE had already begun. (Docket No. EERE–2015–BT–STD–0008) On August 25, 2015, DOE published a notice of intent to establish a working group for dedicated-purpose pool pumps (the DPPP Working Group). 80 FR 51483. DOE selected the members of the DPPP Working Group to ensure a broad and balanced array of interested parties and expertise, including representatives from efficiency advocacy organizations and manufacturers, as well as one representative from a state government organization. Additionally, one member from ASRAC and one DOE representative were part of the group.

The DPPP Working Group completed its initial charter on December 8, 2015, with a consensus vote to approve a term sheet containing recommendations to DOE on scope, metric, and the basis of test procedure (“December 2015 DPPP Working Group recommendations”). ASRAC subsequently voted

unanimously to approve the December 2015 DPPP Working Group recommendations during its January 20, 2016 meeting. (Docket No. EERE–2015–BT–STD–0008, No. 0052) At the January 20, 2016 ASRAC meeting, the DPPP Working Group also requested more time to discuss potential energy conservation standards for dedicated-purpose pool pumps. In response, ASRAC recommended that the DPPP Working Group continue its work in a second phase of negotiations to recommend potential energy conservation standards for dedicated-purpose pool pumps. (Docket No. EERE–2013–BT–NOC–0005, No. 71 at pp. 20–52)

The second phase of meetings commenced on March 21, 2016 and concluded on June 23, 2016, with approval of a second term sheet (June 2016 DPPP Working Group recommendations). This term sheet contained DPPP Working Group recommendations on performance-based energy conservation standard levels, scope of such standards, certain prescriptive requirements, certain labeling requirements, certain definitions, and certain amendments to its previous test procedure recommendations. (Docket No. EERE–2015–BT–STD–0008, No. 82) ASRAC subsequently voted unanimously to approve the June 2016 DPPP Working Group recommendations during the July 29, 2016 meeting.

After carefully considering the consensus recommendations submitted by the DPPP Working Group and adopted by ASRAC, DOE has determined that these recommendations comprised a statement submitted by interested persons who are fairly representative of relevant points of view on this matter. In reaching this determination, DOE took into consideration the fact that the Working Group, in conjunction with ASRAC members who approved the recommendations, consisted of representatives of manufacturers of covered products, States, and efficiency advocates—all of which are groups specifically identified by Congress as relevant parties to any consensus recommendation. (42 U.S.C. 6295(p)(4)(A))

DOE has considered the recommended energy conservation standards and believes that they meet the EPCA requirements for issuance of a direct final rule. As a result, DOE published a direct final rule establishing energy conservation standards for pool pumps elsewhere in **Federal Register**. If DOE receives adverse comments that may provide a reasonable basis for

withdrawal and withdraws the direct final rule, DOE will consider those comments and any other comments received in determining how to proceed with this proposed rule.

For further background information on these proposed standards and the supporting analyses, please see the direct final rule published elsewhere in **Federal Register**. That document includes additional discussion of the EPCA requirements for promulgation of energy conservation standards; the history of the standards rulemaking for pool pumps; and information on the test

procedures used to measure the energy efficiency of pool pumps. The document also contains an in-depth discussion of the analyses conducted in support of this rulemaking, the methodologies DOE used in conducting those analyses, and the analytical results.

II. Proposed Standards

1. Benefits and Burdens of Standards Considered for Dedicated-Purpose Pool Pumps

Table II.1 and Table II.2 summarize the quantitative impacts estimated for

each trial standard level (TSL) for pool pumps. The national impacts are measured over the lifetime of dedicated-purpose pool pumps purchased in the 30-year period that begins in the anticipated year of compliance with new standards (2021–2050). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section V.A of the direct final rule.

TABLE II.1—SUMMARY OF ANALYTICAL RESULTS FOR POOL PUMPS TSLs: NATIONAL IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Cumulative FFC National Energy Savings <i>quads</i>	0.79	3.0	3.8	4.1	4.6
NPV of Consumer Costs and Benefits <i>billion 2015\$</i>					
3% discount rate	5.1	17	24	21	25
7% discount rate	2.5	8.1	11	10	12
Cumulative FFC Emissions Reduction.					
CO ₂ <i>million metric tons</i>	42	160	202	216	246
SO ₂ <i>thousand tons</i>	31	116	147	156	178
NO _x <i>thousand tons</i>	53	203	257	275	313
Hg <i>tons</i>	0.10	0.39	0.50	0.53	0.60
CH ₄ <i>thousand tons</i>	200	765	968	1,035	1,179
N ₂ O <i>thousand tons</i>	0.62	2.3	3.0	3.2	3.6
Value of Emissions Reduction					
CO ₂ <i>billion 2015\$</i>	0.327 to 4.388.	1.207 to 16.402.	1.524 to 20.724.	1.624 to 22.104.	1.841 to 25.113
CH ₄ <i>billion 2015\$</i>	0.069 to 0.549.	0.256 to 2.082.	0.324 to 2.632.	0.346 to 2.812.	0.393 to 3.202
N ₂ O <i>billion 2015\$</i>	0.002 to 0.019.	0.007 to 0.072.	0.008 to 0.091.	0.009 to 0.097.	0.010 to 0.110
NO _x —3% discount rate <i>billion 2015\$</i>	0.103 to 0.231.	0.378 to 0.851.	0.477 to 1.075.	0.508 to 1.144.	0.575 to 1.297
NO _x —7% discount rate <i>billion 2015\$</i>	0.047 to 0.106.	0.167 to 0.377.	0.210 to 0.475.	0.222 to 0.503.	0.25 to 0.566

Parentheses indicate negative (–) values.

* Range of the economic value of CO₂ reductions is based on estimates of the global benefit of reduced CO₂ emissions.

TABLE II.2—MANUFACTURER AND CONSUMER IMPACTS FOR DEDICATED-PURPOSE POOL PUMPS TSLs

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*	TSL 5*
Manufacturer Impacts					
Industry NPV <i>million 2015\$</i> (No-standards case INPV = \$212.8).	201.0–210.9	178.8–200.2	166.5–219.8	126.2–195.9	36.8–110.5
Industry NPV % <i>change</i>	(5.5)–(0.9)	(16.0)–(5.9)	(21.8)–3.3	(40.7)–(7.9)	(82.7)–(48.1)
Consumer Average LCC Savings <i>2015\$</i> .					
Standard-Size Self-Priming Pool Filter Pump	669	1,779	2,140	2,140	2,085
Small-Size Self-Priming Pool Filter Pump	295	322	295	360	414
Standard-Size Non-Self-Priming Pool Filter Pump	191	35	191	10	93
Extra-Small Non-Self-Priming Pool Filter Pump	36	36	36	10	10
Waterfall Pump	(3)	(3)	n/a	(20)	13
Pressure Cleaner Booster Pump	111	111	111	(372)	(313)
Integral Cartridge Filter Pump	n/a	n/a	128	n/a	n/a
Integral Sand Filter Pump	n/a	n/a	73	n/a	n/a
Consumer Simple PBP <i>years</i>					
Standard-Size Self-Priming Pool Filter Pump	0.6	0.7	0.7	0.7	0.6
Small-Size Self-Priming Pool Filter Pump	0.8	2.0	0.8	2.1	1.9
Standard-Size Non-Self-Priming Pool Filter Pump	0.2	2.3	0.2	2.3	2.1
Extra-Small Non-Self-Priming Pool Filter Pump	0.9	0.9	0.9	1.6	1.6
Waterfall Pumps	4.5	4.5	n/a	5.4	3.7
Pressure Cleaner Booster Pumps	0.6	0.6	0.6	6.0	5.1
Integral Cartridge Filter Pump	n/a	n/a	0.4	n/a	n/a
Integral Sand Filter Pump	n/a	n/a	0.5	n/a	n/a
Percent of Consumers that Experience a Net Cost %					
Standard-Size Self-Priming Pool Filter Pump	1	5	10	10	8

TABLE II.2—MANUFACTURER AND CONSUMER IMPACTS FOR DEDICATED-PURPOSE POOL PUMPS TSLs—Continued

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*	TSL 5*
Small-Size Self-Priming Pool Filter Pump	4	27	4	29	26
Standard-Size Non-Self-Priming Pool Filter Pump	0	58	0	51	47
Extra-Small Non-Self-Priming Pool Filter Pump	4	4	4	39	39
Waterfall Pumps	50	50	n/a	70	55
Pressure Cleaner Booster Pumps	0	0	0	69	68
Integral Cartridge Filter Pump	n/a	n/a	3	n/a	n/a
Integral Sand Filter Pump	n/a	n/a	3	n/a	n/a

* Parentheses indicate negative (–) values.

DOE first considered TSL 5, which represents the max-tech efficiency levels. TSL 5 would save an estimated 4.6 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be \$12 billion using a discount rate of 7 percent, and \$25 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 246 Mt of CO₂; 178 thousand tons of SO₂; 313 thousand tons of NO_x; 0.60 tons of Hg; 1,179 thousand tons of CH₄; and 3.6 thousand tons of N₂O. The estimated monetary value of the GHG emissions reduction at TSL 5 ranges from \$1.8 billion to \$25 billion for CO₂, from \$393 million to \$3,202 million for CH₄, and from \$10 million to \$110 million for N₂O. The estimated monetary value of the NO_x emissions reduction at TSL 5 is \$250 million using a 7-percent discount rate and \$575 million using a 3-percent discount rate.

At TSL 5, the average LCC impact is a savings that ranges from \$10 for extra-small non-self-priming pumps, to \$2,085 for standard-size self-priming pump, except for pressure cleaner booster pumps, which have a savings of negative \$313. The simple payback period ranges from 0.6 years for standard-size self-priming pumps to 5.1 years for pressure cleaner booster pumps. The fraction of consumers experiencing a net LCC cost ranges from eight percent for standard-size self-priming pumps to 68 percent for pressure cleaner booster pumps.

At TSL 5, the projected change in INPV ranges from a decrease of \$176.0 million to a decrease of \$102.3 million, which correspond to decreases of 82.7 percent and 48.1 percent, respectively. DOE estimates that industry must invest \$199.5 million to comply with standards set at TSL 5. Manufacturers would need to redesign a significant portion of the equipment they offer, including hydraulic redesigns to convert the vast majority of their standard-size self-priming pool filter pumps.

The Secretary tentatively concludes that at TSL 5 for dedicated-purpose pool

pumps, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on some consumers, and the significant impacts on manufacturers, including the large conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered TSL 4, which represents efficiency levels based on variable speed technology for most equipment classes. TSL 4 would save an estimated 4.1 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be \$10 billion using a discount rate of 7 percent, and \$21 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 216 Mt of CO₂, 156 thousand tons of SO₂, 275 thousand tons of NO_x, 0.53 tons of Hg, 1,035 thousand tons of CH₄, and 3.2 thousand tons of N₂O. The estimated monetary value of the GHG emissions reduction at TSL 4 ranges from \$1.6 billion to \$22 billion for CO₂, from \$346 million to \$2,812 million for CH₄, and from \$8.8 million to \$97 million for N₂O. The estimated monetary value of the NO_x emissions reduction at TSL 4 is \$222 million using a 7-percent discount rate and \$508 million using a 3-percent discount rate.

At TSL 4, the average LCC impact is a savings that ranges from \$10 for extra-small non-self-priming pumps, to \$2,140 for standard-size self-priming pumps, except for pressure cleaner booster pumps, which have a savings of negative \$372, and waterfall pumps, which have a savings of negative \$20. The simple payback period ranges from 0.7 years for standard-size self-priming pumps to 6.0 years for pressure cleaner booster pumps. The fraction of consumers experiencing a net LCC cost ranges from 10 percent for standard-size

self-priming pumps to 70 percent for waterfall pumps.

At TSL 4, the projected change in INPV ranges from a decrease of \$86.6 million to a decrease of \$16.9 million, which correspond to decreases of 40.7 percent and 7.9 percent, respectively. DOE estimates that industry must invest \$68.4 million to comply with standards set at TSL 4.

The Secretary tentatively concludes that at TSL 4 for dedicated-purpose pool pumps, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions, would be outweighed by the economic burden on some consumers, and the significant impacts on manufacturers, including the large conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has tentatively concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, the recommended TSL, which would save an estimated 3.8 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be \$11 billion using a discount rate of 7 percent, and \$24 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 202 Mt of CO₂, 147 thousand tons of SO₂; 257 thousand tons of NO_x, 0.50 tons of Hg, 968 thousand tons of CH₄; and 3.0 thousand tons of N₂O. The estimated monetary value of the GHG emissions reduction at TSL 3 ranges from \$1.5 billion to \$21 billion for CO₂, from \$324 million to \$2,632 million for CH₄, and from \$8.3 million to \$91 million for N₂O. The estimated monetary value of the NO_x emissions reduction at TSL 3 is \$210 million using a 7-percent discount rate and \$477 million using a 3-percent discount rate.

At TSL 3, the average LCC impact is a savings that ranges from \$36 for extra-small non-self-priming pool filter pumps to \$2,140 for standard-size self-priming pumps. The simple payback

period ranges from 0.2 years for standard-size non-self-priming pool filter pumps to 0.8 years for extra-small non-self-priming pool filter pumps. The fraction of consumers experiencing a net LCC cost ranges from zero percent for standard-size non-self-priming pumps and pressure cleaner booster pumps to 10 percent for standard-size self-priming pumps.

At TSL 3, the projected change in INPV ranges from a decrease of \$46.3 million to an increase of \$7.0 million, which represents a decrease of 21.8 percent to an increase of 3.3 percent, respectively. DOE estimates that

industry must invest \$35.6 million to comply with standards set at TSL 3.

After considering the analysis and weighing the benefits and burdens, the Secretary has tentatively concluded that, at TSL 3 for dedicated-purpose pool pumps, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings, would outweigh the potential negative impacts on manufacturers. Accordingly, the Secretary has tentatively concluded that TSL 3 would offer the maximum

improvement in efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy.

Therefore, based on the above considerations, DOE proposes the energy conservation standards for pool pumps at TSL 3. The proposed performance-based energy conservation standards for pool pumps, which are expressed as kgal/kWh, are shown in Table II.3. The proposed prescriptive energy conservation standards for pool pumps are shown in Table II.4.

TABLE II.3—PROPOSED PERFORMANCE-BASED ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class			Minimum allowable WEF score [kgal/kwh]
Dedicated-purpose pool pump variety	hhp Applicability*	Motor phase	
Self-priming pool filter pumps	0.711 hp ≤ hhp < 2.5 hp	Single	$-2.30 * \ln(\text{hhp}) + 6.59$. 5.55, for hhp ≤ 0.13 hp $-1.30 * \ln(\text{hhp}) + 2.90$, for hhp > 0.13 hp. 4.60, for hhp ≤ 0.13 hp $-0.85 * \ln(\text{hhp}) + 2.87$, for hhp > 0.13 hp. 0.42.
Self-priming pool filter pumps	hhp < 0.711 hp	Single	
Non-self-priming pool filter pumps**	hhp < 2.5 hp	Any	
Pressure cleaner booster pumps	Any	Any	

* All instances of hhp refer to rated hydraulic horsepower as determined in accordance with the DOE test procedure at 10 CFR 431.464 and applicable sampling plans.

** Because DOE selected the same efficiency level for both extra-small and standard-size non-self-priming pool filter pumps, the two equipment classes were ultimately merged into one.

TABLE II.4—PROPOSED PRESCRIPTIVE ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class			Prescriptive standard
Dedicated-purpose pool pump variety	hhp Applicability	Motor phase	
Integral sand filter pool pump	Any	Any	Must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.
Integral cartridge filter pool pump	Any	Any	Must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.

2. Summary of Annualized Benefits and Costs of the Proposed Standards

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2015\$) of the benefits from operating equipment that meet the adopted standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, and (2) the annualized monetary value of the benefits of GHG and NO_x emission reductions.

Table II.5 shows the annualized values for dedicated-purpose pool pumps under TSL 3, expressed in 2015\$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for benefits and costs other than GHG reduction (for which DOE used average social costs with a 3-percent discount rate),⁴ the estimated cost of the standards in this rule is \$138 million per year in increased equipment costs, while the estimated annual benefits are \$1.3 billion in reduced equipment operating costs, \$449 million in GHG

reductions, and \$22 million in reduced NO_x emissions. In this case, the net benefit amounts to \$1.7 billion per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the adopted standards for dedicated-purpose pool pumps is \$149 million per year in increased equipment costs, while the estimated annual benefits are \$1.5 billion in reduced operating costs, \$449 million in CO₂ reductions, and \$27 million in reduced NO_x emissions. In this case, the net benefit amounts to \$1.8 billion per year.

⁴ DOE used average social costs with a 3-percent discount rate these values are considered as the "central" estimates by the interagency group.

TABLE II.5—ANNUALIZED BENEFITS AND COSTS OF PROPOSED STANDARDS (TSL 3) FOR DEDICATED-PURPOSE POOL PUMPS

	Discount rate %	Million 2015\$/year		
		Primary estimate	Low-net-bene- fits estimate	High-net-bene- fits estimate
Benefits				
Consumer Operating Cost Savings	7	1,340	1,221	1,467
	3	1,516	1,367	1,678
GHG Reduction (using avg. social costs at 5% discount rate)**	5	147	129	164
GHG Reduction (using avg. social costs at 3% discount rate)**	3	449	392	504
GHG Reduction (using avg. social costs at 2.5% discount rate)**	2.5	642	560	721
GHG Reduction (using 95th percentile social costs at 3% discount rate)**.	3	1,346	1,175	1,510
NO _x Reduction †	7%	22	20	55
	3%	27	24	70
Total Benefits ‡	7% plus GHG range ..	1,509 to 2,708	1,369 to 2,416	1,686 to 3,032
	7%	1,811	1,633	2,026
	3% plus GHG range ..	1,690 to 2,890	1,520 to 2,566	1,912 to 3,258
	3%	1,993	1,783	2,252
Costs				
Consumer Incremental Equipment Costs	7%	138	124	151
	3%	149	133	164
Manufacturer Conversion Costs ††	7%	3	3	3
	3%	2	2	2
Net Benefits				
Total ‡	7% plus GHG range ..	1,371 to 2,570	1,245 to 2,292	1,535 to 2,881
	7%	1,673	1,509	1,875
	3% plus GHG range ..	1,542 to 2,741	1,387 to 2,433	1,748 to 3,094
	3%	1,844	1,651	2,088

* This table presents the annualized costs and benefits associated with pool pumps shipped in 2021–2050. These results include benefits to consumers which accrue after 2050 from the pool pumps purchased from 2021–2050. The incremental equipment costs include incremental equipment cost as well as installation costs. The costs account for the incremental variable and fixed costs incurred by manufacturers due to the proposed standards, some of which may be incurred in preparation for the rule. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices and real GDP from the *AEO2016 No-CPP* case, a Low Economic Growth case, and a High Economic Growth case, respectively. In addition, incremental equipment costs reflect the default price trend in the Primary Estimate, a high price trend in the Low Benefits Estimate, and a low price trend in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F.1 of the DFR. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

** The interagency group selected four sets of SC-CO₂, SC-CH₄, and SC-N₂O values for use in regulatory analyses. Three sets of values are based on the average social costs from the integrated assessment models, at discount rates of 5 percent, 3 percent, and 2.5 percent. The fourth set, which represents the 95th percentile of the social cost distributions calculated using a 3-percent discount rate, is included to represent higher-than-expected impacts from climate change further out in the tails of the social cost distributions. The social cost values are emission year specific. The GHG reduction benefits are global benefits due to actions that occur nationally. See section IV.L of the DFR for more details.

† DOE estimated the monetized value of NO_x emissions reductions associated with electricity savings using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.) See section IV.L.3 for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used national benefit-per-ton estimates for NO_x emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). For the High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.* 2011); these are nearly two-and-a-half times larger than those from the ACS study.

‡ Total Benefits for both the 3-percent and 7-percent cases are presented using the average social costs with 3-percent discount rate. In the rows labeled “7% plus GHG range” and “3% plus GHG range,” the operating cost and NO_x benefits are calculated using the labeled discount rate, and those values are added to the full range of social cost values.

†† Manufacturers are estimated to incur \$35.6 million in conversion costs between 2017 and 2020.

III. Other Prescriptive Requirements

As part of the DPPP Working Group's extended charter, the DPPP Working Group considered requirements for pumps distributed in commerce with freeze protections controls. (Docket No. EERE–2013–BT–NOC–0005, No. 71 at pp. 20–52) Freeze protection controls, as defined in the test procedure final rule, are controls that, at certain ambient temperature, turn on the dedicated-purpose pool pump to circulate water

for a period of time to prevent the pool and water in plumbing from freezing. As the control schemes for freeze protection vary widely between manufacturers, the resultant energy consumption associated with such control can also vary depending on control settings and climate. To ensure freeze protection controls on dedicated-purpose pool pumps only operate when necessary and do not result in unnecessary energy use, the DPPP

Working Group recommended establishing prescriptive requirements for dedicated-purpose pool pumps that are distributed in commerce with freeze protection controls. Specifically, the DPPP Working Group made the following recommendation, which it purports to maintain end-user utility while also reducing energy consumption:

All dedicated-purpose pool pumps distributed in commerce with freeze

protection controls must be shipped either with freeze protection disabled, or with the following default, user-adjustable settings: (1) The *default* dry-bulb air temperature setting is no greater than 40 °F; and (2) the *default* run time setting shall be no greater than 1 hour (before the temperature is rechecked); and (3) the *default* motor speed shall not be more than half of the maximum available speed. *Id.* (Docket No. EERE–2015–BT–STD–0008, No. 82, Recommendation #6A at p. 4). DOE agrees with the DPPP Working Group’s reasoning, and given the considerations discussed in section III.A of the Direct Final Rule, DOE proposes to adopt the recommended prescriptive standard for dedicated-purpose pool pumps distributed in commerce with freeze protection controls.

IV. Procedural Issues and Regulatory Review

The regulatory reviews conducted for this proposed rule are identical to those conducted for the direct final rule published elsewhere in **Federal Register**. Please see the direct final rule for further details.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

Submitting comments via www.regulations.gov. The www.regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be

included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to www.regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through www.regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through www.regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that www.regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or mail. Comments and documents submitted via email, hand delivery/courier, or mail also will be posted to www.regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption

and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters’ names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: one copy of the document marked “confidential” including all the information believed to be confidential, and one copy of the document marked “non-confidential” with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person that would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE’s policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Public Meeting

As stated previously, if DOE withdraws the direct final rule published elsewhere in the **Federal Register** pursuant to 42 U.S.C. 6295(p)(4)(C), DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on December 23, 2016.

David J. Friedman,

Acting Assistant Secretary Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend part 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Section 431.462 is amended by adding the definition for “pool pump timer” in alphabetical order to read as follows:

§ 431.462 Definitions.

* * * * *

Pool pump timer means a pool pump control that automatically turns off a dedicated-purpose pool pump after a run-time of no longer than 10 hours.

* * * * *

■ 3. Section 431.465 is amended by adding paragraphs (e), (f), (g) and (h) to read as follows:

§ 431.465 Pumps energy conservation standards and their compliance dates.

* * * * *

(e) For the purposes of paragraph (f) of this section, “WEF” means the weighted energy factor and “hhp” means the rated hydraulic horsepower, as determined in accordance with the test procedure in § 431.464(b) and applicable sampling plans in § 429.59 of this chapter.

(f) Each dedicated-purpose pool pump that is not a submersible pump and is manufactured starting on July 19, 2021 must have a WEF rating that is not less than the value calculated from the following table:

Equipment class		Minimum allowable WEF score [kgal/kWh]	Minimum allowable WEF score [kgal/kWh]
Dedicated-Purpose Pool Pump Variety	hhp Applicability	Motor phase	
Self-priming pool filter pumps	0.711 hp ≤ hhp < 2.5 hp	Single	WEF = $-2.30 * \ln(\text{hhp}) + 6.59$. WEF = 5.55, for hhp ≤ 1.30. hp – 1.30 * $\ln(\text{hhp}) + 2.90$, for hhp > 0.13 hp. WEF = 4.60, for hhp ≤ 0.13 hp – 0.85 * $\ln(\text{hhp}) + 2.87$, for hhp > 0.13 hp. WEF = 0.42
Self-priming pool filter pumps	hhp < 0.711 hp	Single	
Non-self-priming pool filter pumps	hhp < 2.5 hp	Any	
Pressure cleaner booster pumps	Any	Any	

(g) Each integral cartridge filter pool pump and integral sand filter pool pump that is manufactured starting on July 19, 2021 must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.

(h) For all dedicated-purpose pool pumps distributed in commerce with freeze protection controls, the pump must be shipped with freeze protection disabled or with the following default, user-adjustable settings:

(1) The default dry-bulb air temperature setting is no greater than 40 °F;

(2) The default run time setting shall be no greater than 1 hour (before the temperature is rechecked); and

(3) The default motor speed shall not be more than ½ of the maximum available speed.

[FR Doc. 2016–31665 Filed 1–17–17; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0755; Directorate Identifier 2010–NE–12–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede airworthiness directive (AD) 2012–04–01 that applies to all Rolls-Royce plc (RR) RB211–Trent 800 model turbofan engines. AD 2012–04–01 requires removal from service of certain critical engine rotating parts based on reduced life limits. Since we issued AD 2012–04–01, RR has further revised the life limits of certain critical engine rotating parts. This proposed AD would make additional revisions to the life limits of certain critical engine rotating parts. We

are proposing this AD to correct the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by March 6, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2010–0755; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket

contains this proposed AD, the mandatory continuing airworthiness information, regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781-238-7754; fax: 781-238-7199; email: robert.green@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2010-0755; Directorate Identifier 2010-NE-12-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the

closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On February 10, 2012, we issued AD 2012-04-01, Amendment 39-16956 (77 FR 10355, February 22, 2012), “AD 2012-04-01,” for all RR RB211-Trent 800 model turbofan engines. AD 2012-04-01 requires removal from service of certain critical engine rotating parts based on reduced life limits. AD 2012-04-01 resulted from RR reducing the life limits of certain critical engine rotating parts. We issued AD 2012-04-01 to prevent the failure of critical engine rotating parts, which could result in damage to the engine and damage to the airplane.

Actions Since AD 2012-04-01 Was Issued

Since we issued AD 2012-04-01, RR has reduced the life limit of two affected

critical engine rotating parts and extended the life of an additional critical engine rotating part. Also since we issued AD 2012-04-01, the European Aviation Safety Agency (EASA) has issued AD 2016-0223, dated November 8, 2016, which imposes new life limits on certain critical engine rotating parts.

FAA’s Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require replacement of certain critical engine rotating parts at a newer, lower life limit. This proposed AD would also extend the life limit for an additional critical engine rotating part.

Costs of Compliance

We estimate that this proposed AD affects 16 engines installed on airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement of critical engine rotating parts	0 work-hours × \$85 per hour = \$0.	\$45,000 (pro-rated cost of parts).	\$45,000	\$720,000

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency’s authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2012-04-01, Amendment 39-16956 (77 FR 10355, February 22, 2012), and adding the following new AD:

Rolls-Royce plc: Docket No. FAA-2010-0755; Directorate Identifier 2010-NE-12-AD.

(a) Comments Due Date

We must receive comments by March 6, 2017.

(b) Affected ADs

This AD supersedes AD 2012–04–01, Amendment 39–16956 (77 FR 10355, February 22, 2012).

(c) Applicability

This AD applies to all Rolls-Royce plc (RR) RR RB211–Trent 875–17, 877–17, 884–17,

884B–17, 892–17, 892B–17, and 895–17 turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by RR revising the life limits of certain critical engine rotating parts. We are issuing this AD to prevent the failure of critical engine rotating parts,

damage to the engine, and damage to the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(1) After the effective date of this AD, remove from service the parts listed in Table 1 to paragraph (f) of this AD before exceeding the new life limit indicated:

TABLE 1 TO PARAGRAPH (f)—REDUCED PART LIVES

Part nomenclature	Part No.	Life in standard duty cycles	Life in cycles using the HEAVY profile
Intermediate Pressure (IP) Compressor Rotor Shaft	FK24100	12,500	11,500
IP Compressor Rotor Shaft	FK24496	8,860	8,180
High-Pressure Compressor (HPC) Stage 1 to 4 Rotor Discs Shaft	FK24009	4,560	4,460
HPC Stage 1 to 4 Rotor Discs Shaft	FK26167	5,580	5,280
HPC Stage 1 to 4 Rotor Discs Shaft	FK32580	5,580	5,280
HPC Stage 1 to 4 Rotor Discs Shaft	FW11590	8,550	6,850
HPC Stage 1 to 4 Rotor Discs Shaft	FW61622	8,550	6,850
HPC Stage 5 and 6 Discs and Cone	FK25230	5,000	5,000
HPC Stage 5 and 6 Discs and Cone	FK27899	5,000	5,000
IP Turbine Rotor Disc	FK21117	11,610	10,400
IP Turbine Rotor Disc	FK33083	0	0

(2) Reserved.

(g) Installation Prohibition

After the effective date of this AD, do not install any IP turbine discs, P/N FK33083, into any engine.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: ANE-AD-AMOC@faa.gov.

(i) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: robert.green@faa.gov.

(2) Refer to MCAI European Aviation Safety Agency, AD 2016–0223, dated November 8, 2016, for more information. You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating it in Docket No. FAA–2010–0755.

Issued in Burlington, Massachusetts, on January 11, 2017.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2017–00890 Filed 1–17–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA–2017–0019; Directorate Identifier 2016–CE–038–AD]

RIN 2120–AA64

Airworthiness Directives; GROB Aircraft AG Gliders

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for GROB Aircraft AG Models GROB G 109 and GROB G 109B gliders. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as broken pivots of the tail wheel mounting bracket resulting from corrosion and damage due to wear. We are issuing this proposed AD to require actions to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by March 6, 2017.

ADDRESSES: You may send comments by any of the following methods:

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *Fax:* (202) 493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact GROB Aircraft AG, Product Support, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany, telephone: + 49 (0) 8268–998–105; fax: + 49 (0) 8268–998–200; email: productsupport@grob-aircraft.com; Internet: grob-aircraft.com. You may review this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2017–0019; or in person at the Docket Management Facility between 9 a.m.

and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4165; fax: (816) 329-4090; email: jim.rutherford@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2017-0019; Directorate Identifier 2016-CE-038-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD No.: 2016-0228, dated November 14, 2016 (referred to after this as “the MCAI”), to correct an unsafe condition for the specified products. The MCAI states:

Occurrences were reported of broken pivots of the tail wheel mounting bracket. Subsequent investigation attributed these events to corrosion and damage due to wear.

This condition, if not detected and corrected, could lead to loss of rudder control, resulting in reduced control of the powered sailplane.

To address this potentially unsafe condition, Grob Aircraft AG issued Mandatory Service Bulletin (MSB) 817-70 (hereafter referred to as “the MSB” in this AD) to provide inspection and repair instructions.

For the reasons described above, this AD requires repetitive inspections of the tail wheel mounting bracket and, depending on findings, accomplishment of applicable corrective action(s).

You may examine the MCAI on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0019.

Related Service Information Under 1 CFR Part 51

GROB Aircraft AG has issued Service Bulletin No. MSB817-70, dated September 28, 2016, and GROB Aircraft AG Repair Instruction RI 817-015, dated September 16, 2016. In combination, this service information describes procedures for inspection of the tail mounting bracket and instructions for any necessary repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section of this NPRM.

FAA’s Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD will affect 57 products of U.S. registry. We also estimate that it would take about 3 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Required parts would cost about \$50 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$17,385, or \$305 per product.

In addition, we estimate that any necessary follow-on actions would take about 5 work-hours and require parts costing \$100, for a cost of \$525 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. “Subtitle VII: Aviation Programs,” describes in more detail the scope of the Agency’s authority.

We are issuing this rulemaking under the authority described in “Subtitle VII, Part A, Subpart III, Section 44701: General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a “significant regulatory action” under Executive Order 12866,

(2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

GROB Aircraft AG: Docket No. FAA-2017-0019; Directorate Identifier 2016-CE-038-AD.

(a) Comments Due Date

We must receive comments by March 6, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to GROB Aircraft AG Models GROB G 109 and GROB G 109B gliders, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as broken pivots of the tail wheel mounting bracket resulting from corrosion and damage due to wear. We are issuing this proposed AD to detect and correct if necessary any corrosion or damage to the tail wheel mounting bracket, which could cause loss of rudder control and result in reduced control.

(f) Actions and Compliance

Unless already done, do the following actions:

(1) Within the next 3 months after the effective date of this AD or 100 hours time-in-service (TIS) after the effective date of this AD, whichever occurs first, and repetitively thereafter at intervals not to exceed every 100 hours TIS or 12 months, whichever occurs first, inspect the tail wheel mounting bracket following the Accomplishment Instructions in section 1.8 of GROB Aircraft AG Service Bulletin (SB) No. MSB817-70, dated September 28, 2016.

(2) If any damage is found during any inspection required in paragraph (f)(1) of this AD, before further flight, repair following GROB Aircraft AG Repair Instruction RI 817-015, dated September 16, 2016.

Note 1 to paragraph (f)(2) of this AD: The bolt in Figure 1, Pos. 10 of GROB Aircraft AG Repair Instruction RI 817-015, dated September 16, 2016, is welded into place onto the steel base plate. Therefore, in order to facilitate the removal of the bolt, the welding seams may be carefully ground off using caution to not damage the steel base plate, instead of completely cutting off the bolt head.

(3) Repairs made as required by paragraph (f)(2) of this AD do not qualify as terminating action for the repetitive inspections required in paragraph (f)(1) of this AD.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust,

Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4165; fax: (816) 329-4090; email: jim.rutherford@faa.gov. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2016-0228, dated November 14, 2016, for related information. You may examine the MCAI on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0019. For service information related to this AD, contact GROB Aircraft AG, Product Support, Lettenbachstrasse 9, D-86874 Tussenhausen-Mattsies, Germany, telephone: + 49 (0) 8268-998-105; fax: + 49 (0) 8268-998-200; email: productsupport@grob-aircraft.com; Internet: grob-aircraft.com. You may review this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

Issued in Kansas City, Missouri, on January 6, 2017.

Melvin Johnson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017-00658 Filed 1-17-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 982 and 983

[Docket No. FR-5976-N-03]

Housing Opportunity Through Modernization Act of 2016: Implementation of Various Section 8 Voucher Provisions

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Implementation and request for comment.

SUMMARY: On July 29, 2016, President Obama signed into law the Housing Opportunity Through Modernization Act of 2016 (HOTMA). Several of the statutory amendments made by HOTMA affect the Project-Based Voucher (PBV) program or the Housing Choice Voucher (HCV) program. HOTMA also gave HUD the authority to implement many of

those changes by notice, and those statutory changes are not effective until HUD issues that notice. This document serves as the implementation notice for several of the provisions of HOTMA that impact the HCV and PBV programs, and seeks additional public input on both the implementing requirements in this document and future changes to these programs.

DATES: *Effective date:* April 18, 2017.

Comment due date: March 20, 2017.

ADDRESSES: Interested persons are invited to submit comments regarding this document. All communications must refer to the above docket number and title. There are two methods for submitting public comments.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the www.regulations.gov Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:
Please direct all questions about this notice to HOTMAquestionsPIH@hud.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 29, 2016, President Obama signed HOTMA into law (Public Law 114–201, 130 Stat. 782). HOTMA made numerous changes to statutes that govern HUD programs, including section 8 of the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437f). HUD issued a notice on October 24, 2016, at 81 FR 73030, announcing to the public which of the statutory changes made by HOTMA could be implemented immediately, and which required further guidance from HUD before owners, public housing agencies (PHAs), or other grantees may use the new statutory provisions.

This document implements new statutory provisions regarding certain inspection requirements for both HCV tenant-based and PBV assistance (found in § 101(a)(1) of HOTMA), the definition of PHA-owned housing (§ 105 of HOTMA), and changes to the PBV program at large (§ 106 of HOTMA) by providing the additional information needed for PHAs and owners to use those provisions. The document also implements and provides guidance on the statutory change to the HCV housing assistance payment (HAP) calculation for families who own manufactured housing and are renting the manufactured home space (§ 112 of HOTMA).

While this document makes the provisions below effective, HUD seeks further public comment on the implementation of these provisions. Below each section describing the implementation of a statutory provision, HUD has included specific questions for public comment. All comments must be submitted using the two methods detailed above.

II. Implementation Information

A. Inspections of Dwelling Units (HOTMA § 101(a)(1))

Section 101(a)(1) of HOTMA adds a modified subparagraph (A) to section 8(o)(8) of the 1937 Act (42 U.S.C. 1437f(o)(8)). The amended subparagraph continues the requirement of inspections of dwelling units assisted under section 8(o) of the 1937 Act to determine that the units meet housing quality standards (HQS) prior to the PHA making a housing assistance payment. However, new language provides an exception to this requirement, allowing the PHA to

approve the assisted tenancy and commence housing assistance payments if the unit fails the inspection but only has non-life-threatening HQS deficiencies. If a PHA makes payments under that exception, the PHA must withhold any assistance payments if the non-life-threatening deficiencies are not remedied within no more than 30 days of the PHA notifying the owner of the unit, in writing, of the unit's failure to comply with HQS.

In addition, new language authorizes occupancy of a unit prior to the inspection being completed if the unit had, in the previous 24 months, passed an alternative inspection method under section 8(o)(8)(E). The PHA must inspect the unit within 15 days of receiving the Request for Tenancy Approval. Once the unit passes the HQS, the PHA may make assistance payments retroactively, dating back to the beginning of the assisted lease term, which is the effective date of the HAP contract. Per 24 CFR 982.309(b), the term of the HAP contract begins on the first day of the lease term and ends on the last day of the lease term.

This document does not implement other provisions in section 101(a) of HOTMA.

1. Occupancy Prior to Meeting HQS (§ 8(o)(8)(A)(ii) of 1937 Act)

As a result of the HOTMA amendments to Section 8(o)(8)(A)(ii) of the 1937 Act, PHAs may choose to approve an assisted tenancy, execute the HAP contract, and begin making housing assistance payments on a unit that fails the initial HQS inspection, provided the unit's failure to meet HQS is the result only of non-life-threatening conditions, as such conditions are defined by HUD. In exercising this administrative flexibility under § 8(o)(8)(A)(ii), PHAs must comply with the definitions and requirements in this section, in addition to those provided in HUD regulations and requirements. If the PHA exercises this authority, this document overrides the requirement at 982.305(a)(2) and (b)(i) that the PHA has determined that the unit *meets* HQS before approval of the tenancy and beginning of the initial lease term. (The PHA must still conduct the HQS inspection prior to approval of the tenancy and the beginning of the initial lease term in accordance with those regulations.)

A. HUD Definition of Non-Life-Threatening and Life-Threatening Conditions

For the purposes of implementing § 8(o)(8)(A)(ii), HUD is defining a non-life-threatening condition as any

condition that would fail to meet the housing quality standards under 24 CFR 982.401 and is not a life-threatening condition. Further, for the purposes of this implementation notice, HUD is defining life-threatening conditions as follows:

(1) Gas (natural or liquid petroleum) leak or fumes. A life-threatening condition under this standard is one of the following: (a) A fuel storage vessel, fluid line, valve, or connection that supplies fuel to a HVAC unit is leaking; or (b) a strong gas odor detected with potential for explosion or fire, or that results in health risk if inhaled.

(2) Electrical hazards that could result in shock or fire. A life-threatening condition under this standard is one of the following: (a) A light fixture is readily accessible, is not securely mounted to the ceiling or wall, and electrical connections or wires are exposed; (b) a light fixture is hanging by its wires; (c) a light fixture has a missing or broken bulb, and the open socket is readily accessible to the tenant during the day to day use of the unit; (d) a receptacle (outlet) or switch is missing or broken and electrical connections or wires are exposed; (e) a receptacle (outlet) or switch has a missing or damaged cover plate and electrical connections or wires are exposed; (f) an open circuit breaker position is not appropriately blanked off in a panel board, main panel board, or other electrical box that contains circuit breakers or fuses; (g) a cover is missing from any electrical device box, panel box, switch gear box, control panel, etc., and there are exposed electrical connections; (h) any nicks, abrasions, or fraying of the insulation that expose conducting wire; (i) exposed bare wires or electrical connections; (j) any condition that results in openings in electrical panels or electrical control device enclosures; (k) water leaking or ponding near any electrical device; or (l) any condition that poses a serious risk of electrocution or fire and poses an immediate life-threatening condition.

(3) Inoperable or missing smoke detector. A life-threatening condition under this standard is one of the following: (a) the smoke detector is missing; or (b) the smoke detector does not function as it should.

(4) Interior air quality. A life-threatening condition under this standard is one of the following: (a) the carbon monoxide detector is missing; or (b) the carbon monoxide detector does not function as it should.

(5) Gas/oil fired water heater or heating, ventilation, or cooling system with missing, damaged, improper, or misaligned chimney or venting. A life-

threatening condition under this standard is one of the following: (a) The chimney or venting system on a fuel fired water heater is misaligned, negatively pitched, or damaged, which may cause improper or dangerous venting of gases; (b) a gas dryer vent is missing, damaged, or is visually determined to be inoperable, or the dryer exhaust is not vented to the outside; (c) a fuel fired space heater is not properly vented or lacks available combustion air; (d) a non-vented space heater is present; (e) safety devices on a fuel fired space heater are missing or damaged; or (f) the chimney or venting system on a fuel fired heating, ventilation, or cooling system is misaligned, negatively pitched, or damaged which may cause improper or dangerous venting of gases.

(6) Lack of alternative means of exit in case of fire or blocked egress. A life-threatening condition under this standard is one of the following: (a) Any of the components that affect the function of the fire escape are missing or damaged; (b) stored items or other barriers restrict or prevent the use of the fire escape in the event of an emergency; or (c) the building's emergency exit is blocked or impeded, thus limiting the ability of occupants to exit in a fire or other emergency.

(7) Other interior hazards. A life-threatening condition under this standard is a fire extinguisher (where required) that is missing, damaged, discharged, overcharged, or expired.

(8) Deteriorated paint, as defined by 24 CFR 35.110, in a unit built before 1978 that is to be occupied by a family with a child under 6 years of age. This is a life-threatening condition only for the purpose of a condition that would prevent a family from moving into the unit. All lead hazard reduction requirements in 24 CFR part 35, including the timeline for lead hazard reduction procedures, still apply.

(9) Any other condition subsequently identified by HUD as life threatening in a notice published in the **Federal Register**. HUD will notify PHAs if such changes are made.

(10) Any other condition identified by the administering PHA as life-threatening in the PHA's administrative plan prior to this notice taking effect.

B. Administrative Plans

Before implementing § 8(o)(8)(A)(ii), PHAs must amend their HCV administrative plans to include HUD's definition of non-life-threatening conditions as any conditions that would fail to meet the housing quality standards under 24 CFR 982.401 and do not meet the definition of life-

threatening provided in this notice. The PHA's HCV administrative plan must list the specific life-threatening conditions that will be identified through the PHA's inspections, including the life-threatening conditions listed in Section 1.A. above and any other conditions that the PHA identified in its HCV administrative plan as life-threatening prior to this notice taking effect.

The PHA must also specify in its administrative plan how it will apply the flexibility provided by § 8(o)(8)(A)(ii) to its HCV and/or PBV program. The PHA may opt to apply the policy to all the PHA's initial inspections or to a portion of the PHA's initial inspections. The PHA's administrative plan must specify the circumstances under which the PHA will enter into a HAP contract for a unit that fails the initial HQS inspection as a result only of non-life-threatening conditions and the circumstances under which a PHA will require the unit to meet all HQS standards before entering into the HAP contract.

The changes to the PHA's HCV administrative plan to define non-life-threatening conditions and to specify how the policy will be applied across its portfolio of units may constitute significant amendments to the PHA's PHA plan, in which case a PHA must follow its PHA plan amendment and public notice requirements before implementing § 8(o)(8)(A)(ii).

C. Application of Life-Threatening Definition to aAl Inspections

A PHA that chooses to implement § 8(o)(8)(A)(ii) must apply the list of life-threatening conditions identified in its HCV administrative plan to all HQS inspections that the PHA conducts, not just the initial inspections. In other words, PHAs that adopt § 8(o)(8)(A)(ii) must amend their HCV administrative plans to include HUD's definition of life-threatening conditions, as well as any additional life-threatening conditions included in the PHA's HCV administrative plan that were already defined in the PHA's HCV administrative plan prior to this notice taking effect, and must use those definitions in its ongoing HQS inspections and HQS enforcement activities as well as its initial inspections. The PHA must use the new definition of life-threatening deficiencies across all of its HQS inspections even if the PHA chooses to apply § 8(o)(8)(A)(ii) only to a portion of its initial inspections. The only exception to this uniformity requirement is the presence of deteriorated paint in units built before

1978 to be occupied by a family with a child under the age of 6. The presence of such hazards during the initial HQS inspection means a PHA may not approve the tenancy, execute the HAP contract and make assistance payments until lead hazard reduction is complete. However, in the case where the deficiency is identified for a unit under HAP contract during a regular or interim HQS inspection, lead hazard reduction need not be completed within 24 hours. Instead, PHAs and owners must follow the requirements in 24 CFR part 35.

D. Documenting the Absence of Life-Threatening Conditions

A PHA that chooses to implement § 8(o)(8)(A)(ii) must ensure that the unit does not have any life-threatening deficiencies before the PHA approves the assisted tenancy and executes the HAP contract. The PHA must document that the unit passes all inspection items that relate to any life-threatening deficiencies identified in the PHA's HCV administrative plan (including those on HUD's list of life-threatening deficiencies). HUD will provide guidance for PHAs on how to incorporate HUD's definition of life-threatening conditions into its regular HQS procedures for purposes of implementing § 8(o)(8)(A)(ii).

E. Notification of Owners and Tenants

PHAs that adopt § 8(o)(8)(A)(ii) must notify owners and families, as applicable, of the new procedures and timelines for assistance payments. If the initial inspection on the unit identifies one or more non-life-threatening deficiencies, the PHA must provide the family a list of the deficiencies and offer the family the opportunity to decline to enter into the assisted lease without losing the voucher. The PHA must also notify the family that if the owner fails to correct the non-life-threatening deficiencies within the PHA-specified time period, the PHA will terminate the HAP contract, which in turn terminates the assisted lease, and the family will have to move to another unit in order to receive voucher assistance.

F. Housing Assistance Payments

PHAs that adopt § 8(o)(8)(A)(ii) may, with the agreement of the family, approve the assisted tenancy, execute the HAP contract, and make housing assistance payments for a unit that fails the initial HQS inspection only as a result of non-life-threatening conditions as defined above. If the non-life-threatening conditions are not corrected within 30 days of the PHA notifying the owner of the unit, in writing, of the unit's failure to comply with HQS, the

PHA must withhold any further assistance payments until those conditions are addressed and the unit is in compliance with the housing quality standards. After the 30-day correction period has passed and the PHA begins withholding payments, the PHA may establish a policy regarding the maximum amount of time it will withhold payments before abating payments or terminating the HAP contract for owner non-compliance with HQS. Once the unit is in compliance, the PHA may use any payments withheld to make payments for the period during which payments were withheld.

The PHA will follow its administrative policy on when to issue a new voucher to the family and when to terminate the HAP contract for owner non-compliance with HQS. HUD expects PHAs to require prompt correction of HQS deficiencies to minimize the amount of time a family could be living in a unit that is not HQS compliant. There may be some cases where repairs cannot be made immediately. However, under no circumstances may the HAP contract continue beyond 180 days of the effective date of the HAP contract if unit is not in compliance with HQS.

If the PHA adopts this administrative policy, 24 CFR 982.305(a) and (b) remain in effect, with the exception that the PHA is required to inspect the unit and determine that there are no life-threatening deficiencies (rather than determining the unit satisfies the HQS) before the approval of the assisted tenancy and the beginning of the assisted lease term.

G. Notification of HUD

PHAs that plan to adopt § 8(o)(8)(A)(ii) must notify HUD of their intention to do so. The notification must be provided at least 30 days before the new policy is implemented and must be sent by email to HOTMA_HQS@hud.gov. This notification allows HUD to track the usage of this provision as authorized by this notice for the purpose of making adjustments to the PHA's scoring under HUD's Section Eight Management Assessment Program (SEMAP) as needed.

H. Section Eight Management Assessment Program (SEMAP)

SEMAP Indicator 11, Pre-Contract HQS Inspection, scores the PHA based on the percentage of units that pass the HQS inspection before the beginning of the assisted lease and HAP contract. This indicator is inconsistent with § 8(o)(8)(A)(ii), assuming a PHA utilizes the new statutory flexibility. Therefore,

HUD will issue specific guidance on how SEMAP Indicator 11 will be modified to ensure that PHAs that adopt § 8(o)(8)(A)(ii) will be scored based on the new statutory standard. Until further guidance is provided, PHAs should continue to report as usual in PIC (that is, the date the PHA enters into PIC for when the unit passes HQS inspection is the date that the unit is found to have no HQS deficiencies, including no non-life-threatening deficiencies).

Questions for Comment

1. Is HUD's definition of non-life-threatening conditions as any condition that does not meet HUD's definition of life-threatening appropriate? If not, is there an alternate definition HUD should use?

2. HUD's list of life-threatening conditions is based on the definition currently being used by the UPCS-V demonstration. Are there other sources that HUD should consider for this list?

3. Is establishing 180 days as the maximum time the PHA may withhold or abate payments before terminating the HAP contract for the owner's failure to make the repairs the appropriate time frame? Should this time period be shorter or longer?

4. How should HUD modify SEMAP Indicator 11 for PHAs that elect to implement § 8(o)(8)(A)(ii)?

5. Are there any other discretionary factors that PHAs should consider in implementing § 8(o)(8)(A)(ii)?

2. Alternative Inspections (§ 8(o)(8)(A)(iii) of 1937 Act)

The new § 8(o)(8)(A)(iii) of the 1937 Act authorizes occupancy of a unit prior to the PHA's inspection being completed if the property has, in the previous 24 months, passed an alternative inspection method that qualifies as an alternative inspection method pursuant to § 8(o)(8)(E). In this case, a PHA may also make assistance payments retroactively, dating back to the effective date of the HAP contract and assisted lease term, once the unit has been inspected and found to meet HQS standards. In exercising this administrative flexibility under § 8(o)(8)(A)(iii), PHAs must comply with the definitions and requirements in this section, in addition to those provided in HUD regulations and requirements. If a PHA exercises this authority, this document overrides the regulatory requirement at 24 CFR 982.305(a)(2) and (b)(1)(i) that the PHA inspect the unit and determine it meets HQS prior to approving the tenancy and the beginning of the assisted lease term. The requirements of this document also

overrides §§ 982.305(b)(2) and 982.305(c)(1) and (3).

A. Eligible Alternative Inspection Methods

In order to qualify as an alternative inspection method for § 8(o)(8)(A)(iii), the inspection method must meet the same requirements for the use of alternative inspections under 24 CFR 982.406. Specifically:

(1) The PHA must be able to obtain the results of the alternative inspection.

(2) If the alternative inspection employs sampling, the PHA may rely on such alternative method only if the HCV or PBV unit was included in the population of units forming the basis of the sample. For example, if a 100-unit property includes 20 units that are occupied by HCV-assisted families or are under a PBV contract, then those 20 units must be included in the universe of units from which the sample was pulled. This does not mean that the 20 units had to be included in the actual sample of units that were inspected under the alternative inspection, but that these units were included in the universe of potential units from which the sample was drawn.

(3) A PHA may rely upon inspections of housing assisted under the HOME Investment Partnerships (HOME) program or housing financed using Low-Income Housing Tax Credits (LIHTCs), or inspections performed by HUD, without prior HUD approval. However, before employing this alternative method the PHA must amend its HCV administrative plan and notify HUD as described below.

(4) If the PHA wishes to rely on an alternative inspection method other than that used for HOME, LIHTC, or inspections performed by HUD, the PHA must, prior to amending its HCV administrative plan, submit to HUD's Real Estate Assessment Center (REAC) a copy of the inspection method it wishes to use, along with its analysis of the inspection method that shows that the method "provides the same or greater protection to occupants of dwelling units" as would HQS. A PHA may not rely upon such alternative inspection method unless and until REAC has reviewed and approved use of the method and the PHA has amended its HCV administrative plan and notified HUD as described below. A PHA that uses such alternative inspection method must monitor changes to the standards and requirements applicable to such method. If any change is made to the alternative inspection method, the PHA must submit to REAC a copy of the revised standards and requirements, along with a revised comparison to

HQS. If the PHA or REAC determines that the revision would cause the alternative inspection to no longer meet or exceed HQS, then the PHA may no longer rely upon the alternative inspection method for § 8(o)(8)(A)(iii).

B. Administrative Plans

The PHA must identify the alternative inspection method(s) being used in its HCV administrative plan, making clear the specific properties or types of properties for which the inspection method(s) will be employed. This change may be a significant amendment to the PHA Plan, in which case a PHA must follow its PHA Plan amendment and public notice requirements before using the alternative inspection method.

C. Authorization of Occupancy

Section 8(o)(8)(A)(iii) states that the PHA may “authorize occupancy” before the PHA completes its inspection if the property passed the alternative inspection. The PHA authorizes occupancy in response to a Request for Tenancy Approval (RFTA) received from the family. Upon receiving the RFTA, a PHA that elects to use this provision determines whether the property in which the unit is located received an inspection within the previous 24 months that qualifies as an alternative inspection and the unit meets any additional requirements established in the PHA administrative plan. If the property has passed the alternative inspection within the past 24 months, the PHA may approve the assisted tenancy before the PHA conducts the initial HQS inspection. If the PHA chooses to approve the assisted tenancy prior to conducting the HQS inspection, the PHA enters into the HAP contract with the owner and the owner and family enter into the lease agreement and HUD prescribed tenancy addendum before the PHA’s HQS inspection takes place. The PHA must conduct the HQS inspection within 15 days of receiving the RFTA (as described below) and after it has executed the HAP contract.

In the case where the PHA exercises its authority under § 8(o)(8)(A)(iii), the PHA must execute the HAP contract with the owner before the PHA’s inspection takes place. The PHA must execute the HAP contract with the owner on or before the beginning of the lease term, not within 60 days of the beginning of the lease term as provided in 24 CFR 982.305(c). Since the family will have moved into the unit before the PHA does the initial inspection, the PHA must have a contractual relationship with the owner at the time of the inspection so that the PHA can

take enforcement action if the unit does not pass HQS and the owner does not make the necessary repairs within the required timeframes.

D. Timing of the PHA Inspection

Section 8(o)(8)(A)(iii) allows the PHA to authorize occupancy before the PHA’s inspection is completed. It does not eliminate the requirement under § 8(o)(8)(A)(i) for the PHA (or designated entity) to conduct the initial inspection. Under the current program regulations at 24 CFR 982.305(b)(2), a PHA with up to 1,250 budgeted units in its tenant-based program must complete the initial inspection within 15 days of receiving the RFTA, and a PHA with more than 1,250 budgeted units in its tenant-based program must complete the initial inspection within a reasonable time after the PHA receives the RFTA. All PHAs that implement Section 8(o)(8)(A)(iii) must complete the initial inspection within 15 days of receiving the RFTA for units located in properties that have met the requirements of an eligible alternative inspection in the past 24 months. The 15-day standard applies to all units for which the PHA employs § 8(o)(8)(A)(iii), regardless of the size of the PHA’s tenant-based program.

E. Housing Assistance Payments

The PHA must conduct the initial HQS inspection within 15 days of receiving the RFTA. If the unit passes the PHA’s inspection, the PHA may make HAPs retroactively to the effective date of the HAP contract and the start of the assisted lease term. If the unit does not pass the PHA’s inspection, and if the PHA has not adopted § 8(o)(8)(A)(ii) regarding the correction of non-life-threatening deficiencies, the PHA may not make housing assistance payments until the HQS deficiencies have been corrected. The PHA must notify the owner in writing of the defects and take enforcement action against the owner if any life-threatening defect (as identified in the PHA’s HCV administrative plan) is not corrected within 24 hours or any other defect is not corrected within 30 calendar days or any PHA-approved extension. If the PHA has adopted § 8(o)(8)(A)(ii) and the unit has only non-life-threatening deficiencies, the PHA may make housing assistance payments according to the procedures specified in Section A.1. above.

In deciding whether to implement Section 8(o)(8)(A)(ii), HUD recommends that PHAs carefully consider the complications that could arise if a PHA enters into a HAP contract with an owner on the basis of an alternative

inspection but then identifies HQS deficiencies in its initial inspection. The family may be living with these deficiencies during the correction period and may ultimately have to move if the owner is not willing to make the corrections. The PHA will follow its administrative policy on when to issue a new voucher to the family and when to terminate the HAP contract for owner non-compliance with HQS. HUD expects PHAs to require prompt correction of HQS deficiencies to minimize the amount of time a family could be living in a unit that is not HQS compliant. There may be some cases where repairs cannot be made immediately. However, under no circumstances will the HAP contract continue beyond 180 days of the effective date of the HAP contract if unit is not in compliance with HQS.

F. Notification of Owners and Tenants

PHAs that adopt § 8(o)(8)(A)(iii) must notify owners and families, as applicable, of the new procedures and timelines for assistance payments. When authorizing a family to move into a unit prior to the PHA’s inspection, the PHA must advise the family of the PHA’s list of life-threatening deficiencies so that the family can look for such items in the unit and notify the PHA immediately if such deficiencies are found or decline to enter into the lease with the owner.

G. Notification of HUD

PHAs that plan to adopt § 8(o)(8)(A)(iii) must notify HUD of their intention to do so. The notification must be provided at least 30 days before the new policy is implemented and must be sent by email to HOTMA_HQS@hud.gov. This allows HUD to track the usage of this provision as authorized by this notice for the purpose of making adjustments to the PHA’s scoring under HUD’s Section Eight Management Assessment Program (SEMAP) as needed.

H. Section Eight Management Assessment Program (SEMAP)

SEMAP Indicator 11, Pre-Contract HQS Inspection, scores the PHA based on the percentage of units that pass the HQS inspection before the beginning of the assisted lease and HAP contract. This indicator is inconsistent with § 8(o)(8)(A)(iii), assuming a PHA utilizes the new statutory flexibility. Therefore, HUD will issue specific guidance on how SEMAP Indicator 11 will be modified to ensure that PHAs that adopt § 8(o)(8)(A)(iii) will be scored based on the new statutory standard.

Question for Comment

How should HUD modify SEMAP Indicator 11 for PHAs that elect to implement § 8(o)(8)(A)(iii)?

B. Units Owned by a PHA (HOTMA § 105)

HOTMA amends section 8(o) of the 1937 Act to provide a statutory definition of units owned by a PHA, overriding HUD's current definition at 24 CFR 983.3 for the PBV program and as a PHA-owned unit is described at 24 CFR 982.352. A unit is now "owned by a public housing agency" only if the unit is in a project that is one of the following categories:

- (1) Owned by a PHA.
- (2) Owned by an entity wholly controlled by the PHA.
- (3) Owned by a limited liability company or limited partnership in which the PHA (or an entity wholly controlled by the PHA) holds a controlling interest in the managing member or general partner. A "controlling interest" is—
 - (A) holding 50 percent or more of the stock of any corporation;
 - (B) having the power to appoint 50 percent or more of the members of the board of directors of a non-stock corporation (such as a non-profit corporation);
 - (C) where 50 percent or more of the members of the board of directors of any corporation also serve as directors, officers or employees of the PHA;
 - (D) holding 50 percent or more of all managing member interests in an LLC;
 - (E) holding 50 percent or more of all general partner interests in a partnership; or
 - (F) equivalent levels of control in other organizational structures.

Units in which PHAs have a different ownership interest are no longer considered to be owned by the PHA.

In order to be considered a "PHA-owned" unit as described above, the PHA must have ownership interest in the building itself, not simply the land beneath the building.

For units that were previously considered to be PHA-owned but are no longer PHA-owned due to this definitional change, the PHA must obtain an opinion from its legal counsel that the project in question falls outside the statutory definition. The PHA must keep the opinion in the PHA's files. Until such time that the opinion letter is obtained, the PBV project remains PHA-owned for purposes of program requirements and HUD monitoring. If an ownership structure changes in the future that removes a project from the definition of PHA-owned, the PHA must

obtain and keep the same sort of opinion letter. If an ownership structure changes in a manner that would cause a PBV project to be classified as PHA-owned (e.g., PHA ownership interest is increased to an amount greater than 50 percent), the PHA must identify, in writing, within 30 days of the change in ownership, the proposed independent entity that will perform all of the applicable independent entity responsibilities for the project in compliance with 24 CFR 983.59 and PIH Notice 2015–05 (or subsequent guidance) for PBV and 24 CFR 982.352(b) for HCV tenant-based assistance.

For PBV projects where the PHA has an interest in the project, but such interest does not cause the project to be classified as PHA-owned housing as described above, HUD may review the PHA's rent determination for such projects, including the PHA's methodology of determining rent comparability. HUD intends to issue additional guidance concerning HUD review and monitoring of rent determinations and rent adjustments for PBV projects, including cases in which the PHA has an interest in the PBV project.

Questions for Comment

1. Should the definition of "controlling interest" be different?
2. Are there programmatic issues with changing a unit's designation from PHA-owned to not PHA-owned that need to be addressed by HUD?
3. What, if any, additional oversight and monitoring should HUD undertake for units in which the PHA has ownership interest in order to ensure that all program requirements (including rent reasonableness and housing quality standards) are being met, especially in cases where the PHA responsible for enforcing those standards has a financial interest in the project?

C. Project-Based Vouchers (HOTMA § 106)

This section makes several statutory changes to the Project-Based Voucher (PBV) Program in section 8(o)(13) of the 1937 Act. The amendments include:

- (1) changing the terminology in the statute from "structure" to "project" where the statute refers to structure instead of project;
- (2) changing the PHA HCV program limitation on PBV vouchers from a 20 percent funding limitation to a 20 percent unit limitation calculation and allowing for additional project-basing of vouchers by raising the limit an additional 10 percent for homeless

families, families with veterans, supportive housing for persons with disabilities or elderly persons, or in areas where vouchers are difficult to use. The statute also excludes certain projects that were previously subject to federally required rent restrictions or were receiving another type of long-term HUD housing subsidy from the program PBV limitation entirely;

(3) changing the income-mixing cap on the number of PBV units in a project to be the greater of 25 units in a project or 25 percent of the units in a project (the project unit cap), and making changes to the categories of PBV units that are excepted from this project unit cap;

(4) allowing the PHA to provide for an initial PBV contract of up to 20 years and to further extend that term for an additional 20 years;

(5) allowing the PHA to establish a selection preference for families who *qualify* for voluntary services, including disability-specific services, offered in conjunction with assisted units, provided that the preference is consistent with the PHA plan;

(6) allowing the PHA to attach assistance to structures in which the PHA has an ownership interest or control without following a competitive process; and

(7) allowing PHAs to project-base HUD-VASH and FUP vouchers in accordance with statutory and regulatory requirements of the PBV program without additional requirements for approval by HUD.

This notice does not implement all the provisions of section 106 of HOTMA, but only those where HUD believes it is reasonable to do so and does not provide undue burden on PHAs to implement. HUD may provide additional guidance to this notice to ensure effective implementation and elaborate on issues that may need clarification.

Provisions under section 106 of HOTMA that are *not* implemented by this document and that the PHA and owner may not yet implement are as follows:

(1) Entering into a PBV HAP Contract for any unit that does not qualify as existing housing and is under construction or recently has been constructed regardless of whether the PHA and owner executed an Agreement to Enter a Housing Assistance Payments Contract (AHAP) (see section 106(a)(4) of HOTMA);

(2) Providing rent adjustments using an operating cost factor (see section 106(a)(6) of HOTMA);

(3) Establishing and utilizing procedures for owner-maintained site-

based waiting lists (see section 106(a)(7) of HOTMA); and

(4) Concerning the environmental review requirements for existing housing (see section 106(a)(8) of HOTMA).

1. Changing “structure” to “project” (§ 106(a)(1) of HOTMA)

This provision amends section 8(o)(13) by replacing the term “structure” with the term “project” throughout the paragraph. No guidance is needed to make this change. In accordance with the law, this document serves as official notice that this statutory change is effective as of *April 18, 2017*. HUD will issue any needed conforming regulatory changes in the future.

2. Changing the Maximum Amount of PBVs Permitted in the PHA HCV Program (§ 8(o)(13)(B) of 1937 Act).

This section of the document overrides 24 CFR 983.6 of the PBV program regulations.

A. Maximum Amount of PBVs in the PHA’s HCV Program

Under the new § 8(o)(13)(B) of the 1937 Act, PHAs may now project-base up to 20 percent of the PHA’s authorized units, instead of 20 percent of the PHA’s voucher budget authority. However, the PHA is still responsible for determining the amount of budget authority it has is available and ensuring that the amount of assistance that will be attached to the units is available under the ACC, regardless of whether the PHA has vouchers available for project-basing.

Prior to issuing a request for proposals (RFP) (24 CFR 983.51(b)(1)), selecting a project based on a previous competition (24 CFR 983.51(b)(2)), or selecting a project without following a competition process where the PHA has ownership interest and is engaged in improving, developing or replacing a public housing property or site (see section C.7 of this document), the PHA must submit to the local field office all the following information (in lieu of following the requirements of 24 CFR 983.6(d)):

(1) The total number of units authorized under the Consolidated Annual Contributions Contract (ACC) for the PHA (excluding those PBV units entirely excluded from the cap described in sections C.2.C and C.2.D below). This number of authorized units includes special-purpose vouchers such as HUD–VASH (except as provided in section D below) and Family Unification Program vouchers. The PHA must also identify the number of PBV units that are excluded from total, if applicable.

(2) The total number of units currently committed to PBV (excluding those PBV units entirely excluded from the cap described in sections C.2.C and C.2.D below.). The number of units “committed to PBV” is comprised of the total number of units that are either (a) currently under PBV HAP contract, (b) under an Agreement to Enter into HAP contract (AHAP), or (c) covered by a notice of proposal selection (24 CFR 983.51(d)). The PHA must also identify the number of PBV units that are excluded from the total, if applicable. This number must match the number of PBV units excluded from the baseline units (discussed above).

(3) The number of units to which the PHA is proposing to attach project-based assistance through the new RFP or selection.

The PHA is no longer required to submit information on funding or available budget authority when submitting information to HUD on its intent to project-base vouchers. However, PHAs are still required to provide this PBV unit information to HUD no later than 14 calendar days prior to the date that the PHA intends to issue the Request for Proposals (or makes the selection based on a previous competition or noncompetitively as applicable). The PHA continues to submit the required information electronically to the HUD field office by sending an email to pbvsubmission@hud.gov. The PHA must also copy their local HUD Office of Public Housing Director on its email submission.

B. Additional Project-Based Units

HOTMA further allows PHAs to project-base an additional 10 percent of its units above the 20 percent program limit, provided those additional units fall into one of the following categories:

(1) The units are specifically made available to house individuals and families that meet the definition of homeless under section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302), and contained in the Continuum of Care Interim Rule at 24 CFR 578.3. See <https://www.federalregister.gov/d/2012-17546> and <https://www.federalregister.gov/d/2016-13684>.

(2) The units are specifically made available to house families that are comprised of or include a veteran. A veteran is an individual who has served in the United States armed forces. The PHA may further define “veteran” for purposes of determining if the units are eligible for this exception. For example, the PHA could require that the veteran must be eligible to receive supportive services from the Department of

Veterans Affairs or require that the veteran was not dishonorably discharged.

(3) The units provide supportive housing to persons with disabilities or to elderly persons. The definitions of a person with disabilities and an elderly person are found at 24 CFR 5.403. Supportive housing means that the project makes supportive services available for all of the assisted families in the project and provides a range of services tailored to the needs of the residents occupying such housing. Such services may include (but are not limited to):

(A) meal service adequate to meet nutritional need,

(B) housekeeping aid,

(C) personal assistance,

(D) transportation services;

(E) health-related services;

(F) educational and employment services; or

(G) other services designed to help the recipient live in the community as independently as possible.

The PHA must include in the PHA administrative plan the types of services offered to families for a project to qualify for the exception and to the extent to which such services will be provided. Such supportive services need not be provided by the owner or on-site, but must be reasonably available to the families receiving PBV assistance in the project. A PHA may not require participation as a condition of living in an excepted unit, although such services may be offered.

Note that in accordance with 24 CFR 983.354, with the exception of an assisted living facility, the owner of a PBV project may not require the assisted family to pay charges for meals or supportive services, and non-payment of such charges by the family is not grounds for termination of tenancy. In the case of an assisted living facility (as defined in § 983.3) receiving PBV assistance, owners may charge families for meals or supportive services. These charges may not be included in the rent to owner or the calculation of reasonable rent.

(4) The units are located in a census tract with a poverty rate of 20 percent or less, as determined in the most recent American Community Survey 5-Year Estimates.

These categories are those under which a PHA is permitted to project-base an additional 10 percent of its units above the normally applicable 20 percent PBV program limitation. These categories are separate and distinct from exceptions to the income-mixing requirements that limit the number and percentage of units within a particular

project to which PBV assistance may be attached (no more than the greater of 25 units or 25 percent of the units), which is discussed later in this document.

If a PHA wishes to add PBV units under this exception authority, the PHA must submit the same information in section C.2.A above to the Field Office, and identify the exception category (or categories) for which the PHA will project-base additional units (up to an additional 10 percent above the normally applicable PBV program limitation) and the specific number of units that qualify under the exception category.

PBV units may only be covered by this 10 percent exception authority if the PBV HAP contract was first executed on or after the effective date of this notice.

C. Units Not Subject to PBV Program Unit Limitation

New language in section 8(o)(13)(B) provides that units that were previously subject to certain federal rent restrictions or receiving another type of long-term housing subsidy provided by HUD do not count toward the percentage limitation when PBV assistance is attached to them.

(1) *Exception requirements.* For purposes of this document, the unit must meet the following conditions in order to qualify for this exception:

(a) The unit must be covered under a PBV HAP contract that first became effective on or after the effective date of this notice; and

(b) In the 5 years prior to the date the PHA either (i) issued the RFP under which the project was selected or (ii) selected the project based on a prior competition or without competition, the unit met at least one of the two following conditions:

(i) The unit received one of the following forms of HUD assistance:

(I) Public Housing Capital or Operating Funds (section 9 of the 1937 Act).

(II) Project-Based Rental Assistance (section 8 of the 1937 Act). Project-based rental assistance under section 8 includes the section 8 moderate rehabilitation program, including the single-room occupancy (SRO) program.

(III) Housing For the Elderly (section 202 of the Housing Act of 1959).

(IV) Housing for Persons With Disabilities (section 811 of the Cranston-Gonzalez National Affordable Housing Act).

(V) The Rent Supplement (Rent Supp) program (section 101 of the Housing and Urban Development Act of 1965).

(VI) Rental Assistance Program (RAP) (section 236(f)(2) of the National Housing Act).

(ii) The unit was subject to a rent restriction as a result of one of the following HUD loan or insurance programs:

(I) Section 236.

(II) Section 221(d)(3) or (d)(4) BMIR.

(III) Housing For the Elderly (section 202 of the Housing Act of 1959).

(IV) Housing for Persons With Disabilities (section 811 of the Cranston-Gonzalez National Affordable Housing Act).

Units that were previously receiving PBV assistance or HCV tenant-based assistance are not covered by this exception. (The statute provides that the units must have been receiving "other" project-based assistance provided by the Secretary in order to cover by the exception authority.)

Both existing units and units rehabilitated under the PBV program are eligible for this exception if the units meet the conditions outlined above. In addition, newly constructed units developed under the PBV program may also be excluded from the PHA program limitation, provided the newly constructed unit qualifies as a replacement unit as described below.

(2) *PBV New Construction Units that Qualify for the Exception as Replacement Housing.* For purposes of this notice, a PBV new construction unit must meet all of the following requirements in order to be a replacement unit and qualify for this exception to the program limitation:

(a) The unit which the PBV new construction unit is replacing (*i.e.*, the original unit) must have received one of the forms of HUD assistance or was subject to a rent restriction as a result of one of the HUD loan or insurance programs listed above no more than 5 years from the date the PHA either (i) issued the RFP under which the PBV new construction project was selected or (ii) selected the PBV new construction project based on a prior competition or without competition. If the PBV new construction project was selected based on a prior competition or without competition, the date of selection used to determine if the 5-year threshold has been met is the date of the PHA written notice of owner selection under 24 CFR 983.51(d)).

(b) The newly constructed unit is located on the same site as the unit it is replacing. An expansion of or modification to the prior project's site boundaries as a result of the design of new construction project is acceptable as long as a majority of the replacement units are built back on the site of the

original public housing development and any units that are not built on the existing site share a common border with, are across a public right of way from, or touch that site.

(c) One of the primary purposes of the planned development of the PBV new construction project is or was to replace the affordable rental units that previously existed at the site, as evidenced by at least *one* of the following:

(i) Former residents of the original project are provided with a selection preference that provides the family with the right of first occupancy at the PBV new construction project when it is ready for occupancy.

(ii) Prior to the demolition of the original project, the PBV new construction project was specifically identified as replacement housing for that original project as part of a documented plan for the redevelopment of the site.

HUD is specifically seeking comment on what changes HUD should consider making to the initial conditions set forth under this notice in order for a PBV new construction unit to qualify as replacement housing and the exception to the PBV program limitation. Please see the questions for comment section, below.

(3) *Unit size configuration and number of units for new construction and rehabilitation projects.* The unit size configuration of the PBV new construction project may differ from the unit size configuration of the original project that the PBV units are replacing. In addition, the total number of PBV assisted units may differ from the number of units in the original project. However, under no circumstances may the program limitation exception be applied to PBV new construction units that exceed the total number of covered units in the original project that the PBV units are replacing. For example, assume the PBV new construction project will consist of a total of 50 PBV units and is replacing a former section 236 project consisting of 40 units. The maximum number of PBV units that would meet the exception from the program limitation in this example would be 40 units, and the remaining 10 PBV units in the project would count against the program limitation.

These same policies apply in the case where the owner is rehabilitating the project under the PBV program and is changing the unit configuration and/or total number of units in the project as a result of the rehabilitation.

(4) *Applicability of PBV project selection requirements.* For owner proposals involving all of these PBV

properties (existing, rehabilitation, and new construction), the standard criteria for selection of projects and the units to which project-based assistance can be attached, including consistency with the PHA Plan, the goals of deconcentrating poverty and expanding housing and economic opportunities, site selection, and all civil rights requirements, are still in effect. Likewise, the requirements of HUD Notice PIH 2013–27 that concern the voluntary relinquishment by families of enhanced voucher assistance for PBV assistance remains in effect. The only difference is that the PBV units in these projects will not be included in determining if a PHA has exceeded its PBV program cap. These units are excluded from both the total number of units authorized under the PHA's ACC and the number of units committed to PBV in the program.

As noted above, the PHA is required to provide the number of PBV units to which it will be attaching PBV assistance under this exception authority to HUD no later than 14 calendar days prior to the date that the PHA intends to issue the RFP or make the selection. The PHA must indicate the specific exception that covers the units (*i.e.*, identify the property and the covered program or programs under which the property was formerly assisted). The PHA submits the required information electronically to the HUD field office by sending an email to pbvsubmission@hud.gov. The PHA must also copy their local HUD Office of Public Housing Director on its email submission.

D. Other Units Not Subject to the PBV Program Unit Calculation

In addition to the units listed under section C.2.C above, other units are not subject to the program limitation calculation and would be excluded in the total number of authorized units and the total number of PBV units currently committed to PBV that the PHA submits to the field office (in lieu of following the requirements of 24 CFR 983.6(b)).

(1) *RAD exception.* HUD waived the 20 percent limitation at section 8(o)(13)(B) of the 1937 Act as well as 24 CFR 983.6 for PBV units under the RAD demonstration. This waiver remains in effect, and, consequently, a PHA that continues to be exempted from submitting information on its PBV cap calculation to HUD when it is project-basing vouchers under RAD. Furthermore, RAD PBV units are excluded from both the total number of units under the ACC and the units committed to PBV when determining if the PHA has vouchers available to

project-base under the program limit requirements.

(2) *HUD–VASH PBV Set-aside vouchers.* HUD has awarded vouchers specifically designated for project-based assistance out of the HUD–VASH appropriated funding made available from the FY 2016, FY 2015, FY 2014, FY 2013, FY 2011, and FY 2010 Appropriations Acts. Since these voucher allocations were specifically allocated for project-based assistance, HUD has determined that the PBV units supported by those vouchers should not count against the PHA's PBV program unit limitation as long as those vouchers remain under PBV HAP contract at the designated project. The Appropriations Acts funding these vouchers authorize the HUD Secretary, in consultation with the VA Secretary, to waive or specify alternative requirements for any provision of any statute or regulation that the HUD Secretary administers in connection with the use of those HUD–VASH funds (except for requirements related to fair housing, labor standards, and the environment), upon a finding by the Secretary that any such waivers or alternative requirements are necessary for the effective delivery and administration of such voucher assistance. Accordingly, section 8(o)(13)(B) is waived for those HUD–VASH PBV vouchers.

This exception only applies to HUD–VASH PBV vouchers that were awarded to the PHA through the HUD–VASH PBV set-aside funding process. All other HUD–VASH vouchers, including those HUD–VASH vouchers that the PHA opts to project-base, are still subject to the PHA PBV program limitation, and would be included in the units authorized and units committed to PBV that the PHA submits to HUD under this document, which replaces the voucher funding information that was previously provided under 24 CFR 983.6(b).

(3) *Additional categories established by HUD by regulation.* Section 8(o)(B)(ii), as amended by HOTMA, further provides that the Secretary may, by regulation, establish additional categories for the exception to the PBV program unit limitation. HUD has not yet exercised this authority but may do so in the future.

For future PBV projects other than RAD, the PHA is required to provide the number of PBV units to which it will be attaching PBV assistance under this exception authority to HUD no later than 14 calendar days prior to the date that the PHA intends to issue the RFP or make the selection. The PHA must indicate the specific exception that covers the units. The PHA submits the required information electronically to

the HUD field office by sending an email to pbvsubmission@hud.gov. The PHA must also copy their local HUD Office of Public Housing Director on its email submission.

Questions for Comment

1. Should HUD allow PHAs that are administering PBV units that would qualify under the additional 10 percent exception categories but were placed under HAP contract prior to the effective date of this notice count those units as excepted? This would potentially allow a PHA that was at the 20 percent limit to add new PBV units that do not fall under any of the exception categories, because counting the PBV units that were already under HAP under the new 10 percent exception authority would free up space under the regular 20 percent cap.

2. The new (o)(13)(B) further provides that the additional 10 percent exception may be applied to units that are difficult to use, as determined by the Secretary, and with respect to census tracts with a poverty rate of 20 percent or less. This document, for now, only applies the statutory exception provision to those units located in census tracts with poverty rates of 20 percent or less. What criteria should HUD use to define or determine the areas where vouchers are “difficult to use” for this exception category?

3. The statute allows the Secretary to issue regulations to create additional exception categories from the normally applicable PBV program limit, which could apply to the additional 10 percent authority or that could be exempted from the program limit entirely. What additional exception categories that should be included in the 10 percent authority? What other types of units should be exempted from the PBV program limit entirely?

4. This document sets out certain conditions that a PBV new construction unit must meet in order to be considered replacement housing and eligible for the exception to the PHA PBV program limitation. Are those conditions appropriate or should they be changed or expanded?

5. In light of the impact that additional exceptions and exemptions from the program limit will have on the number of vouchers available for tenant-based assistance under the HCV program, should HUD establish additional categories at all? What limits or requirements on project-basing, if any, should be placed on the use of this exception authority to ensure that the PHA has sufficient tenant-based assistance available for families to exercise their statutory right to move

from the PBV project with tenant-based assistance after one year of occupancy at the PBV project?

3. Changes to Income-Mixing Requirements for a Project (Project Cap) (§ 8(o)(13)(D) of 1937 Act)

This section overrides the PBV program regulations at 24 CFR 983.56(a) and 983.56(b)(1) and (2). This section also overrides §§ 983.262(c) and (d).

A. PBV Income-Mixing Project Cap, Generally

HOTMA amended the income-mixing requirement for an individual project found in section 8(o)(13)(D) of the 1937 Act. The limitation on the number of PBVs in a project is now the greater of 25 units or 25 percent of the units in a project. However, owners under current HAP contracts are still obligated by the terms of those HAP contracts with respect to the requirements that apply to the number of excepted units in a multifamily project. The owner must continue to designate the same number of contract units and assist the same number of excepted families as provided under the HAP contract during the remaining term of the HAP contract, unless the owner and the PHA mutually agree to change those requirements. For example, if an owner has a PBV HAP contract for a 20 unit project, and the HAP contract provides that 15 of those units were exempted from the 25 percent income mixing requirement because the units are designated for elderly families, the owner must continue to designate those units for occupancy by elderly families, notwithstanding the fact that the statutory limit on PBV has been increased to 25 units, unless the owner and the PHA mutually agree to change the terms of the assistance contract.

Except as provided below, the PBV HAP contract may not include units in excess of the greater of 25 units or 25 percent of the units in the project.

B. Exceptions to Project Cap

Units that are in one of the following categories are excluded from the 25 percent or 25-unit project cap on PBV assistance:

(1) Units exclusively serving elderly families (as such term is defined in 24 CFR 5.403).

(2) Units housing households eligible for supportive services available to all families receiving PBV assistance in the project. The project must make supportive services available to all assisted families in the project (but the family does not have to actually accept and receive the supportive service for the exception to apply to the unit).

Families eligible for supportive services under this exception to the project cap would include families with a household member with a disability, among other populations. Such supportive services need not be provided by the owner or on-site, but must be reasonably available to the families receiving PBV assistance in the project and designed to help the families in the project achieve self-sufficiency or live in the community as independently as possible. PHAs must include in the PHA administrative plan the type of services offered to families for a project to qualify under the exception and the extent to which such services will be provided.

A PHA may not require participation in the supportive services as a condition of living in an excepted unit, although such services may be offered. In cases where the unit is excepted because of FSS supportive services or any other supportive services as defined in the PHA administrative plan, if a family at the time of initial tenancy was eligible for FSS supportive services and successfully completes its FSS contract of participation or the supportive services objective, the unit continues to count as an excepted unit for as long as the family resides in the unit even though the family is no longer eligible for the service.

However, if the FSS family fails to successfully complete the FSS contract of participation or supportive services objective and consequently *is no longer eligible* for the supportive services, the family must vacate the unit within a reasonable period of time established by the PHA, and the PHA shall cease paying housing assistance payments on behalf of the ineligible family. If the family fails to vacate the unit within the established time, the unit must be removed from the HAP contract (unless it is possible to substitute a different unit for the formerly excepted unit in the project in accordance with 983.207(a)).

(3) Projects that are in a census tract with a poverty rate of 20 percent or less, as determined in the most recent American Community Survey 5-Year Estimates.

The PHA may only refer qualifying families for occupancy of excepted units under (1) and (2) above.

C. Grandfathering of Certain Properties

The HOTMA amendments entirely eliminate the statutory exemption from a project cap for projects that serve disabled families and modify the supportive services exception. Previously, the statutory exception required that the family must be

actually receiving the supportive services for the individual unit to be exempted from the income-mixing requirement. The new requirement provides that the project must make supportive services available to all assisted families in the project (but that the family does not have to actually accept and receive the supportive services for the exception to apply to the unit). However, projects that are using the former statutory exemptions will continue to operate under the pre-HOTMA requirements and will continue to renew their HAP contracts under the old requirements, unless the PHA and the owner agree by mutual consent to change the conditions to the HOTMA requirement. The PBV HAP contract may not be changed to the HOTMA requirement if the change would jeopardize an assisted family's eligibility for continued assistance at the project (e.g., excepted units at the project included units designated for the disabled, and changing to the HOTMA standard would result in those units no longer being eligible as an excepted unit unless the owner will make supportive services available to all assisted families in the unit.)

D. Projects Not Subject to a Project Cap

New language in section 8(o)(13)(D) exempts certain types of units receiving project-based voucher assistance from having a project cap entirely. These are PBV units that were previously subject to certain federal rent restrictions or receiving another type of long-term housing subsidy provided by HUD. This exception to the project cap may only be applied to projects that were not already under HAP contract on the effective date of this document. The exception may not be applied retroactively to projects under HAP contract on the effective date of this notice or subsequently applied at the extension of those HAP contracts.

(1) *Exception requirements.* For purposes of this document, the unit must meet the following conditions in order to qualify for this exception:

(a) The unit must be covered under a PBV HAP contract that first became effective on or after the effective date of this notice, and

(b) In the 5 years prior to the date the PHA either (i) issued the RFP under which the project was selected or (ii) selected the project without competition, the unit met at least one of the two following conditions:

(i) The unit received one of the following forms of HUD assistance:

(I) Public Housing Capital or Operating Funds (section 9 of the 1937 Act).

(II) Project-Based Rental Assistance (section 8 of the 1937 Act). Project-based rental assistance under section 8 includes the moderate rehabilitation program, including the SRO program.

(III) Housing For the Elderly (section 202 of the Housing Act of 1959).

(IV) Housing for Persons With Disabilities (section 811 of the Cranston-Gonzalez National Affordable Housing Act).

(V) The Rent Supplement program (section 101 of the Housing and Urban Development Act of 1965).

(VI) Rental Assistance Program (section 236(f)(2) of the National Housing Act); or

(ii) The unit was subject to a rent restriction as a result of one of the following HUD loan or insurance programs:

(I) Section 236.

(II) Section 221(d)(3) or (d)(4) BMIR.

(III) Housing For the Elderly (section 202 of the Housing Act of 1959).

(IV) Housing for Persons With Disabilities (section 811 of the Cranston-Gonzalez National Affordable Housing Act).

Units that were previously receiving PBV assistance are not covered by this exception. The statute provides that the units must have been receiving “other” project-based assistance provided by the Secretary in order to be covered by the exception authority.

For proposals involving these properties, the standard criteria for selection of projects and the units to which PBV assistance can be applied are still in effect. The only difference is that any PBV assistance provided to these properties may be used to project base up to 100 percent of the units in the project.

Both existing units or units rehabilitated under the PBV program are eligible for this project cap exception if the units meet the conditions outlined above. In addition, newly constructed units developed under the PBV program may also be excluded from the PHA program limitation, provided the newly constructed unit qualifies as a replacement unit as described below.

(2) *PBV New Construction Units that Qualify for the Exception as Replacement Housing.* For purposes of this document, the PBV new construction unit must meet the following requirements in order to be a replacement unit and qualify for the project cap exception (these are the same conditions that apply for units to qualify as replacement units for purposes of the exception to the PBV Program unit limit under section C.2.C of this document above):

(a) The unit which the PBV new construction unit is replacing (*i.e.*, the original unit) must have received one of the forms of HUD assistance or was subject to a rent restriction as a result of one of the HUD loan or insurance programs listed above within 5 years from the date the PHA either (i) issued the RFP under which the PBV new construction project was selected or (ii) selected the PBV new construction project under a prior competition or without competition. If the PBV new construction project was selected based on a prior competition or without competition, the date of selection is the date of the PHA notice of owner selection (24 CFR 983.51(d)).

(b) The newly constructed unit is located on the same site as the unit it is replacing. (An expansion of or modification to the prior project’s site boundaries as a result of the design of new construction project is acceptable as long as new project is generally located at the same site as the original project for purposes of this requirement.)

(c) One of the primary purposes of the planned development of the PBV new construction project is or was to replace the affordable rental units that previously existed at the site, as evidenced by at least *one* of the following:

(i) Former residents of the original project are provided with a selection preference that provides the family with the right of first occupancy at the PBV new construction project when it is ready for occupancy.

(ii) Prior to the demolition of the original project, the PBV new construction project was specifically identified as replacement housing for that original project as part of a documented plan for the redevelopment of the site.

(3) *Unit size configuration and number of units.* The unit size configuration of the PBV new construction project may differ from the unit size configuration of the original project that the PBV units are replacing. In addition, the total number of PBV assisted units may differ from the number of units in the original project. However, under no circumstances may the project cap exception be applied to PBV new construction units that exceed the total number of covered units in the original project that the PBV units are replacing. For example, assume the PBV new construction project will consist of a total of 50 PBV units and is replacing a former section 236 project consisting of 40 units. The maximum number of PBV units that would meet the exception from the project cap in this

example would be 40 units, and the remaining 10 PBV units would be subject to the project cap and would need to qualify for an exception on the basis of another exception category.

These same policies apply in the case where the owner is rehabilitating the project under the PBV program and is changing the unit configuration and/or total number of units in the project as a result of the rehabilitation.

Questions for Comment

1. What other standards should HUD require for supportive services under B.2, above?

2. The Secretary has authority to define areas where tenant-based vouchers are “difficult to use.” This document, for now, only applies the statutory provision of census tracts with poverty rates of 20 percent or less. What are some other criteria that HUD should include? For example, other possible criteria include rental vacancy rates, voucher success rates, high cost areas as captured by the difference between the zip code level small area FMR and the metropolitan-wide FMR, or alternative measures of low-poverty areas.

3. Are there additional properties formerly subject to federal rent restrictions or receiving rental assistance from HUD that should be exempted from a project cap?

4. The statute allows HUD to impose additional monitoring and requirements on projects that project-base assistance for more than 40 percent of the units. How can PHAs ensure that this increase in PBV units will not hamper mobility efforts and moves to opportunity areas?

4. PBV Contract Terms (§ 8(o)(13)(F) and (G) of 1937 Act and §§ 106(a)(4) and (5) of HOTMA)

A. Initial Term of HAP Contract and Extension of Term

The initial HAP Contract term may now be of a period of up to 20 years (instead of the prior 15-year limitation). The length of the term of the initial HAP contract for any HAP contract unit may not be less than one year nor more than 20 years (instead of the prior 15-year limitation on the initial term of the HAP contract). In addition, the PHA may agree to enter into an extension (at the time of the initial HAP contract execution or any time before the expiration of the contract, for an additional term of up to 20 years (as opposed to the prior 15-year limitation on the term of the contract extension). A HAP contract extension may not exceed 20 years. The PHA may provide for multiple extensions; however, in no circumstances may such extensions exceed 20 years, cumulatively.

PHAs and owners with HAP contracts that are still in the initial term may extend the initial term up to a maximum initial term of 20 years by mutual consent, and then may subsequently agree to extend the contract for up to 20 years. The maximum term of the HAP contract in that instance (initial term and subsequent extension) would be 40 years. PHAs and owners with HAP contracts that are no longer in the initial term may mutually agree to extend the HAP contract for a total extension term of 20 years. The maximum term of the HAP contract in that case would be 20 years plus the number of years that constituted the initial term of the HAP contract.

If the project in question is a PHA-owned project, any change in the initial term and any subsequent extension is also subject to the approval of the independent entity.

This section overrides 24 CFR 983.205(a) and (b) only with respect to the length of the initial term and the extension of the term of the HAP contract. Otherwise, all of the other requirements of those regulations remain in effect, including the requirements related to PHA-owned units.

B. Priority of Assistance Contracts

The new section 8(o)(13)(F)(i)(I) requires PHAs, in times of insufficient funding, to first take all cost-savings measures prior to failing to make payments under existing PBV HAP contracts (*i.e.*, terminating the HAP contract). If the PHA has taken all cost-savings measures and still has insufficient funding to make HAPs, it is left up to the discretion of the PHA to choose to terminate HCV or PBV assistance first. The list of cost-savings measures that must be taken prior to terminating assistance contracts are found in PIH Notice 2011–28.¹

C. Biennial Inspection Requirements

The new language in section 8(o)(13)(F)(i)(II) of the 1937 Act is a change that clarifies the frequency of inspection requirement for PBV projects to those found in paragraph (8), which allows for biennial as opposed to annual inspections. The language in paragraph (13)(F)(i)(II) merely clarifies that for PBV assistance, biennial inspections may be conducted using a sample of units. The PBV regulations at 24 CFR 983.103 were revised under the final rule entitled, “Streamlining Administrative Regulations for Public Housing, Housing Choice Voucher, Multifamily Housing, and Community Planning and Development Programs,” published in the **Federal Register** on March 8, 2016,

at 81 FR 12353. This rule amended regulations to reflect the biennial inspection requirement for PBV and that a random sampling of at least 20 percent of the PBV units in each building may be used to fulfill that biennial inspection requirement.

D. Additional Units Without Competition

The new language in section 8(o)(13)(F)(ii) allows PHAs and owners to amend the HAP contract to add additional PBV contract units in projects that already have a HAP contract without having to fulfill the selection requirements (see 24 CFR 983.51(b)) for those added PBV units, regardless of when the HAP contract was signed. The additional PBV units, however, are still subject to the PBV program cap and the individual project caps, found in sections 8(o)(13)(B) and (D) of the 1937 Act, respectively. Furthermore, prior to attaching additional units without competition, the PHA must submit to the local field office the information described in section C.2.A above, which pertains to demonstrating the PHA is able to project-base additional units without exceeding the PHA program limitation on PBV units. PHAs must also detail their intent to add PBV units in this manner in their administrative plan, along with their rationale for adding PBVs to this specific project. This provision overrides the restriction in 24 CFR 983.207(b) that additional units may only be added to the HAP contract during the three-year period immediately following execution of the HAP contract. All of the other requirements under § 983.207(b) continue to apply.

E. Additional Contract Conditions

The new 8(o)(13)(F)(IV) allows the PBV HAP contract to have additional conditions, including conditions related to continuation, termination, or expiration. HUD is not adding any additional conditions to the PBV HAP contract at this time.

The section further requires that HAP contracts specify that, upon termination or expiration of a contract that is not extended, a family living at the property is entitled to receive a tenant-based voucher (the voucher that was previously providing project-based assistance for the family in the PBV project). The PHA must provide the family with a voucher and that family must also be given the option by the PHA and owner to remain in their unit with HCV tenant-based assistance if the unit complies with inspection requirements and rent reasonableness

requirements. The family must pay the total tenant payment (determined under 24 CFR part 5 subpart F) and any additional amount if the unit rent exceeds the applicable payment standard. The family has the right to remain in the project as long as the units are used for rental housing and are otherwise eligible for HCV assistance (for example, the rent is reasonable, unit meets HQS, etc.). The owner may not terminate the tenancy of a family that exercises its right to remain except for a serious or repeated lease violation or other good cause.

Families that receive a tenant-based voucher at the expiration or termination of the PBV HAP contract are not new admissions to the PHA HCV tenant-based program, and are not subject to income eligibility requirements or any other admission requirements. If the family chooses to remain in their unit with tenant-based assistance, the family may do so regardless of whether the family share would initially exceed 40 percent of the family's adjusted monthly income.

The statutory owner notice requirements related to the contract termination or expiration at 24 CFR 983.206 continue to apply to the PBV program. If the owner fails to provide timely notice of termination, the owner must permit the tenants in assisted units to remain in their units for the required notice period with no increase in the tenant portion of the rent, and with no eviction as a result of an owner's inability to collect an increased tenant portion of the rent. For families that wish to remain at the property, the HCV tenant-based assistance would not commence until the owner's required notice period ends.

Question for Comment

Are there additional parameters HUD should consider placing on PHAs and owners when amending HAP contract terms related to continuation, termination or expiration?

5. Preference for Families Who Qualify for Voluntary Services (§ 8(o)(13)(J) of 1937 Act)

Section 106(a)(7)(A) and (C) of HOTMA makes changes to section 8(o)(13)(J) of the 1937 Act to allow a PHA to allow owners with PBV contracts to create and maintain site-based waiting lists. HUD is not implementing these provisions at this time, but instead will pursue rulemaking.

However, section 106(a)(7)(B) of HOTMA provides that a PHA may establish a selection preference for families who qualify for voluntary

services, including disability-specific services, offered in conjunction with assisted units, provided that the preference is consistent with the PHA plan. This is a change from the current regulatory requirement at 24 CFR 983.251(d), that provides in selecting families, PHAs may give preference to disabled families who need the services offered at a particular project in accordance with the limits under the regulatory paragraph, regardless of whether the family qualifies for the supportive service and will actually be able to receive the supportive services. Note, however, that the prohibition on granting preferences to persons with a specific disability at 24 CFR 982.207(b)(3) continues to apply. This document provides PHAs with additional guidance and information on how to establish such preferences.

A. Selection Preference for Families Who Qualify for Voluntary Services

(1) Consistency With Nondiscrimination and Civil Rights Statutes and Requirements

Both the owner and the PHA are responsible for ensuring that the proposed preference is consistent with all applicable Federal nondiscrimination and civil rights statutes and requirements. This includes, but is not limited to, the Fair Housing Act, Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and HUD's Equal Access Rule. See 24 CFR 5.105(a). It is also the responsibility of the PHA to ensure that an owner is carrying out the PHA's program in a manner consistent with Section 504. There are unique requirements regarding the selection preference when considered in the context of providing services for individuals with disabilities. In particular, the statutory language permitting a preference for individuals who qualify for voluntary services, including disability-specific services, must be read consistent with Federal laws that provide protections against discrimination based on disability and segregation of individuals with disabilities as well as the affirmative requirement that programs, services, and activities be provided in the most integrated setting appropriate to the needs of individuals with disabilities. Among these requirements, PHAs and owners, and in certain circumstances services providers, may not impose eligibility criteria that discriminate on the basis of disability, and must comply with the integration mandate.

The HOTMA amendments permit a PHA to establish a preference based on who qualifies for voluntary services, including disability-related services, offered in conjunction with the assisted units. Consistent with Federal nondiscrimination laws, qualifications or eligibility criteria, including for voluntary services, cannot be applied in a discriminatory manner. In particular, PHAs, owners, and service providers cannot impose additional admissions criteria that discriminate or are applied in a discriminatory manner. Any individual who is qualified for the services must be able to receive the preference, including qualified individuals with disabilities, regardless of disability type.

Voluntary services can consist of a variety of activities, including for example, meal service adequate to meet nutritional needs, housekeeping assistance, personal assistance, transportation services, case management, child care, education services, employment assistance and job training, counseling services, life skills training, and other services designed to help the recipient live in the community as independently as possible. Voluntary services can also include disability-specific services, such as mental health services, assistance with activities of daily living, personal assistance services, outpatient health services, and the provision of medication, which are provided to support a person with a disability. Such services may also include, for example, services provided by State Medicaid programs to promote community based settings for individuals with disabilities.

The revised statute permits such a preference to be established if it is consistent with the PHA plan. As part of the PHA plan review process, the Office of Fair Housing and Equal Opportunity, in consultation with the Office of General Counsel, will review each proposed preference for consistency with fair housing and civil rights requirements. As part of this process, HUD may request the PHA or owner provide any additional documentation necessary to determine consistency with the PHA plan and all applicable federal fair housing and civil rights requirements. In developing any proposed targeted preferences, PHAs must comply with the requirements outlined in PIH Notice 2012–31 and HUD's *Statement on the Role of Housing in Accomplishing the Goals of Olmstead*.

(2) Preferences for Disability-Specific Services

A PHA or owner may offer a preference for individuals who qualify for voluntary services offered in connection with the units. Such services may or may not include disability-specific services. For example, a preference may be only for persons who qualify for employment assistance, or for transportation services, or a preference may be for persons who qualify for either housekeeping assistance, case management, or outpatient health services. If a PHA or owner decides, however, that the only preference that will be offered is based on qualification for a disability-specific service, it is especially important for the entity to consider how to implement this preference consistent with Section 504 and the ADA, and their implementing regulations.

Further, the statutory language allowing an agency or owner to give preference to families who qualify for voluntary services, including disability-specific services, must be implemented consistent with the integration mandate under Section 504 and Title II of the ADA. 24 CFR 8.4(d); 28 CFR 35.130(d). The integration mandate, as mentioned earlier in the notice, requires that covered entities ensure persons with disabilities can interact with persons without disabilities to the fullest extent possible. HUD has provided guidance on what the Department considers integrated settings in the housing context:

“Integrated settings also enable individuals with disabilities to live independently with individuals without disabilities and without restrictive rules that limit their activities or impede their ability to interact with individuals without disabilities. Examples of integrated settings include scattered-site apartments providing permanent supportive housing, tenant-based rental assistance that enables individuals with disabilities to lease housing in integrated developments, and apartments for individuals with various disabilities scattered throughout public and multifamily housing developments.”²

By contrast, HUD has stated that segregated settings are “occupied exclusively or primarily by individuals with disabilities.”³

² Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead, <http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf>.

³ The U.S. Department of Justice provides additional relevant guidance on the application of the integration mandate under Title II and Section 504 in its Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C., <https://www.ada.gov/olmstead/>

In addition, requirements under the Fair Housing Act, including the regulatory obligation under 24 CFR 100.70(c)(4) regarding dispersion of units occupied by individuals with disabilities and not assigning individuals with disabilities to a particular section or floor of a building, continue to apply.

As more states implement requirements under Title II of the ADA and *Olmstead*, which are focused on transitioning individuals from institutional and other segregated settings into integrated community-based settings, as well as assisting individuals at risk of institutionalization from entering such settings, there is an increased need for affordable, integrated, and accessible housing opportunities. To assist with these concerns, PHAs or owners may want to coordinate with other relevant agencies implementing *Olmstead* planning and transition planning related to the Centers for Medicare and Medicaid Services (CMS)' Home and Community-Based Setting (HCBS) regulation in their State. HUD encourages the PHA or owner to consult with the relevant agencies who make determinations as to whether the housing qualifies as a HCBS under the CMS regulations to allow for State Medicaid funding to be accessed at the site. The CMS regulations specify the qualities that HCBS must have in order to receive funding, including that the setting is integrated.

B. Informed Client Choice and Self-Determination

HUD emphasizes the importance of client choice, independence, and self-determination in implementing this provision. Consistent with the statutory language, as well as federal fair housing and civil rights requirements, participation in services is voluntary. Accordingly, the existing regulatory language at 24 CFR 982.251(d)(2) stating that residents with disabilities shall not be required to accept the particular services at the project continues to apply. Program beneficiaries who receive housing because of the preference still have the ability to receive voluntary services from a service provider of their choosing, or choose not to participate in services at all. Similarly, an individual who chooses to no longer participate in a service or who no longer qualifies for services he or she did qualify for at the time of initial occupancy cannot subsequently be denied a continued housing opportunity

because of this changed circumstance. A PHA or owner also cannot determine that a participant's needs exceed the level of care offered by qualifying services or require that individuals be transitioned to different projects based on service needs.

C. Additional Requirements

- PHAs and project owners must also ensure that their programs are operated in a manner to affirmatively further fair housing under the Fair Housing Act, 42 U.S.C. 3608, and related authorities, such as the Affirmatively Furthering Fair Housing Rule, 24 CFR 5.150 *et seq.*

- Housing providers cannot use a preference to impose additional criteria that intentionally discriminates against members of any protected class or may result in a discriminatory effect. For recent HUD guidance on discriminatory effects under the Fair Housing Act, see Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf; Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency, <http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.

- PHAs and owners must also ensure their implementation of preferences and other operations comply with other Federal nondiscrimination requirements. This includes, among other requirements, providing reasonable accommodations for persons with disabilities, auxiliary aids and services necessary to ensure effective communication with individuals with disabilities, which includes ensuring that information is provided in appropriate accessible formats as needed, *e.g.*, Braille, audio, large type, accessible web-based applications, assistive listening devices, and sign language interpreters, and taking reasonable steps to maximize the utilization of accessible units (units accessible to persons with mobility impairments and units accessible to persons with hearing or vision impairments) by eligible individuals who need the accessibility features of the particular unit. For additional guidance on permissible PHA preferences, please see the *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead*, <http://portal.hud.gov/hudportal/documents/huddoc?id=OlmsteadGuidnc060413.pdf>, and PIH Notice 2012-31,

<http://portal.hud.gov/hudportal/documents/huddoc?id=pih2012-31.pdf>. In addition, HUD anticipates issuing additional guidance on the application of HOTMA, including fair housing guidance.

6. Attaching PBVs to Structures Owned by PHAs (§ 8(o)(13)(N) of 1937 Act)

The new section 8(o)(13)(N) allows PHAs to attach PBVs to projects in which the PHA has an ownership interest or has control of, without following a competitive process, in cases where the PHA is engaged in an initiative to improve, develop, or replace a public housing property or site. The PHA's ownership interest does not have to meet the definition of the term "owned by a PHA" established by section 105 of HOTMA. For purposes of this section, an ownership interest means that the PHA or its officers, employees, or agents are in an entity that holds any such direct or indirect interest in the building, including, but not limited to an interest as: titleholder; lessee; a stockholder; a member, or general or limited partner; or a member of a limited liability corporation. These PBV projects are still subject to all other applicable PBV requirements.

In order to be subject to this non-competitive exception, the PHA must be planning rehabilitation or construction on the project with a minimum of \$25,000 per unit in hard costs. The PHA must detail in its PHA administrative plan what work it plans to do on the property or site and how many units of PBV it is planning on adding to the site.

This section overrides the regulatory requirements for selection of PBV proposals at 24 CFR 983.51(b).

Questions for Comment

1. Is the \$25,000 per unit threshold appropriate for this exception from the competitive process? HUD chose the \$25,000 threshold based on the findings of the 2010 Capital Needs study on the average existing capital need per public housing unit, but is seeking public comment on other possible dollar thresholds or methodologies for determining whether a PHA's rehabilitation or construction projects qualifies as an initiative to improve, develop, or replace a public housing property or site.

2. The law provides that this section is applicable to a PHA that has an ownership interest in or has control of the project. Are there examples or cases where a PHA may have control of a project but would not have any ownership interest in the project that HUD should address in future implementing guidance or when

q&a_olmstead.htm and its *Olmstead* compliance and enforcement efforts, <https://www.ada.gov/olmstead/index.htm>.

conforming the regulation to these provisions?

7. Project-Basing Special-Purpose Vouchers (§ 8(o)(13)(O) of 1937 Act)

HOTMA added a new section 8(o)(13)(O) to the 1937 Act, allowing PHAs to project-base Family Unification Program (FUP) and HUD-VASH vouchers without requiring additional HUD approval. This document serves as official notice that this statutory change is effective as of *April 18, 2017*. This document also provides additional information on how PHAs may project-base HUD-VASH or FUP vouchers.

All normally applicable PBV requirements under 24 CFR part 983 or implemented through this document apply to project-based FUP and HUD-VASH vouchers, and PHAs must continue to meet all of their obligations to assist the required number of HUD-VASH and FUP families for their HCV programs.

A. HUD-VASH Vouchers

The most current requirements for the HUD-VASH program may be found in PIH Notice 2015–10. In that notice, HUD requires that PHAs wishing to project-base HUD-VASH vouchers must meet certain requirements in order to do so. Those PBV requirements are now superseded by the statutory amendments made by HOTMA.

However, statutory authorization for the HUD-VASH program, including section 8(o)(19) of the 1937 Act and the FY 2016 appropriations Act,⁴ requires that PHAs conduct their HUD-VASH programs in conjunction with a Veterans Administration Medical Center (VAMC), which must make supportive services available to individuals receiving HUD-VASH assistance. Therefore, in order to meet the requirement that the PHA provide rental assistance in conjunction with a VAMC's ability to provide supportive services, PHAs wishing to project-base HUD-VASH vouchers must consult with their partner VAMC to ensure that the VAMC will be able to continue to provide supportive services should the PHA project-base its HUD-VASH vouchers. Furthermore, PHAs that received HUD-VASH PBV set-aside funds must continue to comply with all of the terms and conditions that apply to those vouchers.

B. Family Unification Program (FUP) Vouchers

HOTMA also allows PHAs to project-base vouchers awarded to the PHA for

the FUP program without further approval from HUD. However, HUD encourages PHAs wishing to do so to consider whether project-basing such vouchers yields significant benefits, whether doing so would limit the ability of youth to use such vouchers, and whether project-basing FUP vouchers would allow the PHA to serve the populations eligible for FUP vouchers in such a way as to keep the units filled. A PHA project-basing FUP vouchers may limit the project-based vouchers to one category of FUP eligible families, such as making the project-based vouchers exclusively available for FUP-youth.

Questions for Comment

1. Is there an advantage to grouping FUP families (either FUP families, FUP youth, or all FUP families) in one project (as opposed to interspersed with other PBV units in a PHA's portfolio)?
2. How would the PHA administer waitlists and preferences to manage FUP availability across multiple waitlists?
3. How do PHAs ensure mobility access with a time-limited voucher (*i.e.*, FUP voucher that is assisting a FUP-eligible youth)?
4. How do PHAs ensure full occupancy of PBV units with time-limited vouchers and limited numbers?

D. Using Vouchers in Manufactured Housing (HOTMA § 112)

Section 112 of HOTMA amends section 8(o)(12) of the 1937 Act with respect to the use of voucher assistance provided to families that are owners of manufactured housing. Prior to the HOTMA amendment, voucher assistance payments on behalf of owners of manufactured housing under section 8(o)(12) could only be made to assist the manufactured home owner with the rent for the space on which the manufactured home is located (the manufactured home space). Section 112 expanded the definition of "rent" for manufactured home owners receiving voucher assistance to also include other housing expenses, specifically the monthly payments made by the family to amortize the cost of purchasing the manufactured home (including any required insurance and property taxes) and tenant-paid utilities.

The use of housing assistance payments to assist a manufactured home owner with the rent of the manufactured home space and other eligible expenses continues to be a special housing type under 24 CFR part 982 subpart M. In general, the PHA is not required to permit families to use any of the special housing types and may limit the number

of families using special housing types. However, the PHA must permit use of any special housing type if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities in accordance with 24 CFR part 8.

For manufactured home owners that are currently receiving HCV assistance to rent the manufactured home space in accordance with 24 CFR 982.622 through 982.624, the PHA must implement the HOTMA changes to the calculation of "rent" and the amount of subsidy effective on the first regular reexamination following the effective date of this document, or no later than one year after the effective date of this document (if the first regular examination falls after that date). The new subsidy calculation shall apply from that point on during the term of the HAP contract.

24 CFR 982.622 and 982.624 continue to apply for HCV assistance provided on behalf of a manufactured home owner that is renting the manufactured home space. Section 982.623, which covers how the housing assistance payment is calculated, is no longer applicable. Instead, if a PHA chooses to provide voucher assistance to a manufactured home owner who is renting the manufactured home space, the monthly housing assistance payment is calculated as the lower of:

- (a) The PHA payment standard minus the total tenant payment; or
- (b) The rent of the manufactured home space (including other eligible housing expenses) minus the total tenant payment.

The PHA payment standard is determined in accordance with 24 CFR 982.505 and is the payment standard used for the PHA's HCV program. The payment standard for the family is the lower of the payment standard amount for the family unit size or the payment standard amount for the size (number of bedrooms) of the manufactured home. The separate fair market rent (FMR) for a manufactured home space is no longer applicable to establishing the payment standard for a manufactured homeowner who is renting the manufactured home space since the payment is assisting the homeowner with other housing expenses. The PHA payment standard will be based on the applicable HUD published FMR for the area in which the manufactured home space is located.

The rent of the manufactured home space (including other eligible housing expenses) is the total of:

- (a) The rent charged for the manufactured home space;

⁴ Division L, Title II of the Consolidated Appropriations Act, 2016 (Pub. L. 114–113, approved December 18, 2015).

(b) owner maintenance and management charges for the space;

(c) the monthly payments made by the family to amortize the cost of purchasing the manufactured home, including any required insurance and property taxes; and

(d) the applicable allowances for tenant paid utilities.

The monthly payment made by the family to amortize the cost of purchasing the manufactured home is the debt service established at the time of application to a lender for financing the purchase of the manufactured home if monthly payments are still being made. Any increase in debt service due to refinancing after purchase of the home may not be included in the amortization cost. Debt service for set-up charges incurred by a family may be included in the monthly amortization payments made by the family. In addition, set-up charges incurred before the family became an assisted family may be included in the amortization cost if monthly payments are still being made to amortize the charges.

The total amount for the rent of the manufactured home space and the other eligible expenses is reported in PIC on the HUD-50058 on line 12k, even though it includes amounts in addition to the total monthly rent payable to the owner under the lease for the contract unit.

The utility allowances are the applicable utility allowances from the PHA utility allowance schedule under 24 CFR 982.517 and 982.624.

If the amount of the monthly assistance payment for a family exceeds the monthly rent for the manufactured home space (including the owner's monthly management and maintenance charges), the PHA may pay the remainder to the family, lender or utility company.

HOTMA further provides that the PHA may choose to make a single payment to the family for the entire monthly assistance amount rather than making the HAP directly to the owner of the manufactured home space the family is renting. HUD is not implementing this option at this time but is seeking comment on how to best implement this option, including how to best ensure the PHA may still take enforcement action when necessary against an owner who fails to fulfill his or her responsibilities under the HCV program.

Question for Comment

When implementing the option to allow the PHA to make a single HAP directly to the family, how would HUD ensure that a PHA take enforcement

action against an owner of a manufactured home space who fails to fulfill his or her responsibilities under the HCV program? Would a manufactured home park owner be willing to enter into a contract under which he or she would receive no direct payment?

III. Environmental Impact Certification

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection on www.regulations.gov.

Dated: January 10, 2017.

Nani Coloretti,

Deputy Secretary.

[FR Doc. 2017-00911 Filed 1-17-17; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR 30

[178A2100DD/AAKC001030/
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Proposed Membership of the Bureau of Indian Education Accountability Negotiated Rulemaking Committee

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed membership of negotiated rulemaking committee; request for nominations; and request for comments.

SUMMARY: The Secretary of the Interior has selected proposed members to form the Bureau of Indian Education (BIE) Accountability Negotiated Rulemaking Committee (Committee) which will recommend revisions to the existing regulations to implement the Secretary's responsibility to define the standards, assessments, and accountability system for Bureau-funded schools, as required by the Every Student Succeeds Act (ESSA). Representatives were nominated by Tribes whose students attend Bureau-funded schools. After considering nominations, the Secretary proposes to appoint the persons named in this notice as Tribal Committee members. Tribes, Tribal organizations, and individual Tribal members may submit comments on the proposed Tribal Committee membership, apply for Tribal membership on the

Committee, or submit other nominations for Tribal membership on the Committee. The Secretary also proposes to appoint Federal representatives to the Committee as listed.

DATES: Comments on the proposed Tribal members of this Committee must be submitted no later than February 17, 2017.

ADDRESSES: Send comments and nominations to the Designated Federal Official: Sue Bement, Education Program Specialist, Bureau of Indian Education, C/O Office of Regulatory Affairs and Collaborative Action, 1001 Indian School Road NW., Suite 312, Albuquerque, NM 87104. Or email at: BIEcomments@bia.gov.

FOR FURTHER INFORMATION CONTACT: Sue Bement, Designated Federal Official; email BIEcomments@bia.gov.

SUPPLEMENTARY INFORMATION:

Background

The purpose of the BIE Committee is to serve as an advisory committee under the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act (NRA) in a manner that:

(1) Reflects the unique government-to-government relationship between American Indian Tribes and the United States;

(2) Ensures that the membership of the Committee includes only representatives of the Federal Government and Tribes; and

(3) To the extent possible, allots Tribal representation based upon the Tribes' proportionate share of the total enrollment in Bureau-funded schools.

The Secretary has determined that the proper functioning of the Committee requires that the Committee be limited to no more than the 25 members recommended by the NRA (5 U.S.C. 565). The Secretary has selected 19 Tribal representatives and 6 Federal representatives for the Committee, for a proposed total of 25 members.

The Secretary finds that the proposed Tribal representatives for the Committee:

(1) Represent a balance of interests that will be significantly affected by the final rules (*i.e.*, parents; teachers; school board members; and administrators of Tribal and Tribally operated contract day schools, grant day schools, grant boarding schools, and peripheral dormitories);

(2) Proportionately represent students from Tribes served by Bureau-funded schools;

(3) Reflect the different varieties of school size, type of school and facility, and geographical location; and

(4) Have been selected using a process that considers the nominees' experience and expertise in Indian education.

Every Student Succeeds Act (ESSA)

The ESSA reauthorizes and amends the Elementary and Secondary Education Act of 1965 (ESEA). ESSA Section 8007(2) directs the Secretary of the Interior, in consultation with the Secretary of Education, if so requested, to use a negotiated rulemaking process to develop regulations for implementation of the Secretary of the Interior's defined standards, assessments, and accountability system for Bureau-funded schools no later than the 2017–2018 academic year. The Committee will recommend revisions to the existing regulations (25 CFR part 30) to replace Adequate Yearly Progress (AYP) regulatory language and implement the Secretary's statutory responsibilities. The regulations will define the standards, assessments, and accountability system, consistent with Section 1111 of the ESEA, for Bureau-funded schools on a national, regional, or Tribal basis.

ESSA Section 8007(2) also provides that if a Tribal governing body or school board of a Bureau-funded school determines the requirements established by the Secretary of the Interior are inappropriate, they may waive, in part or in whole, such requirements. Where such requirements are waived, the Tribal governing body or school board must, within 60 days, submit to the Secretary of the Interior a proposal for alternative standards, assessments, and an accountability system, if applicable, consistent with ESEA Section 1111. The proposal must take into account the unique circumstances and needs of the school or schools and the students served. The proposal will be approved by the Secretary of the Interior and the Secretary of Education, unless the proposed standards, assessments, and accountability system do not meet the requirements of ESEA Section 1111. Additionally, a Tribal governing body or school board of a Bureau-funded school seeking a waiver may request, and the Secretary of the Interior and the Secretary of Education will provide, technical assistance.

Proposed Work of the Committee

The Committee will attempt to reach consensus on draft regulatory language for implementation by the 2017–2018 academic year. The objectives of the Committee are to represent the interests that will be significantly affected by the final regulations, negotiate in good faith, and reach consensus, where possible, on

recommendations to the Secretary for the proposed regulations.

The Committee will be charged, consistent with ESSA Section 8007, with developing draft regulations to implement the Secretary's responsibility to define the standards, assessments, and an accountability system, consistent with ESEA Section 1111, for Bureau-funded schools. The draft regulations will be considered by the Secretary and subject to government-to-government consultation. The Department must have final regulations for implementation by the 2017–2018 academic year. As a part of its deliberations, the Committee will consider the appropriate scope of the draft regulations, *e.g.*, national, regional, or Tribal basis, as appropriate, taking into account the unique circumstances and needs of such schools and the students served by such schools, and how BIE will implement such regulations.

The BIE encourages Tribal self-determination in Native education, by encouraging governing Tribes or school boards to develop alternative standards, assessments, and accountability systems, and by providing technical assistance. Therefore, the Committee will also be asked to provide recommendations on how BIE could best provide technical assistance under ESSA Section 8007(2) to Tribes who opt to exercise their authority to adopt their own standards, assessments, and an accountability system).

Since the Department must have final regulations in place by the 2017–2018 academic year, the Committee will be expected to meet frequently within a short time frame, *i.e.*, from the time of establishment through summer 2017. BIE currently anticipates up to six meetings, with each meeting lasting three days in length. The BIE has dedicated resources required to: ensure the Committee is able to conduct meetings, provide technical assistance, and provide any additional support required to fulfill the Committee's responsibilities.

Proposed Tribal Committee Members

On November 9, 2015, the BIE published a notice of intent (80 FR 69161) requesting comments and nominations for Tribal representatives for the Committee. The comment period for that notice of intent closed December 24, 2015. On April 14, 2016, the BIE reopened the comment and nomination period with a new deadline of May 31, 2016 (81 FR 22039). The BIE further extended the comment period for Tribes to nominate individuals for membership on the Committee on August 17, 2016

(81 FR 54768) with a closing date of October 3, 2016.

Within each of those notices, the BIE solicited comments on the proposal to establish the Committee, including comments on any additional interests not identified. Within each of those notices, the BIE solicited nominations from Tribes whose students attended Bureau-funded schools operated either by BIE or by a Tribe or tribal organization through a contract or grant, to nominate Tribal representatives to serve on the Committee and Tribal alternates to serve when the representative is unavailable. Based upon the proportionate share of students, some Tribes similar in affiliation or geography were grouped together for one seat. BIE asked those Tribes to either co-nominate a single Tribal representative to represent the multi-tribal jurisdiction or for each Tribe in the multi-Tribal jurisdiction to nominate a representative with the knowledge that the Secretary will be able to appoint only one of the nominees who will be responsible for representing the entire multi-Tribal jurisdiction on the Committee. A chart demonstrating the proportionate share of students attending Bureau-funded schools can be found in the **Federal Register** at 80 FR 69161, dated November 9, 2015.

The Secretary of the Interior proposes the following Tribal representatives for the BIE Committee, who:

- Have knowledge of school assessments and accountability systems;
- Have relevant experiences as past or present superintendents, principals, teachers, or school board members, or possess direct experience with AYP;
- Are able to coordinate, to the extent possible, with other Tribes and schools who may not be represented on the Committee;
- Are able to present the Tribe(s) with the authority to embody Tribal views, communicate with Tribal constituents, and have a clear means to reach agreement on behalf of the Tribe(s);
- Are able to negotiate effectively on behalf of the Tribe(s) represented;
- Are able to commit the time and effort required to attend and prepare for meetings; and
- Are able to collaborate among diverse parties in a consensus-seeking process.

The proposed Committee was selected based upon nominations submitted through the process identified in each of the **Federal Register** notices under the "Nominations" or "Submitting Nominations" section. The BIE did not consider nominations that were received in any other manner or were

received after the close of each comment period.

The Secretary proposes the following Tribal representatives for the Committee:

Tribe(s) represented	Proposed committee members	Nominated by
Navajo Nation (Total seats = 5)	Dr. Tommy Lewis, Superintendent of Schools, Department of Diné Education. Dr. Calvin White, Office of Diné School Improvement. Dr. Florinda Jackson, Office of Diné Accountability and Compliance. Lemual Adson, Superintendent, Shonto Preparatory School	Navajo Nation.
Sioux Tribes (Total seats = 2)	Charles Cuny, Jr., Superintendent, Little Wound School. Dr. Glori Coats-Kitsopoulos, Superintendent, American Horse School	Oglala Sioux Tribe.
Hopi and Pueblo Tribes (Total seats = 1).	E. David Atencio, Superintendent, Laguna Department of Education ..	Pueblo of Laguna.
Chippewa Tribes (Total seats = 2)	Leslie Harper, Executive Assistant, Leech Lake Band of Ojibwe Tribal Council.	Leech Lake Band of Ojibwe.
Gila River, Apache, Etc. (Total seats = 1).	Isaac Salcido, Director of Tribal Education, Gila River Indian Community.	Gila River Indian Community.
Choctaw (MS) & Cherokee (NC) (Total seats = 1).	Sherry Tubby, Exceptional Education Coordinator	Mississippi Band of Choctaw Indians.
Other Tribes (Total seats = 4)	Quinton Roman Nose, Executive Director, Tribal Education Departments National Assembly. Ron Etheridge, Deputy Executive Director for the Education Services at Cherokee Nation. Alban Naha, Interim Superintendent, Hopi Junior-Senior High School. Michael Dabrieo, Principal, Kha'p'o Community School.	Cheyenne Arapaho Tribes. Cherokee Nation of Oklahoma. Hopi Tribe. Santa Clara Pueblo.

The Secretary proposes the following alternate Tribal representatives for the BIE Committee:

Tribe(s) represented	Proposed alternate committee members	Nominated by
Chippewa Tribes	Jason Schlender, Tribal Governing Board Representative and Education Liaison.	Lac Courte Oreilles Band of Lake Superior Chippewa Indians.
Choctaw (MS) & Cherokee (NC)	Lucretia Williams, Project Coordinator, Tribal Education Department ..	Mississippi Band of Choctaw Indians.
Other Tribes	Chuck Hoskin, Chief of Staff, Cherokee Nation of Oklahoma Rebecca Fred, Instructional Coach, Moencopi Day School Paula Gutierrez, Board President, Kha'p'o Community School	Cherokee Nation of Oklahoma. Hopi Tribe. Santa Clara Pueblo.

Proposed Federal Committee Members

The Secretary proposes the following Federal representatives for the BIE Committee:

Name	Affiliation
Sue Bement ...	Designated Federal Officer, Bureau of Indian Education.
Dr. Jeffrey Hamley.	Associate Deputy Director, Division of Performance and Accountability, Bureau of Indian Education.
Brian Quint	Attorney-Advisor, Office of the Solicitor.

The Secretary proposes the following alternate Federal representatives for the BIE Committee:

Name	Affiliation
Regina Gilbert	Regulatory Policy Specialist, Office of Regulatory Affairs and Collaborative Action.

Name	Affiliation
Jim Hastings ..	Acting Associate Deputy Director and Education Program Administrator, Bureau of Indian Education.
Brenda Riel	Attorney-Advisor, Office of the Solicitor

If you are a Tribe with Bureau-funded schools, an Indian education organization, or an interested individual, we invite you to comment on the nominations in this notice or to nominate other persons for membership on the Committee. The Committee membership should reflect the diversity of Tribal interests, and Tribes should nominate representatives and alternates who will:

- Have knowledge of school assessments and accountability systems;
- Have relevant experiences as past or present superintendents, principals, teachers, or school board members, or possess direct experience with AYP;
- Be able to coordinate, to the extent possible, with other Tribes and schools

who may not be represented on the Committee;

- Be able to present the Tribe(s) with the authority to embody Tribal views, communicate with Tribal constituents, and have a clear means to reach agreement on behalf of the Tribe(s);

- Be able to negotiate effectively on behalf of the Tribe(s) represented;

- Be able to commit the time and effort required to attend and prepare for meetings; and

- Be able to collaborate among diverse parties in a consensus-seeking process.

We will consider nominations for Tribal committee representatives only if they are nominated through the process identified in this notice of intent and in the **Federal Register** notice of intent at 80 FR 69161. We will not consider any nominations that we receive in any other manner. We will also not consider nominations for Federal representatives. Only the Secretary may nominate Federal employees to the Committee.

Nominations must include the following information about each nominee:

(1) A letter from the Tribe supporting the nomination of the individual to serve as a Tribal representative for the Committee and a statement on whether the nominee is only representing one Tribe's views, or whether the expectation is that the nominee represents a specific group of Tribes. Also include the Tribal interest(s) to be represented by the nominee (see Section IV, Part F of **Federal Register** notice of intent at 80 FR 69161);

(2) A resume reflecting the nominee's qualifications and experience in Indian education; resume to include the nominee's name, Tribal affiliation, job title, major job duties, employer, business address, business telephone, and fax numbers (and business email address, if applicable); and

(3) A brief description of how the nominee will represent Tribal views, communicate with Tribal constituents, and have a clear means to reach agreement on behalf of the Tribe(s) they are representing.

We will consider only comments and nominations that we receive by the close of business Eastern Standard Time on the date listed in the **DATES** section, at the location indicated in the **ADDRESSES** section. Comments received will be available for inspection at the address listed above from 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays. Before including your address, phone number, email address or other personal identifying information in your comment, please note that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 11, 2017.

Lawrence S. Roberts,
Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2017-01061 Filed 1-17-17; 8:45 am]

BILLING CODE 4337-15-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-135734-14]

RIN 1545-BM45

Rules Regarding Inversions and Related Transactions; Partial Withdrawal of Notice of Proposed Rulemaking

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws portions of a notice of proposed rulemaking (REG-135734-14) published on April 8, 2016, in the **Federal Register** (81 FR 20588). The withdrawn portions relate to exceptions to general rules addressing certain transactions that are structured to avoid the purposes of section 7874 of the Internal Revenue Code (Code).

DATES: Portions of the proposed rules published on April 8, 2016, in the **Federal Register** (81 FR 20588) are withdrawn as of January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Joshua G. Rabon, (202) 317-6937.

SUPPLEMENTARY INFORMATION:

Background

On April 8, 2016, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (81 FR 20588) proposed regulations (REG-135734-14), including in §§ 1.7874-7 and 1.7874-10, that address certain transactions that are structured to avoid the purposes of section 7874 of the Code. The regulations were proposed by cross-reference to temporary regulations (TD 9761) in the same issue of the **Federal Register** (81 FR 20858). In the Rules and Regulations section of this issue of the **Federal Register**, the Treasury Department and the IRS are amending certain aspects of the temporary regulations in §§ 1.7874-7T and 1.7874-10T. Accordingly, the Treasury Department and the IRS are issuing a notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register** that proposes rules in §§ 1.7874-7 and 1.7874-10 by cross-reference to the amended temporary regulations. This document withdraws the previously proposed regulations that are replaced by the notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register**.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Partial Withdrawal of a Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, §§ 1.7874-7(c)(2) and (h) and 1.7874-10(d)(2) and (i) of the notice of proposed rulemaking (REG-135734-14) published in the **Federal Register** on April 8, 2016 (81 FR 20588) are withdrawn.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2017-00636 Filed 1-13-17; 4:15 pm]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-135734-14]

RIN 1545-BM45

Rules Regarding Inversions and Related Transactions; Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the Department of the Treasury (Treasury Department) and the IRS are amending portions of temporary regulations that address certain transactions that are structured to avoid the purposes of section 7874 of the Internal Revenue Code (Code). The temporary regulations affect certain domestic corporations and domestic partnerships whose assets are directly or indirectly acquired by a foreign corporation and certain persons related to such domestic corporations and domestic partnerships. The text of the temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by April 18, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-135734-14), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions

may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-135734-14), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-135734-14).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Joshua G. Rabon (202) 317-6937; concerning submissions of comments or requests for a public hearing, Regina Johnson, (202) 317-5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend portions of the regulations under section 7874 of the Code concerning the de minimis exceptions to the general rules of §§ 1.7874-7T (disregard of certain stock attributable to passive assets) and 1.7874-10T (disregard of certain distributions). The text of those temporary regulations also serves as the text of the proposed regulations herein. The preamble to those temporary regulations, which is also the preamble to certain final regulations under section 7874, explains the temporary regulations, the corresponding proposed regulations, and the final regulations.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the "Addresses" heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be

available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits electronic or written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Joshua G. Rabon of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
 Section 1.7874-7 also issued under 26 U.S.C. 7874(c)(6) and 7874(g).
 * * * * *
 Section 1.7874-10 also issued under 26 U.S.C. 7874(c)(4) and 7874(g).
 * * * * *

■ **Par. 2.** Section 1.7874-7 is added to read as follows.

§ 1.7874-7 Disregard of certain stock attributable to passive assets.

(a) through (c)(1) [Reserved]
 (2) [The text of proposed § 1.7874-7(c)(2) is the same as the text of § 1.7874-7T(c)(2) as revised elsewhere in this issue of the **Federal Register**.]
 (d) through (g) [Reserved]
 (h) [The text of proposed § 1.7874-7(h) is the same as the text of § 1.7874-7T(h) as revised elsewhere in this issue of the **Federal Register**.]

■ **Par. 3.** Section 1.7874-10 is added to read as follows:

§ 1.7874-10 Disregard of certain distributions.

(a) through (d)(1) [Reserved]
 (2) [The text of proposed § 1.7874-10(d)(2) is the same as the text of § 1.7874-10T(d)(2) as revised elsewhere in this issue of the **Federal Register**.]
 (e) through (h) [Reserved]
 (i) [The text of proposed § 1.7874-10(i) is the same as the text of § 1.7874-

10T(i) as revised elsewhere in this issue of the **Federal Register**.]

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2017-00637 Filed 1-13-17; 4:15 pm]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-131643-15]

RIN-1545-BN05

Definitions of Qualified Matching Contributions and Qualified Nonelective Contributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) under regulations relating to certain qualified retirement plans that contain cash or deferred arrangements under section 401(k) or that provide for matching contributions or employee contributions under section 401(m). Under these regulations, employer contributions to a plan would be able to qualify as QMACs or QNECs if they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. These regulations would affect participants in, beneficiaries of, employers maintaining, and administrators of tax-qualified plans that contain cash or deferred arrangements or provide for matching contributions or employee contributions.

DATES: Comments and requests for a public hearing must be received by April 18, 2017.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-131643-15) Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-131643-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at

www.regulations.gov (IRS REG-131643-15).

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Rosemary Y. Oluwo at (202) 317-6060; concerning submissions of comments or to request a hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 401(k)(1) provides that a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as failing to satisfy the requirements of section 401(a) merely because the plan includes a qualified cash or deferred arrangement (CODA). To be considered a qualified CODA, a plan must satisfy several requirements, including: (i) Under section 401(k)(2)(B), amounts held by the plan's trust that are attributable to employer contributions made pursuant to an employee's election must satisfy certain distribution requirements; (ii) under section 401(k)(2)(C), an employee's right to such employer contributions must be nonforfeitable; and (iii) under section 401(k)(3), such employer contributions must satisfy certain nondiscrimination requirements.

Under section 401(k)(3)(D)(ii), the employer contributions taken into account for purposes of applying the nondiscrimination requirements may, under such rules as the Secretary may provide and at the election of the employer, include, in addition to contributions made pursuant to an employee's election, matching contributions that meet the distribution and nonforfeatability requirements of section 401(k)(2)(B) and (C) and qualified nonelective contributions within the meaning of section 401(m)(4)(C). Under section 401(m)(4)(C), a qualified nonelective contribution is an employer contribution, other than a matching contribution, with respect to which the distribution and nonforfeatability requirements of section 401(k)(2)(B) and (C) are met.

Under § 1.401(k)-1(b)(1)(ii), a CODA satisfies the applicable nondiscrimination requirements if it satisfies the actual deferral percentage (ADP) test of section 401(k)(3), described in § 1.401(k)-2. The ADP test limits the degree of disparity permitted between the percentage of compensation made as employer contributions to the plan for a plan year on behalf of eligible highly compensated employees and the percentage of compensation made as employer contributions on behalf of

eligible nonhighly compensated employees. If the ADP test limits are exceeded, the employer must take corrective action to ensure that the limits are met. In determining the amount of employer contributions made on behalf of an eligible employee, employers are allowed to take into account certain qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) made on behalf of the employee by the employer.

In lieu of applying the ADP test, an employer may choose to design its plan to satisfy an ADP safe harbor, including the ADP safe harbor provisions of section 401(k)(12), described in § 1.401(k)-3. Under § 1.401(k)-3, a plan satisfies the ADP safe harbor provisions of section 401(k)(12) if, among other things, it satisfies certain contribution requirements. With respect to the safe harbor under section 401(k)(12), an employer may choose to satisfy the contribution requirement by providing a certain level of QMACs or QNECs to eligible nonhighly compensated employees under the plan.

A defined contribution plan that provides for matching or employee after-tax contributions must satisfy the nondiscrimination requirements under section 401(m) with respect to those contributions for any plan year. Under § 1.401(m)-1(b)(1), the matching contributions and employee contributions under a plan satisfy the nondiscrimination requirements for a plan year if the plan satisfies the actual contribution percentage (ACP) test of section 401(m)(2) described in § 1.401(m)-2.

The ACP test limits the degree of disparity permitted between the percentage of compensation made as matching contributions and after-tax employee contributions for or by eligible highly compensated employees under the plan and the percentage of compensation made as matching contributions and after-tax employee contributions for or by eligible nonhighly compensated employees under the plan. If the ACP test limits are exceeded, the employer must take corrective action to ensure that the limits are met. In determining the amount of employer contributions made on behalf of an eligible employee, employers are allowed to take into account certain QNECs made on behalf of the employee by the employer. Employers must also take into account QMACs made on behalf of the employee by the employer unless an exclusion applies (including an exclusion for QMACs that are taken into account under the ADP test).

If an employer designs its plan to satisfy the ADP safe harbor of section 401(k)(12), it may avoid performing the ACP test with respect to matching contributions under the plan, as long as the additional requirements of the ACP safe harbor of section 401(m)(11) are met.

Under § 1.401(k)-6, QMACs and QNECs are matching contributions and employer contributions (other than elective or matching contributions) that satisfy the nonforfeatability requirements of § 1.401(k)-1(c) and the distribution requirements of § 1.401(k)-1(d) "when they are contributed to the plan." Similarly, § 1.401(m)-5 includes independent definitions of QMACs and QNECs, which are matching contributions and employer contributions (other than elective or matching contributions) that satisfy the nonforfeatability and distribution requirements of § 1.401(k)-1(c) and (d) "at the time the contribution is made."

The Treasury Department and the IRS have received comments with respect to the definitions of QMACs and QNECs in §§ 1.401(k)-6 and 1.401(m)-5. In particular, commenters assert that employer contributions should be able to qualify as QMACs and QNECs as long as they satisfy applicable nonforfeatability and distribution requirements at the time they are allocated to participants' accounts, rather than when they are first contributed to the plan. Commenters contend that interpreting sections 401(k)(3)(D)(ii) and 401(m)(4)(C) to require satisfaction of applicable nonforfeatability and distribution requirements at the time amounts are first contributed to the plan would preclude plan sponsors with plans that permit the use of amounts in plan forfeiture accounts to offset future employer contributions under the plan from applying such amounts to fund QMACs and QNECs. This is because the amounts would have been allocated to the forfeiture accounts only after a participant incurred a forfeiture of benefits and, thus, generally would have been subject to a vesting schedule when they were first contributed to the plan. Commenters have requested that QMAC and QNEC requirements not be interpreted to prevent the use of plan forfeitures to fund QMACs and QNECs. The commenters urge that the nonforfeatability and distribution requirements under § 1.401(k)-6 should apply when QMACs and QNECs are allocated to participants' accounts and not when the contributions are first made to the plan.

Explanation of Provisions

After consideration of the comments described in this preamble in the “Background” section, the Treasury Department and the IRS are proposing to amend § 1.401(k)–6 to provide that amounts used to fund QMACs and QNECs must be nonforfeitable and subject to distribution restrictions in accordance with § 1.401(k)–1(c) and (d) when allocated to participants’ accounts, and to no longer require that amounts used to fund QMACs and QNECs satisfy the nonforfeitable and distribution requirements when they are first contributed to the plan. Treasury and IRS note that while the second sentence of each of the current definitions of QMACs and QNECs refers to the “vesting” requirements of § 1.401(k)–1(c), those requirements are more appropriately characterized as “nonforfeitable” requirements consistent with section 401(k)(2)(C) and the title of § 1.401(k)–1(c). Accordingly, these proposed regulations would amend these definitions to clarify those references by replacing the word “vesting” with “nonforfeitable” in each definition; these changes are not otherwise intended to have any substantive impact on this or any other section of the regulations. These proposed regulations would also amend the definitions of QMACs and QNECs in § 1.401(m)–5 to provide cross-references to the definitions of QMACs and QNECs under § 1.401(k)–6. These amendments to § 1.401(m)–5 are being made to ensure a consistent definition of QMACs and QNECs in § 1.401(k)–6 and § 1.401(m)–5 (including the requirement that amounts used to fund QMACs and QNECs be made subject to nonforfeitable and distribution requirements when they are allocated to participants’ accounts as QMACs or QNECs) and are not otherwise intended to have any substantive impact on this or any other section of the regulations.

Proposed Effective/Applicability Date

These regulations are proposed to apply to taxable years beginning on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Taxpayers, however, may rely on these proposed regulations for periods preceding the proposed applicability date. If, and to the extent, the final regulations are more restrictive than the rules in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Rosemary Y. Oluwo, Office of Associate Chief Counsel (Tax Exempt and Governmental Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.401(k)–1 is amended by adding paragraph (g)(5) to read as follows:

§ 1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(g) * * *

(5) *Effective date for definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs).* The revisions to the second sentence in the definitions of QMACs and QNECs in § 1.401(k)–6 apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

■ **Par. 3.** Section 1.401(k)–6 is amended by revising the second sentence in the definitions of *Qualified matching contributions (QMACs)* and *Qualified nonelective contributions (QNECs)* to read as follows:

§ 1.401(k)–6 Definitions.

* * * * *

Qualified matching contributions (QMACs). * * * Thus, the matching contributions must satisfy the nonforfeitable requirements of § 1.401(k)–1(c) and be subject to the distribution requirements of § 1.401(k)–1(d) when they are allocated to participants’ accounts. * * *

Qualified nonelective contributions (QNECs). * * * Thus, the nonelective contributions must satisfy the nonforfeitable requirements of § 1.401(k)–1(c) and be subject to the distribution requirements of § 1.401(k)–1(d) when they are allocated to participants’ accounts. * * *

* * * * *

■ **Par. 4.** Section 1.401(m)–1 is amended by adding paragraph (d)(4) to read as follows:

§ 1.401(m)–1 Employee contributions and matching contributions.

* * * * *

(d) * * *

(4) *Effective date for definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs).* The revisions to the definitions of QMACs and QNECs in § 1.401(m)–5 apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

■ **Par. 5.** Section 1.401(m)–5 is amended by revising the definitions of *Qualified matching contributions (QMACs)* and *Qualified nonelective contributions (QNECs)* to read as follows:

§ 1.401(m)–5 Definitions.

* * * * *

Qualified matching contributions (QMACs). *Qualified matching contributions or QMACs* means qualified matching contributions or QMACs as defined in § 1.401(k)–6.

Qualified nonelective contributions (QNECs). *Qualified nonelective contributions or QNECs* means qualified nonelective contributions or QNECs as defined in § 1.401(k)–6.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2017–00876 Filed 1–17–17; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2016–1041]

RIN 1625–AA08

Special Local Regulation; Pago Pago Harbor, American Samoa

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a permanent special local regulation for the Annual Fautasi Ocean Challenge canoe race in Pago Pago Harbor, American Samoa. This annual event historically occurs during the weeks of Veteran's Day and Thanksgiving Day. This action is necessary to safeguard the participants and spectators, including all crews, vessels, and persons on the water in Pago Pago Harbor during the event. This regulation will functionally close the port to vessel traffic during the race, but will not require the evacuation of any vessels from the harbor. Entry into, transiting, or anchoring in the harbor would be prohibited to all vessels not registered with the sponsor as participants or not part of the race patrol, unless specifically authorized by the Captain of the Port (COTP) Honolulu or a designated representative. Vessels who are already moored or anchored in the harbor seeking permission to remain there shall request permission from the COTP unless deemed a spectator vessel that is moored to a waterfront facility within the regulated area. The area forming the subject of this permanent special local regulation is described below. We invite your comments on this notice of proposed rulemaking (NPRM).

DATES: Comments and related material must be received by the Coast Guard on or before February 17, 2017.

ADDRESSES: You may submit comments identified by docket number USCG–2016–1041 using the Federal eRulemaking Portal at [http://](http://www.regulations.gov)

www.regulations.gov. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Lieutenant Commander Nicolas Jarboe, Waterways Management Division, U.S. Coast Guard Sector Honolulu; telephone (808) 541–4359, email nicolas.a.jarboe@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

COTP Captain of the Port, Honolulu
CFR Code of Federal Regulations
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

This annual event will consist of a series of races entirely within Pago Pago Harbor between longboats with paddling crews of 30–50 persons each. It is anticipated that a large number of spectator pleasure craft will be drawn to the event. Spectator vessels and commercial vessel traffic would pose a significant safety hazard to the longboats, longboat crew members, and other persons and vessels involved with the event due to the longboats limited maneuverability within the port.

The Captain of the Port, Honolulu (COTP), proposes to establish a permanent special local regulation for Pago Pago Harbor to minimize vessel traffic in Pago Pago Harbor before, during, and after the scheduled event to safeguard persons and vessels during the longboat races. A regulated area is a water area, shore area, or water and shore area, for safety or environmental purposes, of which access is limited to authorized persons, vehicles, or vessels. The statutory basis for this rulemaking is 33 U.S.C. 1233, which gives the Coast Guard, under a delegation from the Secretary of the Department of Homeland Security, regulatory authority to enforce the Ports and Waterways Safety Act.

III. Discussion of Proposed Rule

This rule will create a permanent special local regulation in Pago Pago Harbor. The regulated area will close the harbor to all vessels not authorized by the COTP for entry into, transiting, or anchoring within the port for the duration of the event. The COTP will authorize registered participants, support vessels, and enforcement vessels to enter and remain in the area.

No other vessels will be permitted to enter the regulated area without obtaining permission from the COTP or a designated representative. The harbor will remain closed until the Coast Guard issues an “All Clear” after races have concluded and the harbor is deemed safe for normal operations. This rule will not require any vessel already moored to evacuate the port, provided they are moored in such a way that they do not interfere with the event. The proposed regulatory text appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. This determination is based on the size, location, duration, and time-of-day of the safety zone. Accordingly, this NPRM has not been reviewed by the Office of Management and Budget.

Under this NPRM, the Coast Guard would issue a Broadcast Notice to Mariners with information pertaining to the regulated area via VHF–FM marine channel 16.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Some owners or operators of vessels intending to transit the regulated area may be small entities and may not be authorized to do so. However, given the

short duration of this proposed temporary rule, this would not create a significant economic impact on a substantial number of these entities. Moreover, the rule would allow all vessels to seek permission from the Coast Guard to enter the regulated area.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

If you believe this proposed rule would have substantial direct effects on federalism or tribal governments, please

contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such expenditure, we discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a temporary and limited safety zone in Pago Pago Harbor. Normally such actions are categorically excluded from further review under paragraph 34(g) of Figure 2–1 of Commandant Instruction M16475.ID. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking,

indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, and Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SPECIAL LOCAL REGULATIONS/REGATTAS AND MARINE PARADES.

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.1401 to read as follows:

§ 100.1401 Special Local Regulation; Annual Fautasi Ocean Challenge Canoe Race, Pago Pago Harbor, America Samoa.

(a) *Location.* The following regulated area is established as a special local regulation: Breakers Point (eastern edge of Pago Pago Harbor entrance) thence southeast to 14°18'47" S., 170°38'54.5" W. thence southwest to 14°19'03" S., 170°39'14" W., thence northwest to Tulutulu Point and then following the coastline encompassing Pago Pago Harbor. This regulated area extends from the surface of the water to the ocean floor.

(b) *Enforcement period.* This annual event historically occurs in November

during the weeks of Veterans Day and Thanksgiving Day. The Captain of the Port Honolulu, will establish enforcement dates that will be announced by Notice of Enforcement, Local Notice to Mariners, Broadcast Notice to Mariners, on-scene designated representatives, and outreach.

(c) *Regulations.* (1) All persons and vessels not registered with the sponsor as participants or support/enforcement vessels are considered spectators. The “support/enforcement vessels” consist of any territory, or local law enforcement and sponsor provided vessels assigned or approved by the Captain of the Port Honolulu to patrol the regulated area.

(2) No spectator shall anchor, block, loiter or impede the transit of participants or support/enforcement vessels in the regulated area during the enforcement dates and times, unless cleared for entry by or through a support/enforcement vessel.

(3) Spectator vessels may be moored to a waterfront facility within the regulated area in such a way that they shall not interfere with the progress of the event. Such mooring must be complete at least 30 minutes prior to the establishment of the regulated area and remain moored through the duration of the event.

(d) *Informational Broadcasts.* The Captain of the Port Honolulu, will establish enforcement dates and times with a Notice of Enforcement. If circumstances render enforcement of the regulated area unnecessary for the entirety of these periods, the Captain of the Port or his designated representative will inform the public through broadcast notices to mariners that the regulated area is no longer being enforced. The harbor will remain closed until the Coast Guard issues an “All Clear” for the harbor after the race has concluded and the harbor is deemed safe for normal operations.

(e) *Penalties.* Vessels or persons violating this rule may be subject to the penalties set forth in 33 U.S.C. 1233.

Dated: January 10, 2017.

M.C. Long,

Captain, U.S. Coast Guard, Captain of the Port Honolulu.

[FR Doc. 2017-00861 Filed 1-17-17; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–0836]

RIN 1625–AA00

Safety Zones; San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend, add, and delete several permanent safety zones located in the Captain of the Port San Francisco zone that are established to protect public safety during annual firework displays. These amendments will update listed events to accurately reflect the firework display locations. This proposed rulemaking would limit the movement of vessels within the established firework display areas unless authorized by the Captain of the Port (COTP) San Francisco or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before February 17, 2017.

ADDRESSES: You may submit comments identified by docket number USCG–2016–0836 using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Lieutenant Junior Grade Christina Ramirez, U.S. Coast Guard Sector San Francisco; telephone 415–399–3585, email D11-PF-MarineEvents@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
PATCOM Patrol Commander
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The Coast Guard is conducting this rulemaking under the authority of 33 U.S.C. 1231. Fireworks displays are held annually on a recurring basis on the

navigable waters within the COTP San Francisco zone. One of the published annual fireworks events that require safety zones does not currently reflect the accurate location of the respective display sites. Three annual fireworks events that require safety zones are not published in 33 CFR 165.1191 and one published fireworks event has not occurred since 2009. These safety zones are necessary to provide for the safety of the crew, spectators, participants of the event, participating vessels, and other users and vessels of the waterway from the hazards associated with firework displays. The effect of these proposed safety zones will be to restrict general navigation in the vicinity of the events, from the start of each event until the conclusion of that event. Except for the persons or vessels authorized by the COTP San Francisco or a designated representative, no person or vessel may enter or remain in the regulated area. These regulations are needed to keep spectators and vessels a safe distance away from the fireworks displays to ensure the safety of participants, spectators, and transiting vessels.

III. Discussion of Proposed Rule

The Coast Guard has reviewed 33 CFR 165.1191 for accuracy. The Coast Guard is proposing to amend Table 1 in § 1191 to modify one event to reflect the current event locations, add three events, and delete one outdated event.

The event proposed to be modified is listed numerically in Table 1 of this section as item 9, “Fourth of July Fireworks, City of Richmond.” The display location currently listed, Richmond Harbor, has been deemed undesirable or hazardous by the event sponsors, and so it is being changed to a barge located in the harbor, and the area of the safety zone would be the area around the barge.

We are also proposing to add three events to Table 1 of 33 CFR 165.1191, as items 28, 29, and 30. These events are titled Execpro Services Fourth of July Fireworks, Monte Foundation Fireworks, Lake Tahoe, and Sausalito Lighted Boat Parade Fireworks, respectively. The events proposed to be added have taken place in 2011, 2013, and 2014, and we believe that they will likely be regularly scheduled in the future. For those reasons, we believe it is beneficial to include them in the permanent regulation.

Finally, we propose to remove item 2, “KFOG KaBoom,” as this event is outdated. It is unlikely to reoccur and its continued inclusion in the regulation offers the possibility of confusion.

The Coast Guard proposes this rulemaking under authority in 33 U.S.C.

1231; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Department of Homeland Security Delegation No. 0170.1.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, duration, and time-of-day of each safety zone. Vessel traffic would be able to safely transit around each safety zone which would impact a small designated area of the COTP San Francisco zone for less than 1 hour during the evening when vessel traffic is normally low. Moreover, the Coast Guard would issue a Local Notice to Mariner and Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zones.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a

significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zones lasting less than 1 hour that would prohibit entry within 1,000 feet of a fireworks barge. Normally such actions are categorically excluded from further review under paragraph 34(g) of Figure 2–1 of Commandant Instruction M16475.ID. A preliminary environmental analysis checklist and Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protestors. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment

applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket

Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend to 33 CFR part 165 as follows:

■ 1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 165.1191, in Table 1 to § 165.1191, remove and reserve item 2, revise item 9, and add items 28, 29, and 30, to read as follows:

§ 165.1191 Northern California and Lake Tahoe Area Annual Fireworks Events.

* * * * *

TABLE 1 TO § 165.1191

* * * * *	
2. [Reserved]	
* * * * *	
9. Fourth of July Fireworks, City of Richmond	
Sponsor	Various Sponsors.
Event Description	Fireworks Display.
Date	Week of July 4th.
Location	A barge located in Richmond Harbor in approximate position 37°54'40" N, 122°21'05" W, Richmond, CA.
Regulated Area	100-foot radius around the fireworks barge during the loading, transit, setup, and until the commencement of the scheduled display. Increases to a 560-foot radius upon commencement of the fireworks display.
* * * * *	
28. Execpro Services Fourth of July Fireworks	
Sponsor	Execpro Services Inc.
Event Description	Fireworks Display.
Date	Week of July 4th.
Location	Off-shore from Incline Village, NV.
Regulated Area	100-foot radius around the fireworks barge during the loading, transit, setup, and until the commencement of the scheduled display. Increases to a 1,000-foot radius upon commencement of the fireworks display.
29. Monte Foundation Fireworks, Lake Tahoe	
Sponsor	Monte Foundation.
Event Description	Fireworks Display.
Date	Week of Labor Day.
Location	Carmelian Bay, Lake Tahoe, CA.
Regulated Area	100-foot radius around the fireworks barge during the loading, transit, setup, and until the commencement of the scheduled display. Increases to a 1,000-foot radius upon commencement of the fireworks display.
30. Sausalito Lighted Boat Parade Fireworks	
Sponsor	Various Sponsors.
Event Description	Fireworks Display.
Date	A Saturday or Sunday in December.
Location	Off-shore from Sausalito Point, Sausalito, CA.
Regulated Area	100-foot radius around the fireworks barge during the loading, transit, setup, and until the commencement of the scheduled display. Increases to a 1,000-foot radius upon commencement of the fireworks display.

Dated: December 13, 2016.

Anthony J. Ceraolo,

Captain, U.S. Coast Guard, Captain of the Port San Francisco.

[FR Doc. 2017-01050 Filed 1-17-17; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Parts 1 and 2

[NPS-WASO-REGS-17326; GPO Deposit Account 4311H2]

RIN 1024-AE30

Withdrawal of the Proposed Rule To Revise General Provisions; Electronic Cigarettes

AGENCY: National Park Service; Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: The National Park Service withdraws the proposed rule that would revise the regulation that defines smoking to include the use of electronic cigarettes and other electronic nicotine delivery systems; and would allow a superintendent to close an area, building, structure, or facility to smoking when necessary to maintain public health and safety. The withdrawal is based upon a need to engage in additional interagency coordination and review of the proposal.

DATES: The January 6, 2017, proposed rule (82 FR 1647) is withdrawn as of January 18, 2017.

ADDRESSES: The withdrawal of the proposed rule, and comments, are available at www.regulations.gov by searching for Regulation Identifier Number (RIN) 1024-AE30.

FOR FURTHER INFORMATION CONTACT: Sara Newman, Director, Office of Public Health, by telephone 202-513-7225, or email sara_newman@nps.gov.

SUPPLEMENTARY INFORMATION: This withdrawal does not affect Director's Order #50D (Smoking Policy), originally issued in 2003 and then revised and reissued in 2009, and Policy Memorandum 15-03 (Use of Electronic Nicotine Delivery Systems), issued on September 10, 2015, which remain in effect and are available online on the NPS Office of Policy Web site at <http://www.nps.gov/applications/npspolicy/index.cfm> by clicking on the drop-down

menu and selecting "Smoking" from the list of policy subjects.

Michael Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2017-01060 Filed 1-17-17; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

42 CFR Part 2

[SAMHSA-4162-20]

RIN 0930-ZA07

Confidentiality of Substance Use Disorder Patient Records

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On Feb. 9, 2016, the Substance Abuse and Mental Health Services Administration (SAMHSA) published a Notice of Proposed Rulemaking (NPRM) that proposed policy changes to update and modernize the Confidentiality of Alcohol and Drug Abuse Patient Records (42 CFR part 2). SAMHSA explained in the NPRM that these changes were intended to better align the regulations with advances in the U.S. health care delivery system while retaining important privacy protections for individuals seeking treatment for substance use disorders. The last substantive update to these regulations was in 1987. SAMHSA is issuing this Supplemental Notice of Proposed Rulemaking (SNPRM) to propose additional clarifications to the part 2 regulations as amended by the concurrently issued final rule. As noted in the final rule, 42 CFR part 2 Confidentiality of Substance Use Disorder Patient Records, questions raised by commenters highlighted varying interpretations of the 1987 rule's restrictions on lawful holders and their contractors and subcontractors' use and disclosure of part 2-covered data for purposes of carrying out payment, health care operations, and other health care related activities. In consideration of this feedback and given the critical role that third-party payers, other lawful holders, and their contractors, subcontractors, and legal representatives play in the provision of health care services, SAMHSA is issuing this SNPRM to seek further comments on our proposals to address and help

clarify these matters before establishing any appropriate restrictions on disclosures to contractors, subcontractors and legal representatives.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on February 17, 2017.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 0930-AA21, by any of the following methods:

Electronically: Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the instructions for submitting comments.

Regular, Express or Overnight Mail, or Hand Delivery or Courier: Written comments sent by hand delivery, or mailed by regular, express, or overnight mail must be sent to the following address ONLY: The Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, Attn: Danielle Tarino, SAMHSA, 5600 Fishers Lane, Room 13E89A, Rockville, Maryland 20857.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

Instructions: To avoid duplication, please submit only one copy of your comments by only one method. All submissions received must include the agency name and docket number or RIN for this rulemaking. All comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process and viewing public comments, see the "Request for Public Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Danielle Tarino, SAMHSA, 5600 Fishers Lane, Room 13E89A, Rockville, Maryland 20857, 240-276-2857, Email address: Danielle.Tarino@samhsa.hhs.gov

SUPPLEMENTARY INFORMATION:

Background

On February 9, 2016, SAMHSA published an NPRM in the **Federal Register** (81 FR 6987) proposing updates to regulations for the Confidentiality of Alcohol and Drug Abuse Patient Records (42 CFR part 2). These regulations implement title 42, section

290dd–2 of the United States Code pertaining to Confidentiality of Records. SAMHSA explained in that NPRM, it proposed to update these regulations, last substantively amended in 1987, to reflect development of integrated health care models and growing use of electronic means for exchanging patient information. At the same time, SAMHSA wished to maintain protections for (part 2) patient identifying information, as persons with substance use disorders still may encounter significant discrimination if their information is improperly disclosed.

Elsewhere in this issue of the **Federal Register** SAMHSA published a final rule. In response to public comments, the final rule provides for greater flexibility in disclosing (part 2) patient identifying information within the health care system while continuing to address the privacy concerns of patients seeking treatment for a substance use disorder. SAMHSA received 376 comments on the NPRM. SAMHSA received a number of comments to the NPRM that went beyond what SAMHSA was proposing. Some commenters to the NPRM urged SAMHSA to clarify the scope of permitted disclosures of (part 2) patient identifying information by third-party payers. Some commenters asked that the current and proposed Qualified Service Organization (QSO) (part 2) patient identifying information disclosure provisions be applied to disclosures by third-party payers and other lawful holders of (part 2) patient identifying information to support health care operations and payment. Some commenters suggested doing this through the expansion of the definition of QSO. For instance, one commenter suggested that the definition of qualified service organization include “lawful holders of [p]art 2 patient identifying information,” stating that ACOs often engage analytics companies to provide support in identifying those high-risk patients who would benefit from care management and other services. Another commenter suggested expanding provisions concerning audits and evaluations to permit CMS to disclose (part 2) patient identifying information to ACOs and bundled payment participating entities for program audit and evaluation purposes. Others noted that QSOs themselves, as well as state Medicaid programs often use software vendors and other contractors, subcontractors, and legal representatives to carry out administrative and claims processing functions. A commenter further urged that the tasks that could be carried out

under the QSO policies not only be broadened to include population health management activities but also “clinical professional support services (e.g., quality improvement initiatives, utilization review and management services); third-party liability and coordination of benefit support services; activities related to preventing fraud, waste and abuse; and other activities and functions typically performed by contractors for or on behalf of third-party payers.”

In developing the final rule, SAMHSA responded directly to several of these public comments about the NPRM. For instance, the “To Whom” discussion in the preamble to the final rule provides that: “[f]or purposes of payment-related activities, to the extent that federal or state law authorizes or requires that the Medicaid or Medicare agency or program share data or enter into a contractual arrangement or other formal agreements to do so, written consent to disclose patient identifying information to the agencies or programs (as a third-party payer) under section 2.31(a)(4)(iii)(A) is considered to extend to the contractors, subcontractors, and legal representatives of the agencies or programs.” SAMHSA discussed in the final rule preamble that a “lawful holder” of (part 2) patient identifying information is an individual or entity who has received such information as the result of a part 2-compliant patient consent (with a prohibition on re-disclosure notice) or as permitted under the part 2 statute, regulations, or guidance and, therefore, is bound by 42 CFR part 2.

One commenter indicated that state Medicaid agencies hire contractors for a wide array of “administrative functions”; and that those contractors and vendors accessed (part 2) patient identifying information to carry out these activities. Other comments noted the role of third-parties in Medicaid program claims processing. Another commenter suggested that, given the role of MCOs, state Medicaid agencies and other programs, whether a patient designated the “name of the state agency, the MCO or simply Medicaid, the rule should consider consent to apply to the State and its contracted delivery system.” Another commenter similarly urged that “In order to ensure that Medicaid programs can carry out its operational requirements, consent that names the Medicaid agency or the MCO should permit disclosure to the entity’s contractors, when necessary.”

With respect to lawful holders, certain commenters requested changes to or highlighted the need for additional guidance regarding how third-party

payers may use and disclose (part 2) patient identifying information (as defined in 42 CFR 2.11) as they carry out their payment and health care operations. One commenter asked for explicit confirmation that Medicaid plans were allowed to process claims through a contracted entity (e.g., Medicaid managed care organizations (MCOs)). Similarly, another commenter recommended that the rule clarify that a patient’s naming of the state agency, the MCO, or simply Medicaid were all adequate to consent to allowing the patient’s information to be released to whichever entity actually conducted the required functions on behalf of the third-party payer. One commenter suggested that such payers should be viewed as intermediaries for purposes of sharing substance use disorder information with treating providers. Other commenters noted that Medicaid agencies and MCOs both require access to (part 2) patient identifying information for the purposes of payment. Another commenter discussed the history of the part 2 rules and asserted that the governing statute, 42 U.S.C. 290dd–2, does not require treating third-party payers differently than other payers. The commenter further asserted that “[e]ssentially all third-party payers contract with third parties to obtain services and perform activities that involve specialized expertise, equipment or other resources that the payer does not maintain in-house due to the associated administrative and other costs.”

These comments, while not addressing specific changes proposed in the NPRM, have prompted SAMHSA to propose additional clarifications and modifications to the part 2 rules to clarify the scope of permissible disclosures. In an effort to address some of the commenters’ requests and recommendations for clarity SAMHSA is concurrently issuing this SNPRM with the final rule to elicit public comment on these additional proposals to further clarify and expound upon these pertinent comments. We seek comment on our proposals regarding the following concepts and provisions: The payment and health care operations-related disclosures that can be made to contractors, subcontractors, and legal representatives by lawful holders under the part 2 rule consent provisions; and the provisions governing disclosures for purposes of carrying out a Medicaid, Medicare or Children’s Health Insurance Program (CHIP) audit or evaluation. SAMHSA will take any such comments under consideration if it engages in further rulemaking in the future.

SAMHSA will consider the public comments on this SNPRM, any relevant comments already received on these subjects in response to the February 9, 2016, NPRM and relevant comments made at the June 11, 2014 listening session on part 2 (see 79 FR 26929) before issuing a final rule.

Proposed Provisions

SAMHSA seeks comment on proposals in this SNPRM to retain the notice found in § 2.32 but consider whether an abbreviated notice would be appropriate and in which circumstances, further revise § 2.33 (Disclosures permitted with written consent) define and limit the circumstances in which certain disclosures for the purposes of payment and health care operations can be made; and similarly to further revise § 2.53 (Audit and Evaluation) to expressly address further disclosures by contractors, subcontractors, and legal representatives for purposes of carrying out a Medicaid, Medicare, or CHIP audit or evaluation. SAMHSA also seeks comment on its proposals regarding the establishment of appropriate restrictions and safeguards on lawful holders and their contractors, subcontractors, and legal representatives' use and disclosure of (part 2) patient identifying information for the purposes discussed in this SNPRM. SAMHSA is not soliciting comments on any other issues relating to the final rule and will not consider comments at this time that address changes to part 2 other than those contemplated in this SNPRM.

Section 2.32 Prohibition on Re-Disclosure

SAMHSA does not propose to substantively modify the existing notice at 2.32, but seeks comment on whether it should add a shorter abbreviated statement in subsection (a) Notice to accompany re-disclosure to be used in certain circumstances (e.g., for particular types of disclosures or technical systems) where a shorter notice may be warranted. An abbreviated statement could read, for example, "Data is subject to 42 CFR part 2. Use/disclose in conformance with part 2."

Section 2.33 Disclosures Permitted With Written Consent

SAMHSA understands that contractors, subcontractors, and legal representatives play an integral role in the management, delivery, and payment of health care services, but believes that limits should be placed on disclosures of (part 2) patient identifying information to such entities to carry out

these activities. As such, SAMHSA seeks public comment on its proposal to explicitly list and limit under § 2.33(b), specific types of activities for which any lawful holder of (part 2) patient identifying information would be allowed to further disclose the minimal information necessary for specific payment and health care operations activities described below. While lawful holders may disclose (part 2) patient identifying information to contractors, subcontractors, and legal representatives for these purposes, this proposal makes clear the scope and requirements for those permitted disclosures. To the extent that a written consent permits the use of part 2 patient identifying information for payment or healthcare operations, this provision at § 2.33(b) specifies that the further disclosures specified below can be made. SAMHSA notes that this list of activities related to payment and health care operation is similar to the HIPAA Privacy Rule's definition of the terms "payment" and "health care operations," although SAMHSA is not adopting those definitions in their entirety. The payment and health care operation activities listed in this section does not include activities that SAMHSA considers to be related to the patient's diagnosis, treatment, or referral for treatment. SAMHSA believes it is important to maintain patient choice in disclosing information to health care providers with whom they will have direct contact. For these reasons, this provision will not cover care coordination or case management and the proposal provides that disclosures to contractors, subcontractors, and legal representatives to carry out other purposes are not permitted under this section. SAMHSA will consider certain payment or health care operations-related activities permissible for lawful holders to disclose to contractors, subcontractors, or legal representatives as long as the activities fit within the overall purpose of the written consent. See paragraphs (b)(1) through (17) of § 2.33

SAMHSA also solicits comment on whether the proposed listing of explicitly permitted activities is adequate and appropriate to ensure the health care industry's ability to conduct necessary payment and the described health care operational functions, while still affording adequate privacy protections for the individuals who were diagnosed, treated, or referred for treatment. We note that contractors, subcontractors, and legal representatives that would receive data under this provision would become lawful holders

upon receipt of such data, and, as such, would themselves be subject to the part 2 requirements. Moreover, consent would still be required and disclosures must be made in accordance with section 2.13(a), Confidentiality restrictions and safeguards, which states that "[a]ny disclosure made under these regulations must be limited to that information which is necessary to carry out the purpose of the disclosure." Consequently, the stated purpose of a written consent limits the scope of the disclosures with respect to the (part 2) patient identifying information disclosed. In addition, lawful holders that disclose (part 2) patient identifying information to contractors, subcontractors, and legal representatives for payment and the described health care operations may only disclose (part 2) patient identifying information to contractors, subcontractors, and legal representatives that perform a function that is consistent with the stated purpose of the consent and only to perform that function. SAMHSA seeks comments on the proper mechanisms to convey the scope of the consent to lawful holders, contractors, subcontractors, and legal representatives, including those who are downstream recipients of (part 2) patient identifying information given current electronic data exchange technical designs.

SAMHSA also believes that it is critical that contractors, subcontractors, and legal representatives understand their obligations with respect to (part 2) patient identifying information. Accordingly, SAMHSA proposes new regulatory text under § 2.33(c) requiring that lawful holders that engage contractors and subcontractors to carry out payment and the described health care operations that will entail using or disclosing (part 2) patient identifying information include specific contract and subcontract provisions requiring contractors and subcontractors to comply with the provisions of part 2. An appropriate comparable instrument will suffice in cases where there is otherwise no contract between the lawful holder and a legal representative who is retained voluntarily (as opposed to one who is required to represent the lawful holder by law, in which case the requirement for a contract or comparable instrument in 2.33(c) shall not apply). SAMHSA proposes to amend subsection (b) and add a new subsection (c) to the disclosure permitted with written consent provisions at § 2.33. SAMHSA seeks comment on the proposal to revise

disclosures permitted with written consent provision in § 2.33.

Section 2.53 Audit and Evaluation

SAMHSA recognized in the final rule the critical importance of audits and evaluations. Accordingly, SAMHSA made clear that disclosures of patient identifying information to ACO's and similar CMS-regulated entities to carry out Medicare, Medicaid and Children's Health Insurance Program (CHIP) audit and evaluation activities are permitted.

However, public comments requested further specification regarding the permitted disclosures of (part 2) patient identifying information for audit and evaluation purposes. Public commenters noted that, as with other payment and health care operations, contractors, subcontractors, and legal representatives may be tasked with conducting audit and evaluation activities. Such entities may not be CMS-regulated, and may be conducted for private payers as well as Medicare and Medicaid programs. In addition, commenters noted that audits and evaluations may include quality improvement activities, as well as efforts related to reimbursement and financing. As such, SAMHSA proposes further amendment as set out in the regulatory text of section 2.53.

Request for Public Comments

SAMHSA believes that the new proposals and clarifications discussed above will provide the desired solutions and understanding sought by commenters to the NPRM, while also offering patient protections appropriate to the current health care environment.

In making these proposals, SAMHSA notes that such payment and the described health care operations and audit and evaluation functions will still be governed by other applicable laws and regulations, such as the HIPAA Privacy and Security Rules, in addition to 42 CFR part 2.

SAMHSA notes that the fact that lawful holders and part 2 programs are permitted to disclose data in no way obviates the overarching purpose of part 2: to protect (part 2) patient identifying information for patients seeking diagnosis, treatment, or referral for treatment for substance use disorders. Lawful holders and part 2 programs have responsibility to exercise due diligence with respect to their contractors, subcontractors, or legal representatives to whom they disclose or with whom they exchange (part 2) patient identifying information. Should the changes in this SNPRM be adopted, SAMHSA anticipates issuing further guidance about these topics.

SAMHSA seeks specific comment on the implications of these proposed changes on the privacy and confidentiality of records concerning substance use disorder diagnosis, prognosis and treatment, and referral for treatment and overall goals of the part 2 rules, and the regulatory and financial impact, if any, of these proposals.

SAMHSA also seeks comments on the following for its consideration in future rulemaking and guidance:

(1) Additional purposes for which lawful holders should be able to disclose (part 2) patient identifying information,

(2) Further subregulatory guidance that SAMHSA and other agencies could provide to help facilitate implementation of 42 CFR part 2 in the current healthcare environment.

Regulatory Impact Analysis (RIA)

In this SNPRM, SAMHSA proposes clarifications and revisions of the following: The disclosures permitted with written consent (§ 2.33), the payment and health care operations activities for which lawful holders may disclose (part 2) patient identifying information to their contractors, subcontractors, and legal representatives; and the audit and evaluation provision that permit certain disclosures for purposes of carrying out a Medicaid, Medicare or CHIP audit and evaluation (§ 2.53).

SAMHSA has analyzed the costs of complying with the proposed regulations in this supplemental NPRM. SAMHSA does not believe these revisions, if ultimately adopted, will result in any additional costs to Part 2 programs. Based on public comments, SAMHSA anticipates that these modifications will enhance efficiency of such payment and health care operations as claims processing, business management, training and customer service. The proposal specifies that lawful holders who receive part 2 records under the terms of a patient's written consent are permitted to further disclose those records to their contractors, subcontractors, and legal representatives to carry out payment and certain health care operations described in the SNPRM. When information is shared with contractors, subcontractors, and legal representatives, contract and subcontract provisions (or provisions in an appropriate comparable instrument in the case of certain legal representatives) must be included requiring these entities to comply with the provisions of part 2. Changes proposed to the audit and evaluation provisions will make clear that the

individual or entity receiving (part 2) patient identifying information for audit and evaluation or quality improvement purposes is permitted to further disclose this information to contractor(s) or subcontractor(s) to complete these activities. Should these proposals ultimately be adopted, SAMHSA does not anticipate entities will incur any additional costs beyond those analyzed in the Final Rule. Nonetheless, SAMHSA seeks comments on costs and benefits of this change for part 2 programs and any burdens these proposed changes may impose on regulated entities.

Under the Paperwork Reduction Act of 1995 (PRA), agencies are required to provide a 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. PRA issues are discussed in the final rule. SAMHSA anticipates no substantive changes in PRA requirements should changes proposed in the SNPRM be adopted. SAMHSA seeks and will consider public comment on our assumptions as they relate to the PRA requirements.

SAMHSA has examined the impact of this proposed rule under Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, September 19, 1980), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866. SAMHSA expects that the changes proposed in this SNPRM, if adopted, will not have an annual effect on the economy of \$100 million or more in at least 1 year. Therefore, this rule will not be an economically significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a rule has a

significant impact on a substantial number of small entities. The RFA generally defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration; (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000 (States and individuals are not included in the definition of “small entity”). For similar rules, HHS considers a rule to have a significant economic impact on a substantial number of small entities if at least 5 percent of small entities experience an impact of more than 3 percent of revenue. SAMHSA anticipates that the proposals in this SNPRM, if adopted, will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$146 million, using the most current (2015) implicit price deflator for the gross domestic product. The proposals in this SNPRM, if adopted, would not trigger the Unfunded Mandate Reform Act because it will not result in expenditures of this magnitude by states or other government entities.

List of Subjects in 42 CFR Part 2

Alcohol abuse, Alcoholism, Drug abuse, Grant programs—health, Health records, Privacy, Reporting, and Recordkeeping requirements.

For the reasons stated in the preamble, SAMHSA proposes to amend 42 CFR part 2 as follows:

PART 2—CONFIDENTIALITY OF SUBSTANCE USE DISORDER PATIENT RECORDS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: Sec. 408 of Pub. L. 92–255, 86 Stat. 79, as amended by sec. 303(a), (b) of Pub. L. 93–282, 83 Stat. 137, 138; sec. 4(c)(5)(A) of Pub. L. 94–237, 90 Stat. 244; sec. 111(c)(3) of Pub. L. 94–581, 90 Stat. 2852; sec. 509 of Pub. L. 96–88, 93 Stat. 695; sec. 973(d) of Pub. L. 97–35, 95 Stat. 598; and transferred to sec. 527 of the Public Health Service Act by sec. 2(b)(16)(B) of Pub. L. 98–24, 97 Stat. 182 and as amended by sec. 106 of Pub. L. 99–401, 100 Stat. 907 (42 U.S.C. 290ee–3)

and sec. 333 of Pub. L. 91–616, 84 Stat. 1853, as amended by sec. 122(a) of Pub. L. 93–282, 88 Stat. 131; and sec. 111(c)(4) of Pub. L. 94–581, 90 Stat. 2852 and transferred to sec. 523 of the Public Health Service Act by sec. 2(b)(13) of Pub. L. 98–24, 97 Stat. 181 and as amended by sec. 106 of Pub. L. 99–401, 100 Stat. 907 (42 U.S.C. 290dd–3), as amended by sec. 131 of Pub. L. 102–321, 106 Stat. 368, (42 U.S.C. 290dd–2).

Subpart B—General Provisions

■ 2. Revise § 2.33 to read as follows:

§ 2.33 Disclosures permitted with written consent.

(a) If a patient consents to a disclosure of their records under § 2.31, a program may disclose those records in accordance with that consent to any person or category of persons identified or general designated in the consent, except that disclosures to central registries and in connection with criminal justice referrals must meet the requirements of §§ 2.34 and 2.35, respectively.

(b) If a patient consents to a disclosure of their records under § 2.31 for payment and/or health care operations activities, a lawful holder who receives such records under the terms of the written consent may further disclose those records as may be necessary for its contractors, subcontractors, or legal representatives to carry out payment and/or the following health care operations on behalf of such lawful holder. Disclosures to contractors, subcontractors, and legal representatives to carry out other purposes are not permitted under this section. In accordance with § 2.13(a), disclosures under this section must be limited to that information which is necessary to carry out the stated purpose of the disclosure.

(1) Billing, claims management, collections activities, obtaining payment under a contract for reinsurance, claims filing and related health care data processing;

(2) Clinical professional support services (e.g., quality assessment and improvement; initiatives, utilization review and management services);

(3) Patient safety activities;

(4) Activities pertaining to:

(i) The training of student trainees and health care professionals;

(ii) The assessment of practitioner competencies; and

(iii) The assessment of provider and/or health plan performance;

(iv) Training of non-health care professionals;

(5) Accreditation, certification, licensing, or credentialing activities;

(6) Underwriting, enrollment, premium rating, and other activities

related to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care;

(7) Third-party liability coverage;

(8) Activities related to addressing fraud, waste and abuse;

(9) Conducting or arranging for medical review, legal services, and auditing functions;

(10) Business planning and development, such as conducting cost-management and planning-related analyses related to managing and operating, including formulary development and administration, development or improvement of methods of payment or coverage policies;

(11) Business management and general administrative activities, including, but not limited to, management activities relating to implementation of and compliance with the requirements of this or other statutes or regulations;

(12) Customer services, including the provision of data analyses for policy holders, plan sponsors, or other customers;

(13) Resolution of internal grievances;

(14) The sale, transfer, merger, consolidation, or dissolution of an organization;

(15) Determinations of eligibility or coverage (e.g. coordination of benefit services or the determination of cost sharing amounts), and adjudication or subrogation of health benefit claims;

(16) Risk adjusting amounts due based on enrollee health status and demographic characteristics;

(17) Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges.

(c) Lawful holders who wish to disclose patient identifying information pursuant to subsection (b) of this section must enter into a written contract with the contractor (or appropriate comparable instrument in the case of a legal representative retained voluntarily by the lawful holder), which provides that the contractor and any subcontractor or legal representative are or will be fully bound by the provisions of part 2 upon receipt of the patient identifying data, and, as such that each disclosure shall be accompanied by the notice required under § 2.32. In making such disclosure, the lawful holder should specify permitted uses of patient identifying information consistent with the written consent, by the contractor and any subcontractors or legal

representatives to carry out the payment and health care operations activities listed in the preceding subparagraph, require such recipients to implement appropriate safeguards to prevent unauthorized uses and disclosures and require such recipients to report any unauthorized uses, disclosures, or breaches of patient identifying information to the lawful holder. The lawful holder should only disclose information to the contractor or subcontractor or legal representative that is necessary for the contractor or subcontractor to perform its duties under the contract. Also, the contract does not permit a contractor or subcontractor or legal representative to re-disclose information to a third party unless that third party is a contract agent of the contractor or subcontractor, helping them provide services described in the contract, and only as long as the agent only further discloses the information back to the contractor or lawful holder from which the information originated.

■ 3. Amend § 2.53 by:

■ a. Revising paragraph (a)(1)(i).

■ b. Revising paragraphs (b)(2)(i) and (ii).

■ c. Revising paragraph (c)(5).

The revisions and addition read as follows:

§ 2.53 Audit and evaluation.

(a) * * *

(1) * * *

(i) Any Federal, State, or local governmental agency which provides financial assistance to the program or is authorized by law to regulate the activities of the part 2 program or those of the lawful holder;

* * * * *

(b) * * *

(2) * * *

(i) Any federal, state, or local governmental agency which provides financial assistance to the program or is authorized by law to regulate the activities of the part 2 program or those of the lawful holder; or

(ii) Any individual or entity which provides financial assistance to the part 2 program, which is a third-party payer covering patients in the part 2 program, or which is a quality improvement organization performing a utilization or quality control review, or such individual's or entity's or quality improvement organization's contractors, subcontractors, or legal representatives.

* * * * *

(c) * * *

(5) If a disclosure to an individual or entity is authorized under this section for a Medicare, Medicaid, or CHIP audit

or evaluation, including a civil investigation or administrative remedy, as those terms are used in paragraph (c)(2) of this section, the individual or entity may further disclose the patient identifying information that is received for such purposes to its contractor(s) or subcontractor(s) to carry out the audit or evaluation, and a quality improvement organization which obtains such information under paragraph (a) or (b) of this section may disclose the information to that individual or entity (or, to such individual's or entity's contractors, subcontractors, or legal representatives, but only for the purposes of this section).

* * * * *

Dated: January 5, 2017.

Kana Enomoto,

Acting Deputy Assistant Secretary for Mental Health and Substance Use.

Approved:

Sylvia M. Burwell,

Secretary.

[FR Doc. 2017-00742 Filed 1-13-17; 11:15 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 11, 23, 36, 39, 42, and 52

[FAR Case 2015-033; Docket No. 2015-0033; Sequence No. 1]

RIN 9000-AN28

Federal Acquisition Regulation: Sustainable Acquisition

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order, Planning for Federal Sustainability in the Next Decade, and the biobased product acquisition provisions of the Agricultural Act of 2014 (also known as the 2014 Farm Bill).

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before March 20, 2017 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2015-033 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2015-033". Select the link "Comment Now" that corresponds with "FAR Case 2015-033." Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2015-033" on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat, ATTN: Ms. Flowers, 1800 F Street NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR Case 2015-033" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Charles Gray, Procurement Analyst, at 703-795-6328 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2015-033."

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement policy that will improve agencies' environmental performance and Federal sustainability. Federal agencies have been the leaders in reducing building and fleet energy use, using renewable energy, and buying more sustainable products and services as the United States works to build a clean energy economy. Building on the progress achieved to date, President Obama issued Executive Order (E.O.) 13693, Planning for Federal Sustainability in the Next Decade, on March 19, 2015, published in the **Federal Register** at 80 FR 15869, on March 25, 2015, to plan for and further expand agency progress in reducing greenhouse gas emissions over the next decade.

The changes made in this proposed rule continue the improvements made by the Federal Government to lead by example in protecting the health of our environment by purchasing sustainable

products and services. This rule promotes the acquisition of sustainable products, services, and construction methods in order to reduce energy and water consumption, reliance on natural resources, and enhance pollution prevention, within the Federal Government. While the anticipated costs associated with this rule are not quantified in dollar amounts, the Councils anticipate that any such impact will be outweighed by the expected benefits of this rule.

This rule advances the policies put into effect by an interim rule issued under FAR case 2010–001, “Sustainable Acquisition” (published in the **Federal Register** at 76 FR 31395, and May 31, 2011), which established a culture within the Federal acquisition community to “leverage agency acquisitions to foster markets for sustainable technologies and materials, products and services.” The comments received on the interim rule will be addressed along with any comments received in response to this rule, in the formulation of the final rule.

The E.O. directs Federal agencies to continue their leadership in sustainable acquisition in order to drive national greenhouse gas reductions and support preparations for the impacts of climate change. The E.O. directs agencies, where life-cycle cost-effective, to promote sustainable acquisition and procurement by ensuring that environmental performance and sustainability factors are included to the maximum extent practicable for all applicable procurements. These factors include—

(1) Statutory mandates for purchase preferences for recycled content products, energy and water efficient products and services (e.g., ENERGY STAR® certified and Federal Energy Management Program (FEMP)-designated products, and biobased products;

(2) Sustainable products and services identified by the Environmental Protection Agency’s (EPA) Significant New Alternatives Policy (SNAP), WaterSense®, Safer Choice, and SmartWay® Transport Partners Programs; and

(3) EPA-recommended specifications, standards, or labels for environmentally preferable products or products meeting environmental performance criteria developed by voluntary consensus standards bodies consistent with the National Technology Transfer and Advancement Act and Office of Management and Budget (OMB) Circular A–119.

In addition to the changes to sustainable acquisition requirements

made by E.O. 13693, this proposed rule implements sections 9001 and 9002(a) of the Agricultural Act of 2014, Public Law 113–79 (also known as the 2014 Farm Bill), which revised the definition of “biobased product.” (See 7 U.S.C. 8101 and 8102.)

II. Discussion and Analysis

The initiatives conveyed in E.O. 13693 and reflected in this proposed rule build on the policies and procedures set in motion by earlier E.O.s, namely E.O. 13423, “Strengthening Federal Environmental, Energy, and Transportation Management,” and E.O. 13514, “Federal Leadership in Environmental, Energy, and Economic Performance,” so as to further promote sustainable acquisition practices throughout the Federal Government. Both of these E.O.s were revoked upon issuance of E.O. 13693.

A summary of the proposed changes is as follows:

A. Definitions

In FAR parts 2 and 23, several new definitions are added and existing definitions are revised, pursuant to E.O. 13693 and, in certain instances, the 2014 Farm Bill.

Under FAR subpart 2.1, the definitions of “biobased product,” “environmentally preferable,” and “sustainable acquisition” are revised to reflect the definitions in the 2014 Farm Bill and E.O. 13693. A new definition for the term “environmentally sustainable electronic product” is added and the definition for “renewable energy” has been removed.

A definition of “sustainable products and services” is added to FAR subpart 2.1. This definition includes the expanded scope of Federal sustainable requirements listed in the sustainable acquisition section of the E.O. (section 3(i)). E.O. section 3(i)(i) through (iii) also provides that sustainable products and services include products that meet EPA recommendations for the use of specifications, standards, and labels or, in the absence of EPA recommendations, other specifications, standards, and labels developed by voluntary consensus standards bodies. The definition of “sustainable products and services” reflects these new provisions.

The following definitions have been added or moved to FAR part 23:

The E.O. 13693 definitions of “clean energy,” “alternative energy” (along with definitions for specific types of alternative energy such as “active capture and storage”, “combined heat and power,” “fuel cell energy systems,” and “thermal renewable energy

technologies”), and “renewable electric energy” are added to the FAR.

A definition of “life-cycle cost-effective” is added, based on the definition of that term in E.O. 13693 and the discussion of life-cycle costs in the E.O. 13693 implementing instructions.

The definition for “water consumption intensity” while unchanged, has been moved from FAR subpart 2.1 to FAR 23.001 because this term is used only in FAR part 23, as opposed to multiple areas of the FAR.

The definition of the term “contract action” at FAR subpart 23.1 is revised to specify that the term includes task and delivery orders placed against both new contracts and existing contracts.

A definition of life-cycle cost is added, which echoes the definition at FAR 7.101.

Finally, the definitions at FAR 23.701, which were related to the “Electronic products environmental assessment tool” (EPEAT®), have been removed. This topic is discussed further at section II C. of this preamble.

B. FAR Parts 7 and 11

FAR parts 7 and 11 are updated to reflect the sustainability factors to be considered in acquisitions. The Web site URL for accessing the Guiding Principles for Sustainable Federal Buildings and Associated Instructions is updated in FAR 7.103(p)(3). At FAR 7.105(b)(17) and 11.002, agencies and contractors are referred to GSA’s Green Procurement Compilation, which consolidates all Federal designations of sustainable products and services into one tool. Also, in FAR 11.002, guidance is added to ensure agencies are aware they must acquire sustainable products and services to the maximum extent practicable.

C. FAR Part 23

The scope of FAR part 23 is revised to note that the sustainable acquisition prescriptions apply to construction and services contracts that require the supply or use of products falling within the sustainable products categories.

FAR 23.100 is revised to reflect the policy established in E.O. 13693 to build a clean energy economy, drive national greenhouse gas emissions reductions, and support preparations for the impacts of climate change. The policy continues to apply to contractors operating Government buildings and is amended to provide that it applies to contractors operating Government fleet vehicles, in accordance with the requirement in E.O. 13693.

FAR 23.103 is revised to reflect the E.O. 13693 requirement that agencies shall advance sustainable acquisition to

the maximum extent practicable. This is a change from E.O. 13514, which required that 95 percent of acquisitions include applicable sustainable product requirements, and is consistent with statutory requirements in the Resource Conservation and Recovery Act and the Farm Security and Rural Investment Act that agencies purchase recycled content and biobased products, respectively, to the maximum extent practicable.

The exceptions in FAR 23.104 are updated to reflect the exceptions provided under E.O. 13693. The methodology for determining whether a product or service is life-cycle cost-effective is provided at FAR 23.104(b).

At FAR 23.106, a prescription is added for the new contract clause at FAR 52.223-XX, Sustainable Products and Services Requirements, which replaces multiple individual clauses.

FAR subpart 23.2 is amended to implement the energy and water efficiency, and clean energy acquisition requirements of E.O. 13693. In particular, FAR 23.202 now focuses on agencies' obligation to improve water use efficiency and management through the acquisition of water efficient products and employing water conservation strategies. Since there will now be one contract clause for sustainable products and services, the energy-efficient product specific clause prescription in FAR 23.206 has been removed because it is no longer needed.

In FAR subpart 23.4, the URL for the U.S. Department of Agriculture's BioPreferred Web site is updated. One requirement from the 2014 Farm Bill was added: Agencies must add to their affirmative procurement programs provisions for reporting the quantities and types of biobased products purchased. Additionally, the prescription to use the clause at FAR 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts, is removed. FAR 23.000 now specifies that sustainable acquisition applies to construction and services contracts and the new clause at FAR 52.223-XX, Sustainable Products and Services Requirements, covers products and services furnished for Government use, incorporated into the construction of a public building or public work, or furnished for contractor use at a Federally-controlled facility, so the clause at FAR 52.223-17 is no longer needed.

FAR subpart 23.7 is revised to reflect the new requirements in E.O. 13693. FAR 23.704, formerly titled "Electronic products environmental assessment tool" (EPEAT®), required agencies to purchase EPEAT®-registered electronic

products; however, the Office of Management and Budget, Office of Federal Procurement Policy has more recently determined that references to proprietary programs such as EPEAT® should be removed from the FAR. Furthermore, E.O. 13693 directs agencies to purchase "environmentally sustainable electronic products" and does not address EPEAT®-registered products. Accordingly, the definitions at FAR 23.701 are removed and FAR 23.703 and 23.704 are—updated to reiterate the environmentally preferable products and services acquisition requirements in E.O. 13693, and require purchase of "environmentally sustainable electronic products" unless an exception or an exemption applies. In addition, new direction has been placed in FAR 23.703 to require that the item being purchased must meet or exceed the applicable specifications, standards, or labels that are recommended by the U.S. Environmental Protection Agency. On September 25, 2015, published in the **Federal Register** at 80 FR 57809, EPA issued interim recommendations for non-Federal standards (e.g., state or local Government or third-party source) and labels for Federal purchasers to use to identify and procure environmentally preferable products. EPA recommends that agencies procure EPEAT®-registered computers, imaging equipment, and televisions. It is possible that in the future other options may be developed that align with EPA Guidelines and support the electronic stewardship mandates of E.O. 13693, section 3(l).

FAR 23.705 is amended to remove the requirements to insert the EPEAT® clauses. Whether an agency continues to purchase electronics listed on the EPEAT® registry, or purchases products verified to meet EPA recommended specifications, standards, or labels, it will be able to use the new, single sustainable products and services clause.

D. FAR Part 36

FAR 36.104 previously required agencies to divert at least 50 percent of their construction and demolition debris by the end of fiscal year (FY) 2015, in keeping with E.O. 13514. E.O. 13693 requires agencies to consistently meet the 50 percent diversion goal annually, rather than by a specific year. Accordingly, FAR 36.104 is revised to delete the FY 2015 date for meeting the construction and demolition debris diversion goal. The updated Web site URL for accessing the Guiding Principles for Sustainable Federal

Buildings and Associated Instructions also is provided.

E. FAR Part 39

FAR 39.101 is amended to delete the reference to EPEAT® and substitute EPA-recommended specifications, standards, or labels for environmentally sustainable electronic products. A new paragraph has been added, directing agencies to consider climate change-related risks when acquiring information technology. This guidance supports the requirement in section 13 of E.O. 13693, for agencies to identify and address the projected impacts of climate change in mission critical operations, such as communication.

F. FAR Part 52

FAR part 52 is revised to update E.O. references and incorporate the policies reflected in E.O. 13693. The modified clauses include—

- FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items—deletion of references to the EPEAT® clauses and addition of the new clause for sustainable products and services requirements;

- FAR 52.213-4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items)—amendment of E.O. reference, addition of the new FAR clause 52.223-XX Sustainable Products and Services Requirements is added, and deletion of FAR 52.223-15;

- FAR 52.223-1, Biobased Product Certification—updated statutory reference

- FAR 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts—revised the title to reflect the clause focus on contractor reporting of biobased products supplied or used under service and construction contracts;

- FAR 52.223-5, Pollution Prevention and Right-to-Know Information—amendment of E.O. reference; and

- FAR 52.223-10, Waste Reduction Program—amendment of E.O. reference.

To address the removal of references to EPEAT from the FAR and move to a new single clause for sustainable products and services, the following FAR clauses are deleted:

FAR 52.223-13, Acquisition of EPEAT®-Registered Imaging Equipment.

FAR 52.223-14, Acquisition of EPEAT®-Registered Televisions.

FAR 52.223-15, Energy Efficiency in Energy-Consuming Products.

FAR 52.223–16, Acquisition of EPEAT®-Registered Personal Computer Products.

FAR 52.223–17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

A new clause at FAR 52.223–XX, Sustainable Products and Services Requirements, is added to implement E.O. 13693's expanded list of environmental and sustainability programs that agencies shall consider when purchasing products and services. Rather than adding new clauses when EPA recommends additional specifications, standards, and labels, this clause refers to GSA's Green Procurement Compilation for the current requirements and recommendations for purchasing sustainable products and services.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to add a new clause at FAR 52.223–XX, Sustainable Products and Services Requirements, which requires contractors performing on Federal contracts to furnish or incorporate into the performance of a service or construction of a public building or public work or use, in connection with the contractors' performance at a Federally-controlled facility, sustainable products and services. Application of this clause to solicitations and contracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, is necessary in order to comply with the Executive Order.

41 U.S.C. 1905 through 1907 make certain provisions of law inapplicable to solicitations and contracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, unless the FAR Council/Administrator for Federal Procurement Policy determine that such exemption from the statute would not be in the best interest of the Federal Government. However, 41 U.S.C. 1905 through 1907 are only applicable to statutory provisions, not Executive orders.

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential

economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

The proposed rule may have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

The requirements for this proposed rule may impact acquisitions covering a wide array of the products and services and related industry sectors within the Federal supplier base including information technology and telecommunications, managerial and administrative support services, installation, maintenance, repair, and rebuilding of equipment, janitorial, construction, manufacturing, and energy. However, Federal contractors have already been required to provide products, services, and construction effort that meet the majority of sustainable acquisition requirements of E.O. 13693, under previous E.O.s, laws, and sustainability programs.

Some sustainable products, such as energy and water-efficient products and services, are less expensive than conventional options while other products and services will realize cost savings over the lifecycle of the product. The latter grouping of products and service may require a higher start-up investment on the part of the contractor, but as demand for products with reduced environmental and human health impacts grows, prices of greener products will decrease. In addition, the rule may have net benefits for small businesses by creating opportunities for them to supply sustainable products and services.

Federal Procurement Data System (FPDS) data obtained on June 21, 2016, reveals that approximately 112,150 unique contractors were awarded Federal contracts during fiscal year (FY) 2015. Of the total number of vendors that received contracts in FY 2015, approximately 75,000 or 67 percent were unique small business concerns. Based on this information, it is estimated that in future years, a similar number of small business concerns will receive contracts subject to the requirements of this rule.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small

Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2015–033), in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, the proposed changes to the FAR do not impose additional information collection requirements to the paperwork burden. The pertinent, previously approved OMB control numbers include 9000–0147, “Pollution Prevention and Right-to-Know Information,” and 9000–0180, “Biobased Procurements.”

List of Subjects in 48 CFR Parts 2, 4, 7, 11, 23, 36, 39, 42, and 52

Government procurement.

Dated: January 5, 2017.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 2, 4, 7, 11, 23, 36, 39, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, 11, 23, 36, 39, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

- 2. Amend section 2.101, in paragraph (b)(2), by—
- a. Revising the definitions “Biobased product”, and “Environmentally preferable”;
- b. Adding, in alphabetical order, the definition “Environmentally sustainable electronic product”;
- c. Removing the definition “Renewable energy”;
- d. Revising the definition “Sustainable acquisition”;
- e. Adding, in alphabetical order, the definition “Sustainable products and Services”; and
- f. Removing the definition “Water consumption intensity”.

The revisions and additions read as follows:

2.101 Definitions.

- (b) * * *
- (2) * * *

Biobased product means a product determined by the U.S. Department of Agriculture to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials or that is an intermediate ingredient or feedstock. The term includes, with respect to forestry materials, forest products that meet biobased content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging.

* * * * *

Environmentally preferable means that products or services have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal related to the product or service.

Environmentally sustainable electronic product means an electronic product that is ENERGY STAR® certified or Federal Energy Management Program (FEMP) designated, as applicable, and meets or exceeds the applicable specifications, standards, or labels that are recommended by the U.S. Environmental Protection Agency, (see <https://www.epa.gov/greenerproducts>).

* * * * *

Sustainable acquisition means ensuring that environmental performance and other sustainability requirements, as prescribed in part 23, are included to the maximum extent practicable in the planning, award, and execution phases of acquisitions.

Sustainable products and services means products and services, including construction, that—

- (1) Meet statutory mandates for purchasing—
 - (i) Recycled content products designated by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Procurement Guidelines;
 - (ii) Energy and water efficient products such as ENERGY STAR® certified and Federal Energy Management Program (FEMP)—designated products identified by EPA and the U.S. Department of Energy; and
 - (iii) Biobased content products meeting the content requirement of the

U.S. Department of Agriculture under the BioPreferred® program;

- (2) Are identified by EPA programs, including—

- (i) Significant New Alternatives Policy (SNAP) chemicals or other alternatives to ozone-depleting substances, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons, such as by using reclaimed instead of virgin hydrofluorocarbons;

- (ii) WaterSense® certified products and services (water efficient products);

- (iii) Safer Choice Certified products (chemically intensive products that contain safer ingredients); and
 - (iv) SmartWay® Transport partners and SmartWay® products (fuel efficient products and services); or

- (3) Are environmentally preferable products or services that—

- (i) Meet or exceed specifications, standards, or labels recommended by EPA, (see <https://www.epa.gov/greenerproducts>); or

- (ii) Where there is no specification, standard, or label recommended by EPA for a specific product or service category, meet environmental performance criteria developed or adopted by voluntary consensus standards bodies consistent with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Public Law 104–113) and Office of Management and Budget Circular A–119).

* * * * *

PART 4—ADMINISTRATIVE MATTERS

- 3. Amend section 4.302 by revising paragraph (a) to read as follows:

4.302 Policy.

(a) Section 3(j) of Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade, directs agencies to reduce and prevent waste. Electronic commerce methods (see 4.502) and double-sided printing and copying are examples of best practices for waste prevention.

* * * * *

PART 7—ACQUISITION PLANNING

- 4. Amend section 7.103 by revising paragraphs (p)(1) through (p)(3) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

- (p) Ensuring that agency planners—
 - (1) Specify needs for uncoated printing and writing paper containing 30 percent postconsumer recycled

content or higher, consistent with section 3(i)(v) of Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade;

- (2) Comply with the policy in 11.002(d) regarding procurement of sustainable products and services (as defined in 2.101);

- (3) Comply with the Guiding Principles for Sustainable Federal and Associated Instructions (Guiding Principles), for the design, construction, renovation, repair, or deconstruction of Federal buildings. The Guiding Principles can be accessed at <https://www.wbdg.org/references/fhpsb.php>; and

* * * * *

- 4. Amend section 7.105 by revising paragraph (b)(17) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

- (b) * * *

- (17) *Environmental and energy conservation objectives.* Discuss—

- (i) The applicable environmental and energy conservation objectives associated with the acquisition (see part 23);

- (ii) The applicability of an environmental assessment or environmental impact statement (see 40 CFR 1502);

- (iii) The proposed resolution of environmental issues;

- (iv) Any environmentally-related requirements to be included in solicitations and contracts (see 11.002 and 11.303); and

- (v) The requirements for the acquisition or use of sustainable products and services (as defined in 2.101). A compilation of the Federal sustainability criteria for various products and services is found on GSA's Green Procurement Compilation at <https://www.sftool.gov/greenprocurement/>. The EPA's recommendations for specifications, standards or labels that can be used for purchasing sustainable products and services are available at <https://www.epa.gov/greenerproducts>.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

- 5. Amend section 11.002 by revising paragraph (d)(1) and the introductory text of paragraph (d)(2) to read as follows:

11.002 Policy.

* * * * *

- (d)(1) Statutes and Executive orders identified in part 23 require agencies to

acquire sustainable products and services (as defined in 2.101) to the maximum extent practicable. To find sustainable products and services, visit GSA's Green Procurement Compilation at <https://www.sftool.gov/greenprocurement>.

(2) Unless an exception applies and is documented by the requiring activity, Executive agencies shall, to the maximum extent practicable, require the use of sustainable products and services when—

* * * * *

■ 6. Amend section 11.303 by removing paragraphs (a) and (b); and adding a new introductory paragraph to read as follows:

11.303 Special requirements for paper.

When purchasing uncoated printing and writing paper (e.g., copier paper, envelopes, etc.), or products printed on uncoated printing and writing paper, agencies shall require that the paper contain at least 30 percent postconsumer recycled content or higher (Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade).

■ 7. Amend part 23 by revising the part heading to read as follows:

PART 23—ENVIRONMENT, ENERGY, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 8. Revise section 23.000 to read as follows:

23.000 Scope.

This part prescribes acquisition policies and procedures supporting the Government's program for ensuring a drug-free workplace, for protecting and improving the quality of the environment, and to acquire and foster markets for sustainable technologies, materials, products, and services, including construction, (see GSA's Green Procurement Compilation at <https://sftool.gov/greenprocurement>) and encouraging the safe operations of vehicles by—

* * * * *

■ 9. Amend section 23.001 by—

■ a. Adding, in alphabetical order, the definitions “Active capture and storage”, “Alternative energy”, “Clean energy”, “Combined heat and power”, and “Fuel cell energy systems”;

■ b. Revising the definition “Greenhouse gases”; and

■ c. Adding, in alphabetical order, the definitions “Life-cycle cost”, “Life-cycle cost effective”, “Renewable electric energy”, “Thermal renewable energy technologies”, and “Water consumption intensity”.

The additions and revision read as follows:

23.001 Definitions.

* * * * *

Active capture and storage means a set of technologies that captures carbon dioxide from power plants, transports the captured carbon dioxide to a sequestration well, and injects the carbon dioxide into the sequestration well in a way that prevents the gas from escaping from the well and back into the atmosphere. These technologies are also referred to as carbon capture and storage technologies.

Alternative energy means energy generated from technologies and approaches that advance renewable heat sources, including biomass, solar thermal, geothermal, waste heat, and renewable combined heat and power processes; combined heat and power; fuel cell energy systems; and energy generation, where active capture and storage of carbon dioxide emissions associated with that energy generation is verified.

Clean energy means renewable electric energy and alternative energy.

Combined heat and power means systems that capture energy that is normally lost in centralized power generation and convert that energy to provide heating and cooling. They are also known as co-generation systems.

* * * * *

Fuel cell energy systems means stationary or distributed generation projects used for baseload power, backup power, power for remote locations, and cogeneration. Stationary fuel cells typically use natural gas, or a renewable energy equivalent such as biogas, to produce either electricity or combined heat and electricity.

Greenhouse gases means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, nitrogen trifluoride, and sulfur hexafluoride.

Life-cycle cost means the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.

Life-cycle cost-effective means that the life-cycle costs of a product are estimated to be equal to or less than the base case (i.e., current or standard practice or product). In some cases, a life-cycle cost-effective product may result in a higher up front cost with lower operations or maintenance costs or longer life.

Renewable electric energy means energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, geothermal heat pumps,

microturbines, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project (Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade).

Thermal renewable energy technologies means solar, wood, biomass, and landfill gas systems that exclusively produce non-electric energy (i.e., heating or cooling).

* * * * *

Water consumption intensity means water consumption per square foot of building space.

23.002 [Reserved]

■ 10. Remove and reserve section 23.002.

■ 11. Add section 23.100 to read as follows:

23.100 Policy.

(a) This subpart prescribes the policies and procedures for the acquisition of sustainable products and services. The Government's policy is to build a clean energy economy that will sustain the environment for generations to come. Federal leadership in sustainable acquisition will continue to drive national greenhouse gas reductions and support preparations for the impacts of climate change.

(b) Except as provided at 23.104 and 23.105 of this subpart, the Government's policy on sustainable acquisition applies to—

(1) All acquisitions, including those using part 12 procedures and those at or below the micro-purchase threshold; and

(2) Contractors operating Government buildings and vehicles. Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade, section 7(d), requires that leases and contracts for lessor or contractor operation of Government-owned buildings or vehicles facilitate the agency's compliance with the Executive Order.

■ 12. Amend section 23.101 by revising the first sentence of the definition “Contract action” to read as follows:

23.101 Definition.

* * * * *

Contract action means any oral or written action, including task and delivery orders, that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars, including purchases below the micro-purchase threshold.

* * * * *

■ 13. Revise section 23.102 to read as follows:

23.102 Authorities.

(a) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

(b) All of the authorities specified in subparts 23.2, 23.4, 23.7, 23.8, and 23.10.

■ 14. Amend section 23.103 by—

■ a. Revising the section heading and paragraph (a); and

■ b. Removing paragraph (d).

The revisions read as follows:

23.103 Acquisition of sustainable products and services.

(a) Federal agencies shall advance sustainable acquisition by ensuring that new contract actions for the supply of products and for the acquisition of services (including construction) require sustainable products and services (as defined in 2.101) to the maximum extent practicable (see GSA's Green Procurement Compilation at <https://www.sftool.gov/greenprocurement>).

* * * * *

■ 15. Revise section 23.104 to read as follows:

23.104 Exceptions.

(a) This subpart does not apply to the following acquisitions:

(1) Contracts performed outside of the United States, unless the agency head determines that such application is in the interest of the United States.

(2) Acquisition of sustainable products or services that are not considered practicable due to one or more of the following conditions—

(i) A product or service cannot be acquired that meets reasonable performance requirements;

(ii) A product or service cannot be acquired competitively within the required delivery or performance schedule;

(iii) A product or service cannot be acquired at a reasonable price, *i.e.*, life-cycle cost-effective (see paragraph (b)); or

(iv) An ENERGY STAR® certified product or FEMP-designated product is not life-cycle cost-effective (see section 23.204).

(b)(1) The price shall be deemed unreasonable when the total life-cycle costs are significantly higher for the sustainable product or service compared to the non-sustainable product or service.

(2) Life-cycle costs are determined by combining the purchase price of a product or service with any net costs or savings revenues generated from that product or service during its life.

(c) If at any point during the acquisition it is determined that a contract action cannot comply with the sustainable requirements for one of the reasons listed in paragraph (a)(2) of this section, the contracting officer shall obtain the documented rationale from the requiring activity and ensure that this documentation is maintained in the contract file.

■ 16. Add section 23.106 to read as follows:

23.106 Contract clause.

When purchasing sustainable products or services, except as provided at 23.104 and 23.105, insert the clause at 52.223–XX, Sustainable Products and Services Requirements, in solicitations and contracts.

Subpart 23.2—Energy Efficient Products, Water Efficient Products and Services, Renewable Electric Energy, and Alternative Energy

■ 17. Revise subpart heading 23.2 as set forth above.

■ 18. Amend section 23.201 by revising paragraphs (g) and (h) to read as follows:

23.201 Authorities.

* * * * *

(g) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

(h) Section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094).

■ 19. Revise section 23.202 to read as follows:

23.202 Water efficient products and services.

Agencies shall improve water use efficiency and management, including stormwater management by—

(a) Reducing potable water consumption intensity by purchasing WaterSense® and other water efficient products and implementing water efficient strategies;

(b) Purchasing and installing water meters and water loss monitoring services; and

(c) Purchasing and installing appropriate green infrastructure features on Federally owned property to help with stormwater and wastewater management in accordance with section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094). (See <https://www.epa.gov/greeningepa/technical-guidance-implementing-stormwater-runoff-requirements-federal-projects> for additional information regarding green infrastructure.)

■ 20. Amend section 23.203 by revising paragraph (b)(2) to read as follows:

23.203 Energy-efficient products.

* * * * *

(b) * * *

(2) FEMP at <http://energy.gov/eere/femp/energy-and-water-efficient-products>.

23.206 [Reserved]

■ 21. Remove and reserve section 23.206.

■ 22. Amend section 23.401 by revising paragraph (b)(2) to read as follows:

23.401 Definitions.

* * * * *

(b) * * *

(2) For which USDA has provided purchasing recommendations available at <http://www.biopreferred.gov/BioPreferred/faces/Welcome.xhtml>.

■ 23. Amend section 23.402 by revising paragraphs (c) and (d); and removing paragraph (e).

The revisions read as follows:

23.402 Authorities.

* * * * *

(c) The Energy Policy Act of 2005, Pub. L. 109–58.

(d) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

■ 24. Amend section 23.404 by—

■ a. Removing from paragraph (a)(3)(iii) the word “and”;

■ b. Redesignating paragraph (a)(3)(iv) as paragraph (a)(3)(v); and

■ c. Adding a new paragraph (a)(3)(iv).

The revision and addition read as follows:

23.404 Agency affirmative procurement programs.

(a) * * *

(3) * * *

(iv) For USDA-designated items only, provisions for reporting quantities and types of biobased products purchased by the Federal agency; and

* * * * *

23.405 [Amended]

■ 25. Amend section 23.405 by removing from paragraph (a)(2) “<http://www.biopreferred.gov>” and adding “<https://www.biopreferred.gov/BioPreferred/>” in its place.

■ 26. Amend section 23.406 by revising paragraphs (b) and (c); and removing paragraph (e) to read as follows:

23.406 Solicitation provisions and contract clauses.

* * * * *

(b) Insert the clause at 52.223–2, Reporting of Biobased Products Under Service and Construction Contracts, in service or construction solicitations and contracts, unless the contract will not involve the use of USDA-designated

items at <https://www.biopreferred.gov/BioPreferred/> or 7 CFR part 3201.

(c) Except for the acquisition of commercially available off-the-shelf items, insert the provision at 52.223–4, Recovered Material Certification, in solicitations that require the delivery or specify the use of EPA-designated items.

* * * * *

■ 27. Revise 23.700 to read as follows:

23.700 Scope.

This subpart prescribes policies for acquiring environmentally preferable products and services, including environmentally sustainable electronic products.

23.701 [Reserved]

■ 28. Remove and reserve section 23.701.

■ 29. Amend section 23.702 by removing paragraphs (f) and (g); and adding a new paragraph (f) to read as follows:

23.702 Authorities.

* * * * *

(f) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

■ 30. Revise section 23.703 to read as follows:

23.703 Policy.

Agencies must—

(a) Purchase environmentally preferable products or services that—

(1) Meet or exceed specifications, standards, or labels recommended by EPA (see <https://www.epa.gov/greenerproducts/>); or

(2) If no EPA recommendations are available for the product or service the agency is procuring, meet environmental performance criteria developed or adopted by voluntary consensus standards bodies consistent with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) and the Office of Management and Budget (OMB) Circular A–119; and

(b) Realize life-cycle cost savings.

■ 31. Revise section 23.704 to read as follows:

23.704 Environmentally sustainable electronic products.

(a) Agencies shall procure environmentally sustainable electronic products (as defined in 2.101), unless an exception in 23.104 or an exemption in 23.105 applies. The Web site at <https://www.epa.gov/greenerproducts/> identifies a registry of environmentally sustainable products that meet the EPA's recommended specifications, standards, or labels. The award of a contract to satisfy an agency's

requirement for an electronic product must be made to a contractor that offers products currently listed on the registry.

(b) This section applies to acquisitions of electronic products to be used in the United States, unless otherwise provided by agency procedures. When acquiring electronic products to be used outside the United States, agencies must use their best efforts to comply with this section.

23.705 [Amended]

■ 32. Amend section 23.705 by redesignating paragraph (a) as the introductory paragraph; and removing paragraphs (b) through (d).

■ 33. Revise section 23.901 to read as follows:

23.901 Authority.

Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

■ 34. Amend section 23.1001 by revising paragraph (c) and removing paragraph (d).

The revision reads as follows:

23.1001 Authorities.

* * * * *

(c) Executive Order 13693 of March 19, 2015, Planning for Federal Sustainability in the Next Decade.

■ 35. Amend section 23.1004 by—

■ a. Revising paragraph (a)(2); and

■ b. Removing from paragraph (b), introductory text, “E.O. 13423” and adding “E.O. 13693” in its place.

The revisions read as follows:

23.1004 Requirements.

(a) * * *

(1) * * *

(2) The toxic chemical and hazardous substance release and use reduction goals of sections 3(j) and (7)(d) of Executive Order 13693.

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 36. Amend section 36.104 by revising paragraphs (b)(1) and (5) to read as follows:

36.104 Policy.

* * * * *

(b) * * *

(1) Ensure that all new construction, major renovation, or repair and alteration of Federal buildings complies with the Guiding Principles for Sustainable Federal Buildings and Associated Instructions (available at <http://www.wbdg.org/references/fhpsb.php>);

* * * * *

(5) Ensure pollution prevention and eliminate waste by diverting at least 50

percent of construction and demolition materials and debris.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 37. Amend section 39.101 by revising paragraph (a)(1)(ii); and adding paragraph (a)(1)(v) to read as follows:

39.101 Policy.

(a)(1) * * *

(ii) Specifications, standards, or labels for environmentally sustainable electronic products recommended by the U.S. Environmental Protection Agency (see 23.704);

* * * * *

(v) Policies to prepare for climate change-related risks (such as increased frequency of extreme weather events, increases in maximum temperatures, and sea level rise), including risk to mission critical communications, such as telecommunications and data centers.

* * * * *

■ 38. Amend section 39.102 by revising paragraph (b) to read as follows:

39.102 Management of risk.

* * * * *

(b) Types of risk may include schedule risk, risk of technical obsolescence, cost risk, risk implicit in a particular contract type, technical feasibility, dependencies between a new project and other projects or systems, the number of simultaneous high risk projects to be monitored, funding availability, program management risk, and projected impacts of climate change.

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 39. Amend section 42.302 by revising paragraph (a)(68)(ii) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) * * *

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery or use of sustainable products and services (as defined in 2.101). This must occur as part of the quality assurance procedures set forth in Part 46; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 40. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraph

(c)(1)(xvi) “Affirmative Procurement” and adding “Reporting” in its place.

The revision reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Date)

* * * * *

- 41. Amend section 52.212–5 by—
- a. Revising the date of the clause and paragraph (b)(40);
- b. Removing paragraphs (b)(41) through (43); and
- c. Redesignate paragraphs (b)(44) through (60) as paragraphs (b)(41) through (b)(57), respectively.

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Date)

* * * * *

(b) * * *
 (40) 52.223–XX Sustainable Products and Services Requirements (Date) (E.O. 13693).

* * * * *

- 42. Amend section 52.213–4 by revising the date of the clause, paragraphs (b)(1)(x) and (b)(1)(xiii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Date)

* * * * *

(b) * * *
 (1) * * *
 (x) 52.223–5, Pollution Prevention and Right-to-Know Information (Date) (E.O. 13693) (Applies to services performed on Federal facilities).

* * * * *

(xiii) 52.223–XX, Sustainable Products and Services Requirements (Date) (E.O. 13693) (Applies to acquisitions for sustainable products and services).

* * * * *

- 43. Amend section 52.223–1 by—
- a. Revising the date of the provision; and
- b. Removing from the provision “(7 U.S.C. 8102(c)(3))” and adding “(7 U.S.C. 8102(a)(2)(F))” in its place.

The revision reads as follows:

52.223–1 Biobased Product Certification.

* * * * *

Biobased Product Certification (Date)

* * * * *

- 44. Amend section 52.223–2 by revising the section heading, the date of the clause, and the clause to read as follows:

52.223–2 Reporting of Biobased Products Under Service and Construction Contracts.

* * * * *

Reporting of Biobased Products Under Service and Construction Contracts (Date)

(a) Report to <https://www.sam.gov>, with a copy to the Contracting Officer, on the product types and dollar value of any USDA-designated biobased products purchased by the Contractor during the previous Government fiscal year, between October 1 and September 30; and

- (b) Submit this report no later than—
- (1) October 31 of each year during contract performance; and
- (2) At the end of contract performance.

(End of clause)

- 45. Amend section 52.223–5 by—
- a. Revising the date on the clause;
- b. Removing from paragraph (c), introductory text, “all information” and adding “the following information as” in its place;
- c. Revising paragraph (c)(6);
- d. Revising the date of Alternate I and paragraph (c)(7);
- e. Revising the date of Alternate II and paragraph (c)(7).

The revisions read as follows:

52.223–5 Pollution Prevention and Right-to-Know Information.

* * * * *

Pollution Prevention and Right-to-Know Information (Date)

* * * * *

- (c) * * *
 (6) The toxic chemical and hazardous substance release and use reduction goals of section 3(j) of Executive Order 13693.

* * * * *

Alternate I (Date). * * *

(c)(7) The facility environmental management system.

Alternate II (Date). * * *

(c)(7) The facility compliance audits.

- 46. Amend section 52.223–10 by—
- a. Removing from the introductory paragraph “23.705(a)” and adding “23.705” in its place;
- b. Revising the date of the clause;
- c. Revising the first sentence of paragraph (b).

The revisions read as follows:

52.223–10 Waste Reduction Program.

* * * * *

Waste Reduction Program (Date)

* * * * *

(b) Consistent with the requirements of sections 3(j) and 7(d) of Executive Order 13693, the Contractor shall establish a program to promote cost-effective waste reduction in all operations and facilities covered by this contract. * * *

* * * * *

52.223–13 thru 52.223–17 [Reserved]

- 47. Remove and reserve sections 52.223–13 thru 52.223–17.
- 48. Add section 52.223–XX to read as follows:

52.223–XX Sustainable Products and Services Requirements

As prescribed in 23.106, insert the following clause,

Sustainable Products and Services Requirements (Date)

(a) *Definitions.* As used in this clause—
Green Procurement Compilation, means a public Web site that identifies Federal sustainable acquisition requirements and provides other guidance for the purchase of sustainable products and services.

Sustainable products and services means products and services, including construction, that—

(1) Meet statutory mandates for purchasing—

(i) Recycled content products designated by the U.S. Environmental Protection Agency (EPA) under the Comprehensive Procurement Guidelines;

(ii) Energy and water efficient products such as ENERGY STAR® certified and Federal Energy Management Program (FEMP)-designated products identified by EPA and the U.S. Department of Energy; and

(iii) Biobased content products meeting the content requirement of the U.S. Department of Agriculture under the BioPreferred® program;

(2) Are identified by EPA programs, including—

(i) Significant New Alternatives Policy (SNAP) chemicals or other alternatives to ozone-depleting substances, and products and services that minimize or eliminate, when feasible, the use, release, or emission of high global warming potential hydrofluorocarbons, such as by using reclaimed instead of virgin hydrofluorocarbons;

(ii) WaterSense® certified products and services (water efficient products);

(iii) Safer Choice Certified products (chemically intensive products that contain safer ingredients); and

(iv) SmartWay® Transport partners and SmartWay® products (fuel efficient products and services); or

(3) Are environmentally preferable products or services that—

(i) Meet or exceed specifications, standards, or labels recommended by EPA, (see <https://www.epa.gov/greenerproducts>); or

(ii) Where there is no specification, standard, or label recommended by EPA for a specific product or service category, meet

environmental performance criteria developed or adopted by voluntary consensus standards bodies consistent with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) and Office of Management and Budget Circular A–119.

(b) Unless approved in writing by the Contracting Officer, in the performance of this contract, the Contractor shall—

- (1) Deliver, furnish for Government use;
- (2) Incorporate into the construction of a public building or public work; or
- (3) Furnish for Contractor use at a Federally-controlled facility sustainable products and services as specified in the contract.

(c) Sustainable products and services must meet the applicable standard, specifications, or other program requirements at the time of submission of an offer or a quote.

(d) Visit the Green Procurement Compilation at <https://www.sftool.gov/greenprocurement> for a comprehensive list of Federal Governmentwide sustainable product and service requirements.

(End of clause)

[FR Doc. 2017–00480 Filed 1–17–17; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, 173, 174, 177, 178, 179, and 180

[Docket No. PHMSA–2016–0077 (HM–251D)]

RIN 2137–AF24

Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT or Department).

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: PHMSA is considering revising the Hazardous Materials Regulations (HMR) to establish vapor pressure limits for unrefined petroleum-based products and potentially all Class 3 flammable liquid hazardous materials that would apply during the transportation of the products or materials by any mode. PHMSA is currently assessing the merits of a petition for rulemaking submitted by the Attorney General of the State of New York regarding vapor pressure standards for the transportation of crude oil. The petition requests that PHMSA implement a Reid Vapor Pressure (RVP) limit less than 9.0 pounds per square inch (psi) for crude oil transported by

rail. PHMSA will use the comments in response to this ANPRM to help assess and respond to the petition and to evaluate any other potential regulatory actions related to sampling and testing of crude oil and other Class 3 hazardous materials. PHMSA will also evaluate the potential safety benefits and costs of utilizing vapor pressure thresholds within the hazardous materials classification process for unrefined petroleum-based products and Class 3 hazardous materials.

DATES: Comments must be received by March 20, 2017.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2016–0077 (HM–251D) and the relevant petition number by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov> Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* To the Docket Management System; Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this ANPRM at the beginning of the comment. To avoid duplication, please use only one of these four methods. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you provide. All comments received will be posted without change to the Federal Docket Management System (FDMS), including any personal information.

Docket: For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov> or DOT's Docket Operations Office located at U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue SE., Washington, DC 20590.

Privacy Act: Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT posts these comments, without edit, including

any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Lad Falat, Director, Engineering and Research, (202) 366–4545, Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Ave. SE., Suite E21–314, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Executive Summary
- II. Objective of This ANPRM
- III. Petition P–1669 & Other Efforts To Set a Vapor Pressure Standard for Crude Oil
 - A. Summary & Supporting Data for Petition P–1669
 - B. North Dakota Industrial Commission (NDIC) Oil Conditioning Order No. 25417
- IV. Background Information
 - A. Current HMR Requirements for the Classification of Unrefined Petroleum-Based Products
 - B. High-Hazard Flammable Train (HHFT) Rulemaking
 - C. Sandia Study
 - D. PHMSA Actions
 - E. Pipeline Operators
 - F. Accident History and Vapor Pressure Levels
- V. Comments and Questions
 - A. General Questions
 - B. Safety Questions
 - C. Vapor Pressure Questions
 - D. Packaging Questions
- VI. Regulatory Review and Notices
 - A. Executive Order 12866, Executive Order 13563, Executive Order 13610, and DOT Regulatory Policies and Procedures
 - B. Executive Order 13132
 - C. Executive Order 13175
 - D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures
 - E. Paperwork Reduction Act
 - F. Environmental Assessment
 - G. Privacy Act
 - H. Executive Order 13609 and International Trade Analysis
 - I. Statutory/Legal Authority for This Rulemaking
 - J. Regulation Identifier Number (RIN)
 - K. Executive Order 13211

I. Executive Summary

On December 1, 2015, PHMSA received a petition for rulemaking from the New York State Office of the Attorney General (New York AG) proposing amendments to the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) applicable to the transportation of crude oil by rail. PHMSA designated the petition as

Petition P-1669¹ (P-1669 or the petition). In P-1669, the New York AG asks PHMSA to add a new paragraph (a)(6) to existing § 174.310 requiring all crude oil transported by rail to have a Reid vapor pressure (RVP) of less than 9.0 pounds per square inch (psi).² The petition is based on the premise that limiting the product's vapor pressure will reduce the risk of death or damage from fire or explosion in the event of an accident. Separately, the North Dakota Industrial Commission (NDIC) implemented a maximum vapor pressure threshold of 13.7 psi, VPCR_x, Reid equivalent.³ Therefore, in this ANPRM, PHMSA is asking a series of questions seeking input as to whether there should be national vapor pressure thresholds for petroleum products and/or other Class 3 hazardous materials and, if so, what that thresholds should be.

PHMSA has long stressed that it is the offeror's responsibility under § 173.22 of the HMR to ensure that hazardous materials are properly classified. To reinforce this requirement, the HMR also require offerors of unrefined petroleum-based products, including crude oil, to institute a sampling and testing program in accordance with § 173.41.⁴ There are numerous industry standards for sampling and determining vapor pressure of crude oil and other Class 3 hazardous materials.

When taking additional steps to better understand hazardous materials and the risks those materials may pose in transportation, DOT always strives to rely on the best available science and information to inform its decision making. Section 7309 of the "Fixing America's Surface Transportation Act of 2015," or the "FAST Act," directs the Secretary of Energy, in cooperation with the Secretary of Transportation (Secretary), to submit a report to Congress that contains results of the Crude Oil Characteristics Research Sampling, Analysis and Experiment

(SAE) Plan⁵ (the Sandia Study discussed in Section IV.C of this ANPRM will implement the SAE Plan), as well as recommendations for regulations and legislation based on the findings to improve the safe transport of crude oil. The findings of the Sandia Study will help inform the Department as it moves forward.

II. Objective of This ANPRM

Federal hazardous materials law authorizes the Secretary to "prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce." 49 U.S.C. 5103(b)(1). The Secretary has delegated this authority to PHMSA, 49 CFR 1.97(b). The HMR are designed to achieve three primary goals: (1) Help ensure that hazardous materials are packaged and handled safely and securely during transportation; (2) provide effective communication to transportation workers and emergency responders of the hazards of the materials being transported; and (3) minimize the consequences of an accident or incident should one occur. The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying safety or security hazards and reducing the probability and consequences of a hazardous material release.

Under the HMR, hazardous materials are categorized into hazard classes and packing groups based on analysis of and experience with the risks they present during transportation. The HMR: (1) Specify appropriate packaging and handling requirements for hazardous materials based on this classification and require a shipper to communicate the material's hazards through the use of shipping papers, package marking and labeling, and vehicle placarding; (2) require shippers to provide emergency response information applicable to the specific hazard or hazards of the material being transported; and (3) mandate training requirements for persons who prepare hazardous materials for shipment or transport hazardous materials in commerce. The HMR also include operational requirements applicable to each mode of transportation.

The Administrative Procedure Act (APA), 5 U.S.C. 551, *et seq.* requires Federal agencies to give interested persons the right to petition an agency to issue, amend, or repeal a rule. 5

U.S.C. 553(e). In accordance with PHMSA's rulemaking procedure regulations in 49 CFR part 106, interested persons may ask PHMSA to add, amend, or repeal a regulation by filing a petition for rulemaking along with information and arguments supporting the requested action (§ 106.95).

The petition is based on the premise that limiting the vapor pressure, as measured by RVP, of crude oil in rail transport below 9.0 psi will reduce the risk of death or damage from fire or explosion in the event of an accident. However, in order to grant the petition, PHMSA would have to:

- Determine the best metric or combination of metrics (vapor pressure or other metric) for measuring and controlling fire and explosion risk in crude oil transport;
- Quantify the improvement in safety, if any, due to risk reduction from implementation of vapor pressure thresholds at varying levels;
- Identify the measurement techniques necessary to establish compliance;
- Identify offerors' compliance strategies and market impacts with RVP standards at varying levels of stringency, and estimate their economic costs and environmental impacts;
- Identify other regulations and industry practices, such as volatile organic compound emissions standards imposed through the Clean Air Act, or State regulations, or pipeline operator RVP standards, potentially affecting compliance strategies and costs, and safety benefits;
- Evaluate the extent to which use of DOT Specification 117 tank cars mitigates the risk of transporting crude oil;
- Compare compliance costs of mitigation strategies with risk reduction from adoption of the petition; and
- Balance the benefits and costs in setting the level of the chosen metric. If RVP is the best metric, PHMSA would have to determine that a particular RVP limit is preferable to any other limit. For example, if 9.0 psi is chosen, PHMSA would need to show that 9.0 psi is preferable to some other potential limits, such as 8.0 or 11.0. This would include considering whether there is a "safe" level of RVP below which risks are minimal (which would lead to little safety benefit from reducing RVP further), or some level of RVP where risks do not further increase.

In this ANPRM, PHMSA is seeking public comment to obtain the views of those who are affected by the NDIC Order, as well as those who are likely to be impacted by the changes proposed

¹ PHMSA placed a copy of the petition in docket number PHMSA-2015-0253, which is accessible at <https://www.regulations.gov/docket?D=PHMSA-2015-0253>.

² RVP was a common measurement of the vapor pressure of flammable liquids such as gasoline and crude oil.

³ RVP uses different equipment and procedures than Reid equivalent. For example, Reid equivalent is done using closed conditions to preserve the lighter ends, while RVP is conducted in an open test chamber.

⁴ "Unrefined petroleum-based products" refers to hazardous hydrocarbons that are extracted from the earth and have not yet been refined. In the high-hazard flammable trains (HHFT) final rule, PHMSA replaced "mined liquids and gases" with "unrefined petroleum-based products" based on comments received in response to the HHFT NPRM.

⁵ <http://energy.gov/sites/prod/files/2016/06/f32/Crude%20Oil%20Characteristics%20Research%20SAE%20Plan.pdf>.

in the petition, including those who are likely to benefit from, be adversely affected by, or potentially be subject to additional regulation. Additionally, PHMSA seeks comment from stakeholders regarding the many factors PHMSA must consider when evaluating the need for and impacts of regulatory changes. In general, PHMSA requests comments on:

- Safety benefits of any proposed regulatory change, including the relevant scientific or other empirical support;
- Economic impacts, including data, on the costs and benefits; and
- Ease of compliance with the regulatory changes that Petition P-1669 requests.

This ANPRM will provide an opportunity for public participation in the development of regulatory amendments and promote greater exchange of information and perspectives among the various stakeholders. PHMSA issued this notice to help respond to Petition P-1669 and,

more broadly, to consider a focused and well-developed regulatory path forward that reflects the views of all relevant parties.

III. Petition P-1669 & Other Efforts To Set a Vapor Pressure Standard for Crude Oil

A. Summary & Supporting Data for P-1669

In Petition P-1669,⁶ the New York State Office of the Attorney General petitioned PHMSA to revise § 174.310 to establish a nationwide vapor pressure standard for crude oil shipped by rail throughout the United States. The petition states, “At present, no federal regulation exists to limit the volatility of crude oil shipped in railroad tank cars. This petition for rulemaking seeks to close that loophole and reduce the risk of harm to American communities.” The petition further requests PHMSA to “assert its rulemaking authority, as delegated by the Secretary of Transportation, and establish a federal RVP limit for crude oil transported by

rail in the United States at an appropriate level that is less than 9.0 psi.”

A copy of the petition is available in the public docket for this ANPRM, and can be viewed at either <http://www.regulations.gov> or DOT’s Docket Operations Office (see **ADDRESSES** section above).

Petition P-1669 makes the following claims to support the establishment of a vapor pressure threshold for crude oil. Specifically, the petition asserts:

1. Shipments of Bakken crude oil by rail are vastly expanding;
2. A disturbing trend of train explosions [exists] involving shipments of Bakken crude oil;
3. Bakken crude oil is highly volatile and extremely flammable; and
4. The volatility of crude oil can be effectively reduced with existing technology.

The petition also provides the following table to highlight the vapor pressures of the crude oil involved in several high-profile train accidents:

Source	Reid Vapor pressure of Bakken crude oil
Lac-Mégantic, Quebec (July 6, 2013)	Average between 9.0 to 9.5 psi. ⁷
Heimdal, North Dakota (May 6, 2015)	10.8 psi. ⁸
PHMSA Operation Safe Delivery	Average of 12.3 psi. ⁹
Mt. Carbon, West Virginia (February 16, 2015)	13.9 psi. ¹⁰
Lynchburg, Virginia (April 2015)	Average of 14.3 psi. ¹¹

In addition, Petition P-1669 summarizes the NDIC Standards (discussed in Section IV.E of this ANPRM) and the HHFT final rule (discussed in Section IV.B of this ANPRM) arguing in support of a new RVP limit of less than 9.0 psi for the safe transportation of crude oil by rail. However, the petition did not identify specific costs and benefits, or robust empirical information, to support the proposed limit.

B. North Dakota Industrial Commission Oil Conditioning Order No. 25417

In December 2014, NDIC issued Oil Conditioning Order No. 25417 (Order), which requires operators of Bakken crude oil produced in the state of North Dakota to separate the gaseous and light hydrocarbons from all Bakken crude oil.¹² The Order requires the use of a

gas-liquid separator and/or an emulsion heater-treater capable of separating the gaseous and liquid hydrocarbons, prohibits blending of Bakken crude oil with specific materials, and requires crude oil produced to have a Vapor Pressure (using ASTM D6377) not greater than 13.7 psi or 1 psi less than the vapor pressure of stabilized crude oil.

According to NDIC, the measurements taken under the Order use the ASTM D6377 with a vapor to liquid (V/L) ratio of 4 and a temperature of 100 °F (37.8 °C), which is equivalent to a Reid Vapor Pressure measurement. The Order requires the 13.7 psi limit to be measured as pounds per square inch absolute (psia) and not pounds per square inch gauge (psig). According to NDIC, psia is used to make clear that the

pressure is relative to a vacuum rather than the ambient atmospheric pressure.

IV. Background Information

In 1990, the Research and Special Programs Administration (RSPA), the predecessor agency to PHMSA, published a final rule under Docket HM-181 which adopted a new classification system for gases, which assigned new divisions for flammable gas (2.1), non-flammable, non-toxic compressed gas (2.2), and toxic/poisonous gases (2.3). The new system defined flammable gases according to their (1) state as a gas at ambient conditions (*i.e.*, 14.7 psia (101.4 kPa) and 68 °F (20 °C)) and (2) flammability, as determined by existing flammability limits. There were no vapor pressure requirements.

⁶ <https://www.regulations.gov/docket?D=PHMSA-2015-0253>.

⁷ See Transportation Safety Board (TSB) of Canada Laboratory Report LP148/2013, Aug. 19, 2014. The TSB Report notes that the vapor pressure measurements of these samples may be lower than the vapor pressure of the Bakken crude oil in the Lac-Mégantic accident: “The occurrence crude oil samples were taken at atmospheric pressure. This could lead to an underestimation of the crude oil[’]s

volatility due to evaporation loss of very light constituents.”

⁸ See Stern, M., “How to Prevent an Oil Train Disaster,” N.Y. Times, May 19, 2015.

⁹ “Operation Safe Delivery Update,” Pipeline and Hazardous Materials Safety Administration, at 16, available at: http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8A422ABDC16B72E5F166FE34048CCCBFED3B0500/filename/07_

¹⁰ See Gold, R., “Crude on Derailed Train Contained High Level of Gas,” Wall Street Journal, March 2, 2015.

¹¹ See Sobczak, B., “Crude in Va. oil-train derailment was highly volatile—safety data,” EnergyWire, E&E Publishing, LLC, Aug. 25, 2015.

¹² See <https://www.dmr.nd.gov/oilgas/Approved-or25417.pdf>.

RSPA adopted the definition of a “gas” from the United Nations (UN) Transport of Dangerous Goods Model Regulation in an effort to harmonize its regulations with international standards in 1994. The HM-181 final rule did not address a particular method of testing vapor pressure, or otherwise address how the new definition would impact the existing definition of flammable gas in 49 CFR 173.115. However, as late as 1990, RSPA’s definitions of gases were limited to gases under pressure, *e.g.*, compressed gases, cryogenic liquids, and refrigerant or dispersant gases. Both the definition of compressed gas, and

the related definition of flammable compressed gas, contemplated using the RVP testing method described in ASTM D 323.

A. Current HMR Requirements for the Classification of Unrefined Petroleum-Based Products

Unrefined petroleum-based products, including crude oil, have variable chemical compositions. Differences in the chemical makeup of the raw material can vary across different times and wellheads. Typically, organic materials from oil and gas production at a wellhead are passed through a

“separator” to separate the gas, oil, and water from the crude oil produced. As such, there are multiple hazardous liquids that are commonly shipped from the well-site, including crude oil, condensate, and natural gas liquids.¹³ A limited separation process, which is insufficient to remove the lightest components, could increase the volatility of the crude oil. In accordance with § 173.22 of the HMR, the offeror must consider all hazards when classifying a hazardous material. The table below identifies key classification considerations for unrefined petroleum-based products.¹⁴

CURRENT CLASSIFICATION CONSIDERATIONS FOR UNREFINED PETROLEUM-BASED PRODUCTS¹⁵

Class	Division	Name	Definition
2	2.1	Flammable Gas	Any material which is a gas at 68 °F or less and 14.7 psia of pressure (a material which has a boiling point of 68 °F or less at 14.7 psia) which— (1) Is ignitable at 14.7 psia when in a mixture of 13 percent or less by volume with air; or (2) Has a flammable range at 14.7 psia with air of at least 12 percent regardless of the lower limit.
	2.2	Non-flammable, Non-poisonous compressed gas.	Any material (or mixture) which—(1) Exerts in the packaging a gauge pressure of 200 kPa (29.0 psig/43.8 psia) or greater at 68 °F, is a liquefied gas or is a cryogenic liquid, and (2) Does not meet the definition of Division 2.1 or 2.3.
	2.3	Gas Poisonous by Inhalation	A material which is a gas at 68 °F or less and a pressure of 14.7 psia (a material which has a boiling point of 68 °F or less at 14.7 psia) and which—(1) Is known to be so toxic to humans as to pose a hazard to health during transportation, or (2) In the absence of adequate data on human toxicity, is presumed to be toxic to humans because when tested on laboratory animals it has an LC ₅₀ value of not more than 5000 mL/m ³ (see § 173.116(a) for assignment of Hazard Zones A, B, C or D). LC ₅₀ values for mixtures may be determined using the formula in § 173.133(b)(1)(i) or CGA P-20 (IBR, see § 171.7).
3		Flammable and Combustible Liquids	<i>Flammable liquids</i> —liquid with a flash point of 140 °F or less. <i>Combustible liquids</i> —liquid with a flash point above 140 °F and below 200 °F that does not meet any other hazard class definition.
6	6.1	Poisonous material	A material, other than a gas, which is known to be so toxic to humans as to afford a hazard to health during transportation, or which, in the absence of adequate data on human toxicity: (1) Is presumed to be toxic to humans because it falls within any one of the categories specified in § 173.132(a)(1) (Oral Toxicity, Dermal Toxicity, or Inhalation Toxicity) when tested on laboratory animals (when-ever possible, animal test data that has been reported in the chemical literature should be used); or (2) Is an irritating material, with properties similar to tear gas, which causes extreme irritation, especially in confined spaces.
8		Corrosive material	A liquid or solid that causes full thickness destruction of human skin at the site of contact within a specified period of time. A liquid, or a solid which may become liquid during transportation, that has a severe corrosion rate on steel or aluminum based on the criteria in § 173.137(c)(2) is also a corrosive material. Whenever practical, in vitro test methods authorized in § 173.137 or historical data authorized in § 173.136(c) should be used to determine whether a material is corrosive.

¹³ Condensate refers to C₅–C₈, natural gas liquids (NGLs) refers to C₂–C₈, both separated from the crude oil during initial processing.

¹⁴ The HMR define three states of matter in 49 CFR 171.8: Solid, liquid, or gas. A liquid is a material, other than an elevated temperature

material, with a melting point or initial melting point of 20 °C (68 °F) or lower at a standard pressure of 101.3 kPa (14.7 psia). In other words, it is a liquid in its normal state at ambient temperature and standard pressure. A gas is a material which has a vapor pressure greater than 300 kPa (43.5 psia) at 50 °C (122 °F) or is

completely gaseous at 20 °C (68 °F) at a standard pressure of 101.3 kPa (14.7 psia). A solid is a material which is not a gas or a liquid.

¹⁵ kPa: kilopascals; psia: pounds per square inch absolute; psig: pounds per square inch gauge; LC₅₀: Lethal Concentration measure.

As illustrated in the above table, an offeror must account for whether their crude oil exhibits hazards beyond that of a Class 3 hazardous material. Below are some examples of the impacts of potential hazards and the risks posed if those properties are not identified and considered:

- Dissolved gases—may result in pressure build-up inside the tank car, increasing the volatility of the material and requiring a more robust packaging.
- Corrosivity—may corrode the tank car and its components, requiring an inner lining.
- Toxicity—may pose an inhalation hazard to human life upon release from the tank car without ignition.

Part 173 of the HMR contains testing methods for the various hazard classes and respective criteria for packing groups. In the event an offeror determines a hazardous material meets more than one hazard class, the offeror must determine the primary hazard. The

HMR (at § 173.2a) require a hazardous material to be classed according to the highest applicable hazard class. The following list illustrates the precedence of the hazard classes that are most frequently associated with unrefined petroleum-based products:

- (1) Division 2.3 (poisonous gases);
- (2) Division 2.1 (flammable gases);
- (3) Division 2.2 (non-flammable gases);
- (4) Division 6.1 (poisonous liquids), Packing Group I, poisonous-by-inhalation only;
- (5) Class 3 (flammable and combustible liquids);
- (6) Class 8 (corrosive materials) or Division 6.1 (poisonous liquids or solids other than Packing Group I, poisonous-by-inhalation); and
- (7) Combustible liquids.

When making classification determinations, the offeror of the hazardous material must also consider the packing groups associated with each hazard class. Packing group indicates a

grouping according to the severity of the hazard presented by hazardous materials. The packing group must be determined by applying the following criteria:

1. Class 2 Packing Group Assignment

Materials meeting the definition of Division 2.1 or 2.2 are not assigned packing groups. Division 2.3 materials are assigned hazard zones related to the toxicity of the material. *See* § 173.116.

2. Class 3 Packing Group Assignment

Packing group	Flash point (closed-cup)	Initial boiling point (°F)
I .....	.....	≤95
II	<73 °F	>95
III	≥73 °F, ≤140 °F	>95

3. Class 6—Division 6.1 Packing Group Assignment

Packing group	Oral toxicity LD ₅₀ (mg/kg)	Dermal toxicity LD ₅₀ (mg/kg)	Inhalation toxicity by dusts and mists LC ₅₀ (mg/L)
I	≤5.0	≤50	≤0.2.
II	>5.0 and ≤50	>50 and ≤200	>0.2 and ≤2.0.
III	>50 and ≤300	>200 but ≤1000	>2.0 and ≤4.0.

Packing group	Vapor concentration and toxicity
I (Zone A)	V ≥ 500 LC ₅₀ and LC ₅₀ ≤200 mL/M ³ .
I (Zone B)	V ≥ 10 LC ₅₀ ; LC ₅₀ ≤1000 mL/m ³ ; and the criteria for Packing Group I, Hazard Zone A are not met.
II	V ≥ LC ₅₀ ; LC ₅₀ ≤3000 mL/m ³ ; and the criteria for Packing Group I, are not met.
III	V ≥ .2 LC ₅₀ ; LC ₅₀ ≤5000 mL/m ³ ; and the criteria for Packing Group I and II, are not met.

Note 1: V is the saturated vapor concentration in air of the material in mL/M³ at 20 °C and standard atmospheric pressure.

Note 2: A liquid in Division 6.1 meeting criteria for Packing Group I, Hazard Zones A or B stated in § 173.133(a)(2) is a poisonous by inhalation subject to additional hazard communication requirements in §§ 172.203(m), 172.313 and table 1 of 172.504(e).

4. Class 8—Packing Group Assignment

Packing group	Corrosivity
I	Material that causes full thickness destruction of intact skin tissue within 60 minutes, starting after an exposure time of three minutes or less.
II	Material (not meeting packing group I criteria) that causes full thickness destruction of intact skin tissue within 14 days starting after an exposure time of more than three minutes but not more than 60 minutes.
III	Material (not meeting packing group I or II criteria) that causes full thickness destruction of intact skin tissue within an observation period of up to 14 days starting after the exposure time of more than 60 minutes but not more than 4 hours; or Material that does not cause full thickness destruction of intact skin tissue but exhibits a corrosion rate on steel or aluminum surfaces exceeding 0.25 inch a year at a test temperature of 130 °F.

Proper classification is a critical step in the process for ensuring hazardous materials are transported safely. Following the selection of a proper hazard class or classes and an appropriate packing group for the material, an offeror must select the name from the Hazardous Materials Table (HMT; 49 CFR 172.101) most accurately describing the material being

shipped (e.g., Petroleum crude oil). The selected name must account for all hazards present. If there is no proper shipping name that accurately describes the material and its hazards, an offeror may use a generic shipping description (e.g., Hydrocarbon gas mixture, liquefied, n.o.s.). Generic descriptions are denoted in the HMT with an “n.o.s.,” meaning “not otherwise

specified.” The accurate selection of the shipping description is important in determining the proper packaging.

In 2014, the rail and oil industry, with PHMSA’s input, developed a recommended practice designed to improve crude oil rail safety through proper classification and loading practices. The American Petroleum Institute (API) led the effort, which

resulted in the development of an American National Standards Institute (ANSI) recognized recommended practice, API RP 3000, *Classifying and Loading of Crude Oil Into Rail Tank Cars*. The API RP 3000 provides guidance on the material characterization, transport classification, and quantity measurement for overfill prevention of crude oil for the loading of rail tank cars.

On July 23, 2014, PHMSA and the Federal Railroad Administration (FRA) released a report summarizing the analysis of Bakken crude oil data gathered from August 2013 to May 2014.¹⁶ PHMSA and FRA conducted tests and obtained results from 135 samples. The majority of crude oil analyzed from the Bakken region displayed characteristics consistent with those of a Class 3 flammable liquid, packing group I or II.

B. High-Hazard Flammable Train (HHFT) Rulemaking

On August 1, 2014, PHMSA, in coordination with FRA, published a notice of proposed rulemaking (NPRM) entitled “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains” (HM–251; 79 FR 45015)¹⁷ proposing requirements to reduce the consequences and, in some instances, reduce the probability of accidents involving trains transporting large quantities of Class 3 flammable liquids. In the NPRM, PHMSA indicated that the properties of unrefined petroleum-based products, including crude oil, are variable based on time, method, and location of extraction, whereas manufactured goods often undergo a strict quality assurance process designed to ensure characteristics are within defined parameters. Unlike manufactured goods, organic materials from oil and gas production represent a unique challenge in regards to classification. The chemical makeup of the raw material can vary over time and geographical location. As noted earlier, typically, organic materials from oil and gas production at a wellhead are passed through a “separator” to remove most of the gas, sediment, and water from the crude oil. As such, there are multiple hazardous liquids that are commonly shipped from the well-site, including

crude, natural gas condensate, and natural gas liquid.

Given this variability, PHMSA stressed that it is the offeror’s responsibility, under § 173.22 of the HMR, to ensure hazardous materials are properly classified. To reinforce this requirement, PHMSA proposed a new § 173.41 explicitly requiring a sampling and testing program for unrefined petroleum-based products, including crude oil.

In the HHFT NPRM, PHMSA also sought comments from the public on the role of vapor pressure in classifying flammable liquids and selecting packagings, as well as whether vapor pressure thresholds should be established. PHMSA did this based on comments received to the HHFT ANPRM (78 FR 54849). Individuals, government organizations, and environmental groups, such as the Delaware Riverkeeper Network, supported mandating vapor pressure testing that in their words would “increase safety and accuracy.” Environmental groups and offeror Quantum Energy also suggested packaging selection should be based on vapor pressure. Industry stakeholders, such as the Dangerous Goods Advisory Council and the American Fuel and Petrochemical Manufacturers (AFPM), stated vapor pressure testing was unnecessary. For example, AFPM specifically stated “Bakken crude oil vapor pressures appear to be within operational limits required for transport in pipelines (facility piping and transmission lines) and for purposes of storage in floating roof tanks; thus operational vapor pressure limits do not necessitate stabilization in advance of rail transportation.”¹⁸

On May 8, 2015, PHMSA, in coordination with FRA, published a final rule entitled “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains” (HM–251; 80 FR 26643) to codify requirements in the HMR to reduce the consequences and, in some instances, reduce the probability of accidents involving trains transporting large quantities of Class 3 flammable liquids. In regard to the classification of unrefined petroleum-based products, the final rule, like the NPRM before it, stressed the offeror’s responsibility to properly classify and describe a hazardous material. In the rule, PHMSA codified § 173.41 to require a sampling and testing program for unrefined petroleum-based products. PHMSA intended § 173.41 to provide

the industry with a direct way of establishing a program to consider the varying characteristics and properties of unrefined petroleum-based products. The program applies to all modes of transportation and offerors must certify that a program is in place, document the testing and sampling program outcomes, and make information available to DOT personnel upon request.

In the HHFT final rule, PHMSA indicated that it could not adopt any other specific changes related to vapor pressure, exceptions for packing group, or incentives to reduce volatility, because PHMSA did not propose them in the NPRM. 80 FR 26643, 26665.¹⁹ However, PHMSA indicated it might consider addressing these comments in a future action. Based on the comments received, and P–1669, PHMSA requests comments regarding the role of “vapor pressure” in the classification process and specifically in regards to unrefined petroleum-based products, such as crude oil.

C. Sandia Study

In 2014, the DOT and the U.S. Department of Energy (DOE) commissioned a review of available crude oil chemical and physical property data literature²⁰ to characterize and define tight crude oils based on their chemical and physical properties, and identify properties that could contribute to increased potential for accidental combustion.²¹ Sandia National Laboratories (Sandia) conducted this review and focused on crude oil’s potential for ignition, combustion, and explosion. A partial list of properties surveyed includes density (expressed as API gravity), vapor pressure, initial boiling point, boiling point distribution, flash point, gas-oil ratio, “light ends” (dissolved gases—including nitrogen, carbon dioxide, hydrogen sulfide, methane, ethane, and propane—and butanes and other volatile liquids) composition, and flash gas composition. Although the review yielded a large database encompassing a wide variety of crude oils and their properties, it also illustrated the difficulty in utilizing available data as the basis for accurately defining and meaningfully comparing crude oils.

¹⁹ <https://www.gpo.gov/fdsys/pkg/FR-2015-05-08/pdf/2015-10670.pdf>.

²⁰ See <http://prod.sandia.gov/techlib/access-control.cgi/2015/151823.pdf>.

²¹ Tight oil is a type of oil extracted from petroleum-bearing formations of low permeability (typically shale or tight sandstone). These formations produce oil through hydraulic fracturing.

¹⁶ See http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Hazmat/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf.

¹⁷ See <https://www.gpo.gov/fdsys/pkg/FR-2014-08-01/pdf/2014-17764.pdf>.

¹⁸ <https://www.regulations.gov/document?D=PHMSA-2012-0082-3274>.

An important outcome of the review was formal recognition of the wide-ranging variability in crude oil sample type, sampling method, and analytical method, as well as the acknowledgement that this variability limits the adequacy of the available crude oil property data set as the basis for establishing effective and affordable safe transport guidelines. In recognition of the need for improved understanding of crude oil, and especially tight crude oil properties, the Sandia Study was designed to characterize tight and conventional crudes based on key chemical and physical properties and to identify properties that may contribute to increased likelihood and/or severity of combustion events that could arise during handling and transport. The work scope represents a phased approach, in that knowledge gained from completing each task will inform the execution of subsequent tasks to maximize efficiency in achieving overall plan objectives. Through four tasks, the SAE Plan,²² will characterize tight and conventional crudes based on identified key chemical and physical qualities and identify properties that may contribute to increased likelihood and/or severity of combustion events that could arise during handling and transport. This project is currently in Task 2, which is designed to determine what methods of sampling and analysis are suitable for characterizing the physical and chemical properties of different crude oils.

D. PHMSA Actions

On January 2, 2014, PHMSA issued a safety alert to notify the public, emergency responders, shippers, and carriers that crude oil from the Bakken region may be more flammable than traditional heavy crude oil.²³ The alert was a follow-up to the PHMSA and FRA joint safety advisory entitled, "Safety and Security Plans for Class 3 Hazardous Materials Transported by Rail," 78 FR 69745, published November 20, 2013. The safety advisory stressed that offerors need to properly classify and describe hazardous materials being offered for transportation in accordance with § 173.22 of the HMR.

E. Pipeline Operators

In recent months, the volume of crude oil exported by rail from North Dakota has steadily declined to less than

400,000 barrels per day. The North Dakota State Pipeline Authority estimates that more than 500,000 barrels per day of Bakken crude oil moves by pipeline. Pipeline operators routinely set upper limits on RVP levels for crude oil that will be accepted for transport. A sample of six North Dakota pipeline operators indicates that they have set RVP upper limits ranging from 9.0 to 14.7 psia for acceptable crude oil.²⁴ Understanding how oil producers comply with pipeline operators' RVP standards, or possibly instead ship crude oil with RVP levels that exceed pipeline operator limits by rail, would provide useful insights for understanding the consequences of setting RVP limits for rail transport.

F. Accident History and Vapor Pressure Levels

As shown above, Petition P-1669 included a table highlighting the vapor pressures of the crude oil involved in several high-profile train accidents. According to the Petition, the vapor pressures of the oil involved in the five accidents was, at the low end, an "average between 9.0 and 9.5 psi," and at the high end, "an average of 14.3 psi." It likely would be useful to have more comprehensive information regarding the vapor pressure levels of Class 3 flammable liquid hazardous materials involved in rail accidents, and information about the nature, characteristics and consequences of the accidents. It would be useful to have such information for accidents involving other transportation modes as well. Such information may inform understanding of how a flammable liquid's vapor pressure affects the characteristics and consequences of accidents involving the liquid. PHMSA

²⁴ Cf. Bakken Oil Express: RVP = 9, <http://www.boemidstream.com/wp-content/uploads/2014/02/BOEPL-Rules-Regulations.pdf>; Belle Fourche RVP = 13.7, <http://www.buttepipeline.com/sites/default/files/tariffs/BFPL%20FERC%20112.17.0.pdf>;

Tesoro High Plains Pipeline (ND): RVP = 13, <http://phx.corporate-r.net/External.File?item=UGFYZW50SUQ9MjU1NjYxJENoaWxkSUQ9LTF8VHlwZT0z&t=1>;

Bakken Link: RVP = 9.5, <http://bakkenlink.com/data/upfiles/media/rules%20and%20regulations.pdf>;

Enbridge North Dakota Pipeline RVP = 103 kPa (14.7 psia), <http://www.enbridge.com/-/media/www/Site%20Documents/Informational%20Postings/Tariffs/North%20Dakota/NDPL-FERC-No-2-2-0.pdf>;

Bakken Pipeline Company (Enbridge) says absolute vapor pressure per ASTM6377 <13.7. <http://www.enbridge.com/-/media/Rebrand/Documents/Tariffs/2015/Bakken%20US%20FERC%20No%20110.pdf?la=en>; and

Bridger Pipeline: RVP = 9.4 summer/11 winter, http://www.hawthornoiltransportation.com/tariffs/ND_RatesRegs_070112.pdf.

began collecting this information for rail after July 2013. The information we have has uncertainty since testing may happen after the train is moved to a final destination and there may have been different sampling and testing techniques used, among other issues. PHMSA may consider publishing this information for the NPRM once we review and consolidate.

V. Comments and Questions

PHMSA requests comments on the merits of P-1669.²⁵ PHMSA is uncertain that the requested action in Petition P-1669 would provide a safety benefit and requests comments on the following questions:

A. General Questions

1. To what extent, if at all, would requiring crude oil shipped by rail to have a RVP of no greater than 9.0 psi decrease the expected degree, consequence, or magnitude of a release or the likelihood of a fire during an accident? Please provide relevant scientific or other empirical information to support your comment.

2. What, if any, peer-reviewed or other robust information is available that addresses the safety effectiveness and/or cost of setting vapor pressure limits for crude oil or other flammable liquids during transportation?

3. How do the consequences resulting from accidents involving low-vapor pressure flammable liquids (e.g., ethanol)²⁶ compare to accidents involving high vapor pressure flammable liquids (e.g., certain crude oil)? If the consequences are significantly similar, will adopting a vapor pressure limit address the magnitude of release or the likelihood of fire during an accident for both commodity types?

4. Would adopting a vapor pressure limit impact trans-border shipments? If so, how?

5. What methods can be employed to measure environmental and human health effects of setting a vapor pressure limit for the transport of crude oil by rail? How would the benefits of setting a vapor pressure limit be quantified?

6. What options are available for reducing the volatility of crude oil before it's offered for transportation and loaded into tank cars, such as existing consensus standards or operating practices used for conditioning (heating and treating) crude oil? What voluntary measures has industry taken to reduce the volatility of crude oil shipped in interstate commerce by any mode? If so, what are they?

7. What other regulatory and industry marketability measures are in place that restrict the volatility of crude oil in transport, such as RVP limits set by pipeline operators, or the impact of volatile organic compound emission standards for storage tanks and other petroleum facilities?

8. How many carloads and trains would be affected by setting a vapor pressure limit for

²² See <http://energy.gov/sites/prod/files/2016/06/f32/Crude%20Oil%20Characteristics%20Research%20SAE%20Plan.pdf>.

²³ See http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1_2_14%20Rail_Safety_Alert.pdf.

²⁵ <https://www.regulations.gov/docket?D=PHMSA-2015-0253>.

²⁶ The vapor pressure of ethanol is RVP (at 100 F) is 2.0 psi.

the transport of crude oil by rail? What portion of current carloads would be out of compliance with the standard proposed in P-1669? Similarly, how many cargo ship shipments, truck shipments and barrels of oil transported by pipeline would be affected by adopting the standard proposed in P-1669?

9. What are the expected impacts of establishing a nationwide vapor pressure standard for crude oil intended for transportation in commerce? Should that standard apply to all modes of transportation or be limited to specific modes? What are the costs and benefits of those impacts? Please provide information and data, and include references and sources for information and data provided.

10. Should there be different vapor pressure limits depending on the specific circumstances of the shipment, such as the mode, the quantity of material or whether the shipment will travel through populated areas?

11. Are there other risk factors that should be considered instead of, or in addition to, vapor pressure (e.g., a material's flammability range, specific heat or heat of vaporization)? How do these risk factors affect the magnitude of release or the likelihood of fire resulting from an accident?

12. While offerors would be legally responsible for compliance with a volatility standard, it may be that actual compliance would be more cost-effectively implemented at some other point in the supply chain. What physical, institutional, or legal arrangements would be needed for implementation of a vapor pressure standard?

13. What types of additional technology, equipment, labor, and changes to existing operations would be needed for the establishment of a nationwide vapor pressure standard for crude oil intended for transportation in commerce? What would be the initial and recurring, and fixed and variable costs? If changes to existing operations would involve additional labor, then please provide the additional time by activity and labor category.

14. To what extent can a vapor pressure standard be implemented within the existing system? At what point would additional investments be required? What level of infrastructure change would be needed? Is this level affected by seasonal and market demands? How do the answers to these questions change if crude oil production returned to historically high volume levels?

15. What additional types of training would be needed for the establishment of a nationwide vapor pressure standard for crude oil? What would be the initial and recurring costs?

16. Compared to the current baseline, what would be the changes to production, pre-treatment, conditioning or stabilization, loading, and transport of petroleum crude oil if PHMSA establishes a nationwide vapor pressure standard?

17. How should the effectiveness and benefits of a rulemaking establishing a nationwide vapor pressure standard for crude oil be measured?

18. In order to estimate benefits of a rulemaking, what consequences would be

mitigated or prevented by establishing a nationwide vapor pressure standard for crude oil? Have there been any U.S. crude-by-rail accidents where a lower vapor pressure would have made a difference in the outcome? If yes, please provide all relevant details to support the conclusion.

19. If PHMSA were to adopt the vapor pressure threshold requested by the petitioner (or another threshold), what timeframe would be needed to comply with the new requirements to implement the needed treatment infrastructure throughout the network of offerors?

20. If PHMSA were to establish a nationwide vapor pressure standard, should any other Class 3 hazardous materials besides crude oil be subject to a vapor pressure limit? If so, which ones? Please provide the basis for your comment.

21. If PHMSA were to establish a nationwide vapor pressure standard, should it apply to the highway mode of transportation? What is the impact of a vapor pressure standard on the current highway fleet capacity? If highway transportation is included, what is the increased exposure for highway deaths and injuries? How does this compare to exposure in rail transportation?

22. What other properties of Class 3 hazardous materials are important to consider when setting vapor pressure limits? For example, are the following properties important: Lower and upper explosive limits, evaporations rates, etc.?

23. Would the flammable gases removed from the crude oil be transported by tank cars or cargo tanks? If so, how many additional tank cars or cargo tank shipments of flammable gases would be required? What are the safety consequences of transporting such materials or how might PHMSA quantify such consequences? How would this impact the overall risk assessment?

24. Given the risks associated with transporting large quantities of flammable liquids, are there measures that PHMSA should consider as an alternative or in addition to addressing material properties such as vapor pressure or flammability range, etc.?

B. Safety Questions

1. Do the current HMR adequately consider the risks that flammable liquids containing dissolved flammable or nonflammable gases present?

2. Should vapor pressure be used to delineate gases (and liquids with high vapor pressures) from liquids with low vapor pressures? If so, is the current definition of a gas sufficient or should a different threshold (i.e., vapor pressure or temperature) be utilized? Answers should also include specification to measurement method (including V/L ratio) and sampling method, if necessary, for that determination when recommending different thresholds.

3. Should unrefined petroleum products not completely gaseous at 20 °C but having a vapor pressure greater than 300 kPa at 50 °C be subjected to the testing in § 173.115(a)(2) to determine whether that material should be regulated as flammable gas? If yes, what affect would this have on other Class 3 hazardous materials?

4. Should PHMSA consider adopting a new Hazardous Materials Table (HMT; § 172.101) entry for petroleum crude oil with a high-concentration of dissolved gases that is similar to the entry for UN3494, Petroleum sour crude oil, flammable, toxic?²⁷

5. Do flammable liquids containing dissolved flammable and nonflammable gases have implications for the response community, such as hazard communication or response considerations, that the agency should consider?

6. If Petition P-1669 were adopted, would there be an impact in the transportation of other flammable products, and if so, what would they be?

C. Vapor Pressure Questions

1. Would the use of RVP, True Vapor Pressure, VPCR_x, or some other standard be the best method for measuring vapor pressure for classification and packaging? Does this method appropriately account for liquids containing dissolved flammable and non-flammable gases under non-equilibrium conditions? What volume to liquid ratio and temperature would be most suitable? Why?

2. Would the definition for "live" and "dead" crude oils from ASTM D6377 and other standards be relevant or useful in setting a vapor pressure limit?

3. Is there a unit of measure for how much dissolved flammable and non-flammable gases contribute to the vapor pressure, volatility, and flammability of crude oil?

4. Are there any materials currently classified as a flammable liquid within the HMR that would be impacted by a vapor pressure threshold?

5. What are the observed vapor pressures of tight crude oil in various stages of production, stabilization, and transportation? Please explain the conditions under which sampling and testing was performed.

6. Have any other nations established vapor pressure limits for transporting crude oil or other flammable liquids by any mode? If so, which nations, what limits do they use, and what information did they use to support the specific limits?

7. Petition P-1669 recommends a RVP of no greater than 9.0 psi. In contrast, the NDIC implemented a maximum vapor pressure threshold of 13.7 psi (VPCR₄ as defined in ASTM D6377). If PHMSA were to establish a national vapor pressure limit, what should it be?

8. Has any source compiled comprehensive and reliable information regarding the vapor pressures of Class 3 flammable liquid hazardous materials involved in transportation accidents, as well as information about the nature, characteristics and consequences associated with those accidents? Has any source conducted statistical or other scientific analysis regarding the relationship between vapor pressure and the consequences of transportation accidents?

²⁷ 49 CFR 172.102(c)(1), Special Provision 343—A bulk packaging that emits hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard must be marked as specified in § 172.327 of this part.

D. Packaging Questions

1. Would further limiting the filling capacity be an effective method for reducing the risks associated with Class 3 hazardous materials containing dissolved gases?

VI. Regulatory Review and Notices

A. Executive Order 12866, Executive Order 13563, Executive Order 13610, and DOT Regulatory Policies and Procedures

This ANPRM is considered a significant regulatory action under section 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget (OMB). It is considered a significant regulatory action under the Regulatory Policies and Procedures order issued by the Department of Transportation. 44 FR 11034 (Feb. 26, 1979).

Executive Orders 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993), and 13563, “Improving Regulation and Regulatory Review,” 76 FR 3821 (Jan. 21, 2011), require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” Executive Order 13610, “Identifying and reducing Regulatory Burdens,” 77 FR 28469 (May 14, 2012), urges agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.

Additionally, Executive Orders 12866, 13563, and 13610 require agencies to provide a meaningful opportunity for public participation. Accordingly, PHMSA invites comments on these considerations, including any cost or benefit figures or factors, alternative approaches, and relevant scientific, technical and economic data. These comments, along with the information provided by the New York State Office of the Attorney General, will help PHMSA evaluate whether regulatory action is warranted and appropriate.

B. Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 10, 1999), requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” PHMSA invites

State and local governments with an interest in this rulemaking to comment on any effect that may result if Petition P-1669 is adopted.

C. Executive Order 13175

Executive Order 13175, “Consultation and Coordination and Indian Tribal Governments,” 65 FR 67249 (Nov. 9, 2000), requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that significantly or uniquely affect Indian communities by imposing “substantial direct compliance costs” or “substantial direct effects” on such communities or the relationship and distribution of power between the Federal Government and Indian tribes. PHMSA invites Indian tribal governments to provide comments on the costs and effects the petitions and recommendations could have on them, if adopted.

D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

Under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.*, PHMSA must consider whether a rulemaking would have a “significant economic impact on a substantial number of small entities.” “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000.

It is possible that if PHMSA proposes to adopt the revisions suggested in Petition P-1669, there may be a “significant economic impact on a substantial number of small entities.” As such, PHMSA would like small entities’ input on the issues presented in this ANPRM. If you believe that revisions to the HMR would have a significant economic impact on a substantial number of small entities, please provide information on such impacts.

Any future proposed rule would be developed in accordance with Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 68 FR 7990 (Feb. 19, 2003), and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, 5 CFR 1320.8(d) requires that PHMSA provide interested members of the public and affected agencies an

opportunity to comment on information collection and recordkeeping requests. This ANPRM does not impose new information collection requirements. PHMSA specifically requests comments on the information collection and recordkeeping burdens that may result if Petition P-1669 is adopted.

F. Environmental Assessment

The National Environmental Policy Act of 1969, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations require Federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. See 40 CFR 1508.9(b). PHMSA welcomes any data or information related to environmental impacts that may result if Petition P-1669 is adopted, as well as possible alternatives and their environmental impacts.

G. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, see 65 FR 19477, or you may visit <http://www.regulations.gov>.

H. Executive Order 13609 and International Trade Analysis

Under Executive Order 13609, “Promoting International Regulatory Cooperation,” 77 FR 26413 (May 4, 2012), agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, regulatory approaches developed through international cooperation can provide equivalent protection to standards developed independently while also minimizing unnecessary differences.

Similarly, the Trade Agreements Act of 1979, Pub. L. 96–39, as amended by the Uruguay Round Agreements Act, Pub. L. 103–465, prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and PHMSA has assessed the effects of the proposed rule to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this rulemaking is consistent with Executive Order 13609 and PHMSA's obligations under the Trade Agreement Act, as amended.

PHMSA welcomes any data or information related to international impacts that may result if Petition P–1669 is adopted, as well as possible alternatives and their international impacts. Please describe the impacts and the basis for the comment.

I. Statutory/Legal Authority for This Rulemaking

This ANPRM is published under the authority of 49 U.S.C. 5103(b), which authorizes the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.” The intent of this ANPRM is to address the safety concerns raised by Petition P–1669 in respect to the transportation of hazardous materials in commerce. Our goal in this ANPRM is to gather the necessary information to determine a course of action in a potential Notice of Proposed Rulemaking (NPRM).

J. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

K. Executive Order 13211

Executive Order 13211, 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” Under the executive order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, ANPRM, and NPRM) that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

PHMSA welcomes any data or information related to energy impacts that may result if P–1669 is adopted, as well as possible alternatives and their energy impacts. Please describe the impacts and the basis for the comment.

Issued in Washington, DC, on January 10, 2017, under the authority of 49 U.S.C. 5103(b).

Anthony R. Foxx,

Secretary of Transportation.

[FR Doc. 2017–00913 Filed 1–17–17; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 161031999–7017–01]

RIN 0648–BG41

International Fisheries; Pacific Tuna Fisheries; 2017 and 2018 Commercial Fishing Restrictions for Pacific Bluefin Tuna in the Eastern Pacific Ocean

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) is proposing regulations under the Tuna Conventions Act to implement Resolution C–16–08 (*Measures for the Conservation and Management of Bluefin Tuna in the Eastern Pacific Ocean*). This Inter-American Tropical Tuna Commission (IATTC) Resolution establishes annual and trip catch limits on commercial

catch of Pacific bluefin tuna (*Thunnus orientalis*) in waters of the eastern Pacific Ocean (EPO) for 2017 and 2018. This action is necessary for the United States to satisfy its obligations as a member of the IATTC.

DATES: Comments on the proposed rule and supporting documents must be submitted in writing by February 17, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2016–0141, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0141, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Celia Barroso, NMFS West Coast Region Long Beach Office, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802. Include the identifier “NOAA–NMFS–2016–0141” in the comments.

Instructions: Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Copies of the draft Regulatory Impact Review (RIR) and other supporting documents are available via the Federal eRulemaking Portal:

www.regulations.gov, docket NOAA–NMFS–2016–0141, or contact with the Regional Administrator, Barry A. Thom, NMFS West Coast Region, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232–1274, or RegionalAdministrator.WCRHMS@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Celia Barroso, NMFS, 562–432–1850, Celia.Barroso@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background on the IATTC

The United States is a member of the IATTC, which was established in 1949 and operates under the Convention for the Strengthening of the IATTC Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention). See: www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf.

The IATTC consists of 21 member nations and four cooperating non-member nations, and facilitates scientific research into, as well as the conservation and management of, tuna and tuna-like species in the IATTC Convention Area (Convention Area). The Convention Area is defined as waters of the EPO within the area bounded by the west coast of the Americas and by 50° N. latitude, 150° W. longitude, and 50° S. latitude. The IATTC maintains a scientific research and fishery monitoring program, and regularly assesses the status of tuna, sharks, and billfish stocks in the EPO to determine appropriate catch limits and other measures deemed necessary to promote sustainable fisheries and prevent the overexploitation of these stocks.

International Obligations of the United States Under the Convention

As a Party to the Antigua Convention and a member of the IATTC, the United States is legally bound to implement decisions of the IATTC. The Tuna Conventions Act (16 U.S.C. 951 *et seq.*) directs the Secretary of Commerce, in consultation with the Secretary of State and, with respect to enforcement measures, the U.S. Coast Guard, to promulgate such regulations as may be necessary to carry out the United States' obligations under the Antigua Convention, including recommendations and decisions adopted by the IATTC. The authority of the Secretary of Commerce to promulgate such regulations has been delegated to NMFS.

Pacific Bluefin Tuna Stock Status

In 2011, NMFS determined overfishing was occurring on Pacific bluefin tuna (76 FR 28422, May 17, 2011), which is considered a single Pacific-wide stock. Based on the results of a 2012 stock assessment conducted by the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean (ISC), NMFS determined Pacific bluefin tuna was not only subject to overfishing, but was also overfished (78 FR 41033, July 9, 2013). Subsequently, based on

the results of the 2014 ISC stock assessment, NMFS determined that Pacific bluefin tuna continued to be overfished and subject to overfishing (80 FR 12621, March 10, 2015).

Pacific Bluefin Tuna Resolution

Recognizing the need to reduce fishing mortality of Pacific bluefin tuna, the IATTC has adopted catch limits in the Convention Area since 2012 (see the final rule implementing Resolution C-14-06 for more information on previous management measures (80 FR 38986, July 8, 2015)). At its resumed 90th Meeting in October 2016, the IATTC adopted Resolution C-16-08. The resolution and subject of this rulemaking was approved by the Secretary of State, thereby prompting implementation by NMFS. Resolution C-16-08 reaffirms that, “. . . the IATTC scientific staff recommend[ed] extending the measures established in the current resolution [Resolution C-14-06] for two more years.”

In 2015, the Western and Central Pacific Fisheries Commission (WCPFC), which has purview over the management of highly migratory fish stocks in the western and central Pacific Ocean, revised a 2014 conservation and management measure for Pacific bluefin tuna intended to decrease the level of fishing mortality (CMM 2015-04). Additionally, the IATTC and the WCPFC have agreed to hold annual joint working group meetings intended to develop a Pacific-wide approach to the management of Pacific bluefin tuna. The first meeting took place August 29 through September 2, 2016, and the second meeting is scheduled for late August 2017. Future conservation measures adopted by the IATTC and WCPFC for Pacific bluefin tuna are also expected to be based, in part, on information and advice from the ISC, which recently completed a stock assessment in 2016 and intends to provide an update in 2018.

Similar to Resolution C-14-06 (applicable 2015 to 2016), the main objective of Resolution C-16-08 is to reduce overfishing and to conserve and rebuild the stock by setting limits on the commercial catch of Pacific bluefin tuna in the IATTC Convention Area during 2017 and 2018. C-16-08 establishes a combined catch limit of 600 metric tons (mt) for 2017 and 2018 applicable to commercial vessels of each member or cooperating non-member, except Mexico, with a historical record of Pacific bluefin tuna catch from the EPO (such as the United States). Total catch is not to exceed 425 mt in a single year.

Council Recommendations for the Implementation of C-16-08

In accordance with a November 2014 Pacific Fishery Management Council (Council) recommendation, NMFS established trip limits when implementing Resolution C-14-06. At its November 2016 meeting, the Council again recommended that the same two trip limits be established: (1) an initial 25 mt trip limit from the start of the year until catch is within 50 mt of the catch limit and (2) a 2 mt trip limit through the end of the year (or until fishing is closed) when the catch for the year is within 50 mt of the catch limit.

Pacific Bluefin Tuna Catch History

While Pacific bluefin tuna catch by U.S. commercial vessels fishing in the Convention Area exceeded 1,000 mt per year in the early 1990s, annual catches have remained below 500 mt for more than a decade. The U.S. commercial catch of Pacific bluefin tuna in the Convention Area for the years 2002 to 2016 can be found in Table 1 below. The average annual Pacific bluefin tuna catch landed by U.S. commercial vessels fishing in the Convention Area from 2011 to 2015 represents only one percent of the average annual landings for all fleets fishing in the Convention Area during that period. For information on Pacific bluefin tuna harvests in the Convention Area through 2015, see http://isc.fra.go.jp/fisheries_statistics/index.html; for preliminary information on Pacific bluefin tuna harvest in the Convention Area in 2016, see www.iattc.org/CatchReportsDataENG.htm.

TABLE 1—ANNUAL U.S. COMMERCIAL CATCH, IN METRIC TONS (MT), OF PACIFIC BLUEFIN TUNA IN THE EASTERN PACIFIC OCEAN FROM 2002 TO 2016

Year	Catch (mt)
2002	62
2003	40
2004	11
2005	208
2006	2
2007	44
2008	1
2009	416
2010	1
2011	118
2012	42
2013	11
2014	408
2015	96

TABLE 1—ANNUAL U.S. COMMERCIAL CATCH, IN METRIC TONS (MT), OF PACIFIC BLUEFIN TUNA IN THE EASTERN PACIFIC OCEAN FROM 2002 TO 2016—Continued

Year	Catch (mt)
2016	*343

Source: Highly Migratory Species Stock Assessment and Fishery Evaluation: www.pcouncil.org/highly-migratory-species/stock-assessment-and-fishery-evaluation-safe-documents/current-hms-safe-document/

*Preliminary estimate of 2016 Pacific bluefin tuna landed catch by United States based on communications with California Department of Fish and Wildlife on December 9, 2016.

Proposed Regulations for Pacific Bluefin Tuna for 2017–2018

This proposed rule would establish catch limits for U.S. commercial vessels that catch Pacific bluefin tuna in the Convention Area for 2017 and 2018. In 2017, the catch limit for the entire U.S. fleet is 425 mt. In 2018, NMFS will announce the catch limit in a **Federal Register** notice, which will be calculated to correspond with the limits established in Resolution C–16–08 (*i.e.*, not to exceed 425 mt in a year). The 2018 catch limit will be calculated as the remainder from 2017 (*i.e.*, how much of 425 mt was not caught) added to 175 mt, except as follows: 1) if 175 mt or less is caught in 2017, then the 2018 catch limit is 425 mt; or 2) if greater than 425 mt is caught in 2017, then the catch limit in 2018 will be further reduced by the amount in excess of 425 mt (*i.e.*, the remainder of the 600 mt limit for 2017–2018).

In each year, a 25 mt trip limit would be in effect until catch is within 50 mt of the annual limit, at which time NMFS would impose a 2 mt trip limit through the end of the year or until fishing is closed. NMFS will publish a notice in the **Federal Register** when the 2 mt trip limit is imposed.

When NMFS determines that the catch limit is expected to be reached in 2017 or 2018 (based on landings receipts, data submitted in logbooks, and other available fishery information), NMFS will prohibit commercial fishing for, or retention of, Pacific bluefin tuna for the remainder of the calendar year. NMFS will also publish a notice in the **Federal Register** announcing that the targeting, retaining, transshipping or landing of Pacific bluefin tuna will be prohibited on a specified effective date through the end of that calendar year. Upon that effective date, a commercial fishing vessel of the United States may not be used to target, retain on board, transship, or land Pacific bluefin tuna

captured in the Convention Area during the period specified in the announcement. However, any Pacific bluefin tuna already on board a fishing vessel on the effective date may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided that they are landed within 14 days after the effective date. NMFS is also proposing to revise a paragraph in the prohibitions section solely to update its reference to another paragraph—the proposed revised Pacific bluefin tuna regulations.

Proposed Catch Monitoring

NMFS would provide updates on Pacific bluefin tuna catches in the Convention Area to the public via the IATTC listserv and the NMFS West Coast Region Web site: www.westcoast.fisheries.noaa.gov/fisheries/migratory_species/bluefin_tuna_harvest_status.html. NMFS would also report preliminary estimates of Pacific bluefin tuna catch between monthly intervals if and when total catch approaches the limits to help participants in the U.S. commercial fishery plan for the possibility of the catch limit being reached.

Endangered Species Act Petition

In June 2016, NMFS received a petition to list Pacific bluefin tuna as endangered or threatened under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* NMFS subsequently found that the petition may be warranted and has initiated a status review (81 FR 70074, October 11, 2016). The petition under the Endangered Species Act regarding a scientific determination about the status of Pacific bluefin tuna is distinct from this proposed rulemaking to restrict commercial fisheries under the Tuna Conventions Act.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Additionally, although there are no new collection-of-information requirements associated with this action that are subject to the Paperwork Reduction Act, existing collection-of-information requirements associated with the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) still apply. These requirements have been approved by the Office of Management and Budget under Control Number

0648–0204. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection-of-information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number.

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The rationale for the certification is provided in the following paragraphs.

The U.S. Small Business Administration (SBA) defines a “small business” (or “small entity”) as one with annual revenue that meets or is below an established size standard. On December 29, 2015, NMFS issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194). The \$11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. SBA current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *Id.* at 81194.

U.S. commercial catch of Pacific bluefin tuna from the Convention Area is primarily made in waters off of California by the coastal pelagic small purse seine fleet, which targets Pacific bluefin tuna opportunistically, and other fleets (*e.g.*, California large-mesh drift gillnet, surface hook-and-line, west coast longline, and Hawaii’s pelagic fisheries), which catch Pacific bluefin tuna incidentally. The small entities the proposed action would directly affect are all U.S. commercial fishing vessels that may target (*e.g.*, coastal pelagic purse seine vessels) or incidentally catch (*e.g.*, drift gillnet) Pacific bluefin tuna in the Convention Area; however, not all vessels that have participated in this fishery decide to do so every year. Implementation of the annual catch limits for 2017 and 2018 in this proposed action is not expected to result in changes in current fishery operations as the annualized catch limit is above recent annual average catch by all fleets

(average annual catch from 2006 to 2015 was 114 mt). Additionally, from 2006 to 2015, incidental landings of Pacific bluefin tuna have not exceeded 2 mt per trip.

Revenues of coastal purse seine vessels are not expected to be significantly altered as a result of this proposed rule. Since 2006, the average annual revenue per vessel from all finfish fishing activities for the U.S. purse seine fleet that have landed Pacific bluefin tuna has been less than \$11 million, whether considering an individual vessel or per vessel average. Since 2006, in years Pacific bluefin tuna was landed, purse seine vessels that caught Pacific bluefin tuna had an average annual income of about \$1.7 million per vessel (based on all species landed). Annually, from 2011 to 2015, the number of small coastal pelagic purse seine vessels that landed Pacific bluefin tuna in the Convention Area ranged from zero to five. In 2011 and 2012, fewer than three vessels targeted Pacific bluefin tuna; therefore, their landings and revenue are confidential. In 2013, the coastal purse seine fishery did not land Pacific bluefin tuna. In 2014 and 2015, four and five vessels landed Pacific bluefin tuna, respectively. In 2014, eight purse seine vessels fishing in the Convention Area landed HMS in California, but only four of them were involved in landing roughly 401 mt of Pacific bluefin tuna, worth about \$588,000, in west coast ports. Similarly, in 2015, 11 vessels fishing in the Convention Area landed HMS in California, but only 5 vessels landed approximately 86 mt of Pacific bluefin tuna, worth about \$75,000.

The revenue derived from Pacific bluefin tuna is a fraction of the overall revenue for coastal pelagic purse seine vessels (3.9 percent annually from 2006–2015) as they typically harvest other species, including Pacific sardine, Pacific mackerel, squid, and anchovy. The value of Pacific bluefin tuna in coastal pelagic purse seine fishery from 2006–2015 is \$1.31/kilogram. This amount is negligible relative to the fleet's annual revenue resulting from other species. Prior to 2015, the Pacific bluefin tuna fishery was not subject to trip limits. From 2006 through 2014, 62.5 percent of trips by coastal purse seine vessels targeting Pacific bluefin tuna landed greater than 25 mt of Pacific bluefin tuna. However, landings did not exceed 25 mt in 2015 after the trip limits became effective on July 9, 2015. Future regulatory discards, if any, will be negligible both in volume and value because a vessel is likely to end fishing for Pacific bluefin tuna when the 25 mt trip limit is met.

Since 2006, the average annual revenue per vessel from all finfish fishing activities for the U.S. fleet with incidental landings of Pacific bluefin tuna has been less than \$11 million. These vessels include drift gillnet, surface hook-and-line, and longline gear-types. As stated earlier, the revenues of these vessels are also not expected to be significantly altered by the rule. From 2011 to 2015, the number of drift gillnet, surface hook-and-line, and longline vessels that participated in this fishery range from 11 to 12, 1 to 50, and 1 to 8, respectively. During these years, vessels with incidental landings landed an annual average of 6.3 mt of Pacific bluefin tuna, worth approximately \$32,600, without exceeding 2 mt per trip. As a result, it is anticipated that the annual and trip limits will not impact vessels landing incidentally-caught Pacific bluefin tuna.

Pursuant to the RFA and NMFS' December 29, 2015, final rule (80 FR 81194), this certification was developed for this action using NMFS' revised size standards. NMFS considers all entities subject to this action to be small entities as defined by both the former, lower size standards and the revised size standards. Because each affected vessel is a small business, there are no disproportional affects to small versus large entities. Based on profitability analysis above, the proposed action, if adopted, will not have significant adverse economic impacts on these small business entities. As a result, an Initial Regulatory Flexibility Analysis is not required, and was not prepared for this proposed rule.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: January 9, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951et seq.

■ 2. In § 300.24, revise paragraph (u) to read as follows:

§ 300.24 Prohibitions.

* * * * *

(u) Use a United States commercial fishing vessel in the Convention Area to target, retain on board, transship or land Pacific bluefin tuna in contravention of § 300.25(g)(3) through (5).

* * * * *

■ 4. In § 300.25, revise paragraph (g) to read as follows:

§ 300.25 Eastern Pacific fisheries management.

* * * * *

(g) *Pacific bluefin tuna* (*Thunnus orientalis*) commercial catch limits in the eastern Pacific Ocean for 2017–2018. The following is applicable to the U.S. commercial fishery for Pacific bluefin tuna in the Convention Area in the years 2017 and 2018.

(1) For the calendar year 2017, all commercial fishing vessels of the United States combined may capture, retain, transship, or land no more than 425 metric tons in the Convention Area.

(2) In 2018, NMFS will publish a notice in the **Federal Register** announcing the 2018 catch limit. For the calendar year 2018, all commercial fishing vessels of the United States combined may capture, retain on board, transship, or land no more than the 2018 annual catch limit. The 2018 catch limit is calculated by adding any amount of the 425 metric ton catch limit that was not caught in 2017, as determined by NMFS, to 175 metric tons, except as follows:

(i) If 175 metric tons or less are caught in 2017, as determined by NMFS, then the 2018 catch limit is 425 metric tons; or,

(ii) If greater than 425 metric tons are caught in 2017, as determined by NMFS, then the 2018 catch limit is calculated by subtracting the amount caught in 2017 from 600 metric tons.

(3) In 2017 and 2018, a 25 metric ton trip limit will be in effect until NMFS anticipates that catch will be within 50 metric tons of the catch limit, after which a 2 metric ton trip limit will be in effect upon publication of a notice in the **Federal Register** by NMFS.

(4) After NMFS determines that the catch limits under paragraphs (g)(1) and (2) of this section are expected to be reached by a future date, NMFS will publish a fishing closure notice in the **Federal Register** announcing the effective date that targeting, retaining on board, transshipping or landing Pacific bluefin tuna in the Convention Area shall be prohibited as described in paragraph (g)(5) of this section.

(5) Beginning on the date announced in the fishing closure notice published under paragraph (g)(4) of this section through the end of the calendar year, a commercial fishing vessel of the United

States may not be used to target, retain on board, transship, or land Pacific bluefin tuna captured in the Convention Area, with the exception that any Pacific bluefin tuna already on board a fishing vessel on the effective date of the notice may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided such Pacific bluefin tuna is landed within 14 days after the effective date published in the fishing closure notice.

* * * * *

[FR Doc. 2017-00623 Filed 1-13-17; 4:15 pm]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 161020986-7012-01]

RIN 0648-BG38

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Amendment 36

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 36 to the Fishery Management Plan (FMP) for the Snapper-Grouper Fishery of the South Atlantic Region as prepared and submitted by the South Atlantic Fishery Management Council (Council). If implemented, this proposed rule would modify the FMP framework procedures to allow spawning special management zones (SMZs) to be established or modified through the framework process; establish spawning SMZs off North Carolina, South Carolina, and Florida; establish transit and anchoring provisions in the spawning SMZs; and establish a sunset provision for most of the spawning SMZs. This proposed rule would also move the boundary of the existing Charleston Deep Artificial Reef Marine Protected Area (MPA). The purpose of this proposed rule is to protect spawning snapper-grouper species and their spawning habitat, and to reduce bycatch and bycatch mortality for snapper-grouper species, including speckled hind and warsaw grouper.

DATES: Written comments on the proposed rule must be received by February 17, 2017.

ADDRESSES: You may submit comments on the proposed rule, identified by “NOAA-NMFS-2016-0153,” by either of the following methods:

- *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0153, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Frank Helies, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in required fields if you wish to remain anonymous).

Electronic copies of Amendment 36 may be obtained from www.regulations.gov or the Southeast Regional Office Web site at <http://sero.nmfs.noaa.gov>. Amendment 36 includes an environmental assessment, Regulatory Flexibility Act (RFA) analysis, regulatory impact review, and fishery impact statement.

FOR FURTHER INFORMATION CONTACT: Frank Helies, NMFS Southeast Regional Office, telephone: 727-824-5305, or email: frank.helies@noaa.gov.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery in the South Atlantic region is managed under the FMP and includes speckled hind and warsaw grouper, along with other snapper-grouper species. The FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Council developed Amendment 36 to protect spawning snapper-grouper species and their spawning habitat by prohibiting fishing for or harvest of snapper-grouper species in certain areas

year-round in Federal waters of the South Atlantic. Areas designated for protection would include habitat characteristics, bottom topography (hard and live bottom), and currents that provide essential fish habitat important for spawning snapper-grouper species. The Council determined that protecting spawning snapper-grouper and their associated habitats would allow these species to produce more larvae, and may subsequently increase snapper-grouper populations.

The Council also developed Amendment 36 to reduce bycatch and bycatch mortality of snapper-grouper species, including speckled hind and warsaw grouper. The snapper-grouper fishery in the South Atlantic is a highly regulated, multi-species fishery. Discards in the fishery can occur due to regulations, such as closed seasons, possession or size limits, or from catch and release of these species. For snapper-grouper species prohibited from harvest, such as speckled hind and warsaw grouper, fish discarded due to regulations are considered bycatch. The deep-water snapper-grouper species are further impacted due to high discard mortality rates (low survivability due to barotrauma). The Council concluded that prohibiting the use of certain fishing gear in specified areas where snapper-grouper are known to occur and possibly spawn would reduce encounters with these species and subsequently provide protection for reproduction. Spawning SMZs could provide long-term beneficial biological and socio-economic effects if spawning fish are sufficiently protected.

The Council has identified a total of five areas proposed to be considered as spawning SMZs in the South Atlantic off North Carolina, South Carolina, and Florida. These areas have been identified based on the documented occurrence of snapper-grouper species and analysis of spawning data, recommendations from the Council’s MPA Expert Work Group and Snapper-Grouper Advisory Panel, as well as cooperative research and public recommendations.

Amendment 36 also contains a 10-year sunset provision that would apply to most of the proposed spawning SMZs. The sunset provision would allow for most of the spawning SMZs to expire 10 years following the implementation date unless they are renewed. When deciding whether to renew a spawning SMZ, the Council may consider the evidence of spawning by snapper-grouper species in the spawning SMZ and whether a spawning SMZ is being monitored. The Council concluded that a 10-year sunset

provision would help to ensure that spawning SMZs are monitored and evaluated during this period to document snapper-grouper spawning within the sites.

The Council developed a system management plan (SMP) for the spawning SMZs proposed in Amendment 36. The SMP describes in detail the monitoring and evaluation requirements for the proposed spawning SMZs. The Council recognizes that monitoring the proposed spawning SMZs by academic, state, or NMFS personnel is necessary to evaluate their effectiveness. Therefore, the SMP outlines the potential monitoring partners and their roles.

In addition to the spawning SMZs proposed for a similar purpose through Amendment 36, the Council originally designated the Charleston Deep Artificial Reef MPA, located off South Carolina, in Amendment 14 to the Snapper-Grouper FMP (74 FR 1621, January 13, 2009) to add protected snapper-grouper habitat and contribute to adding fish biomass. Recently, the State of South Carolina worked with the U.S. Army Corps of Engineers to modify the boundary of this site to include additional substrate material that was sunk by the state in the area of this MPA. The State of South Carolina requested the Council shift the boundary of the existing Charleston Deep Artificial Reef MPA to match the new boundary of the artificial reef site. This proposed rule would align the Charleston Deep Artificial Reef MPA boundary with the site permitted by the U.S. Army Corps of Engineers, while retaining the size of the current MPA. This proposed rule would move the existing boundary around the Charleston Deep Artificial Reef MPA 1.4 mi (2.3 km) to the northwest.

Management Measures Contained in This Proposed Rule

This proposed rule would modify the FMP framework procedures to allow spawning SMZs to be established or modified through the framework process; establish spawning SMZs off North Carolina, South Carolina, and Florida; establish transit and anchoring provisions in the spawning SMZs; establish a sunset provision for most of the spawning SMZs; and move the existing Charleston Deep Artificial Reef MPA 1.4 mi (2.3 km) northwest to match the permitted site boundary.

Modify the FMP Framework Procedures for Spawning SMZs

Amending the FMP can require more detailed analyses and requires a lengthier prescribed timeline prior to

implementation. However, the current FMP contains framework procedures to allow the Council to modify certain management measures, such as annual catch limits and other management measures, via an expedited process (see 50 CFR 622.194; 56 FR 56016, October 31, 1991). Currently, SMZs cannot be modified under the framework process, so any changes to SMZs are required to be done through an FMP amendment. In Amendment 36 and this proposed rule, the Council has decided to include changes to spawning SMZs, such as boundary modifications and the establishment or removal of spawning SMZs, under the framework process. For example, this proposed rule would allow the Council to remove a spawning SMZ if monitoring efforts do not document evidence of spawning snapper-grouper species within the boundary. The proposed revisions to the FMP framework procedures would also allow the Council to remove the proposed 10-year sunset provision for a proposed spawning SMZ if monitoring efforts document snapper-grouper species' spawning inside a spawning SMZ. The Council has decided that changing spawning SMZs through an expedited process can have beneficial biological and socio-economic impacts, especially if the changes respond to newer information, such as spawning locations for snapper-grouper species. The Council has concluded that the framework process will allow adequate time for the public to comment on any proposed change related to a spawning SMZ.

Establish Spawning SMZs Off North Carolina, South Carolina, and Florida

The existing South Atlantic SMZs restrict the use of certain fishing gear in areas including artificial reefs, fish attraction devices, and other modified areas of habitat for fishing (50 CFR 622.182). Possession limits can also be regulated in SMZs. The original FMP established SMZs for artificial reefs to restrict certain fishing gear on artificial reefs (48 FR 49463, August 31, 1983). Currently, there are no spawning SMZs for snapper-grouper in the South Atlantic. The Council is proposing to establish five snapper-grouper spawning SMZs in the South Atlantic off North Carolina, South Carolina, and Florida. The proposed spawning SMZ off North Carolina would be called South Cape Lookout (5.1 sq mi; 13.2 sq km). The Council is proposing three spawning SMZs off South Carolina that would be called Devil's Hole/Georgetown Hole (3.03 sq mi; 7.8 sq km), Area 51 (approximately 3 sq mi; 7.8 sq km), and Area 53 (approximately 3 sq mi; 7.8 sq

km). The proposed spawning SMZ off the east coast of the Florida Keys would be called Warsaw Hole/50 Fathom Hole (3.64 sq mi; 9.4 sq km).

This proposed rule would prohibit fishing for or harvest of snapper-grouper species year-round in the proposed spawning SMZs. Certain other activities in the spawning SMZs would be restricted, including transiting with snapper-grouper species on board and anchoring.

Another purpose of spawning SMZs is to reduce bycatch and bycatch mortality of snapper-grouper species, including speckled hind and warsaw grouper. Currently, retention of speckled hind and warsaw grouper is prohibited in Federal waters in the South Atlantic. Prohibiting the targeting or harvest of snapper-grouper species in specified areas where these species are known to occur and possibly spawn would reduce encounters with these deep-water species and provide protection for reproduction. The Council concluded that protecting snapper-grouper species within the spawning SMZs could enhance the opportunity for these species to reproduce and provide more larvae into the environment. Spawning SMZs would also allow opportunities to monitor population changes in snapper-grouper species and further refine protection of spawning habitat.

Establish Transit and Anchoring Provisions in Spawning SMZs

This proposed rule would allow vessels to transit through the proposed spawning SMZs with snapper-grouper species on board when fishing gear is properly stowed. "Properly stowed" means that trawl or try nets and the attached doors must be out of the water, but would not be required to be on deck or secured below deck. Terminal gear (hook, leader, sinker, flasher, or bait) used with automatic reels, bandit gear, buoy gear, handline, or rod and reel would have to be disconnected and stowed separately from such fishing gear and sinkers would have to be disconnected from down riggers and stowed separately. Vessels in the spawning SMZs would be prohibited from fishing for, harvest, or possession of snapper-grouper species year-round in these areas. Except for the experimental artificial reefs Area 51 and Area 53 off South Carolina, persons on board a fishing vessel would not be allowed to anchor, use an anchor or chain, or use a grapple and chain while in spawning SMZs. Fishermen would continue to be allowed to troll for pelagic species such as dolphin, tuna, and billfish in spawning SMZs.

Establish a Sunset Provision for Most Spawning SMZs

This proposed rule would implement a 10-year sunset provision for the establishment of the spawning SMZs, except for the Area 51 and Area 53 Spawning SMZs, which will remain in effect indefinitely. Thus, except for the latter two areas, the proposed spawning SMZs and their associated management measures would be effective for 10 years following the implementation of a final rule for Amendment 36. For the proposed spawning SMZs and management measures subject to the sunset provision to extend beyond 10 years, the Council would need to evaluate the effectiveness of the spawning SMZs for conserving and protecting spawning snapper-grouper species, and subsequently take further action. The Council will regularly evaluate all of the spawning SMZs over the 10-year period. They concluded that this period was an appropriate timeframe to monitor the sites and determine whether a sufficient level of spawning by snapper-grouper species occurs to justify continued protection as spawning SMZs.

Move the Existing Charleston Deep Artificial Reef MPA

This proposed rule would move the existing Charleston Deep Artificial Reef MPA 1.4 mi (2.3 km) northwest to match the boundary of the U.S. Army Corps of Engineers' permitted artificial reef area at that location. This proposed rule would not change the size of the existing MPA. The Council originally designated the current area as an artificial reef site in Amendment 14. The State of South Carolina has worked with the U.S. Army Corps of Engineers to modify the boundary of this site to include material recently sunk by the state in the area and has requested that the Council shift their boundary of the existing Charleston Deep Artificial Reef MPA to match the new boundary of the U.S. Army Corps of Engineers' permitted artificial reef area.

Management Measure Contained in Amendment 36 but Not in This Proposed Rule

In addition to the management measures that this proposed rule would implement, Amendment 36 includes an action to modify the SMZ procedures in the FMP to allow for the designation of spawning SMZs. The Council would be able to designate important spawning areas as spawning SMZs to provide additional protection to some existing Essential Fish Habitat-Habitat Areas of Particular Concern for snapper-grouper

species. The Council concluded that designating areas as spawning SMZs is important to protect snapper-grouper species and habitat where snapper-grouper species spawn. Furthermore, the Council concluded that the designation of spawning SMZ sites in this proposed rule, and subsequent changes to regulations, would enhance reproduction for snapper-grouper species and thus increase the number of larvae that are produced by the species.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendment 36, the FMP, the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certifies to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

A description of this proposed rule, why it is being considered, and the objectives of this proposed rule are contained in the preamble and in the **SUMMARY** section of the preamble. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This proposed rule would apply to all federally-permitted commercial vessels, federally-permitted charter vessels and headboats (for-hire vessels), and private recreational anglers that fish for or harvest any of the species managed under the FMP in Federal waters. The RFA does not consider recreational anglers to be small entities, thus they are outside the scope of this analysis; only the effects on commercial and for-hire vessels will be analyzed.

As of May 25, 2016, there were 552 valid or renewable Federal South Atlantic snapper-grouper unlimited permits and 116 valid or renewable 225-lb (102.1-kg) trip-limited permits. Each of these commercial permits is associated with an individual vessel. Data from the years of 2010 through 2014 were used in Amendment 36 and these data provided the basis for the Council's decision. Although this proposed rule would apply to all commercial snapper-grouper Federal permit holders, it is expected that the vessels that harvest the species NMFS assumes to be most commonly

harvested within the proposed spawning SMZ areas would be most likely to be affected. These species include red porgy, vermilion snapper, scamp, greater amberjack, blueline tilefish, gag, and red grouper. On average from 2010 through 2014, there were 438 federally-permitted commercial vessels with reported landings of one or more of these species. Their average annual vessel-level revenue from all species for 2010 through 2014 was approximately \$47,000 (2014 dollars). In 2014, the maximum annual revenue reported by a single one of these vessels was approximately \$1 million (2014 dollars).

As of May 25, 2016, there were 1,502 valid Federal charter vessel/headboat (for-hire) permits for South Atlantic snapper-grouper. Although the for-hire permit application collects information on the primary method of operation, the permit itself does not identify the permitted vessel as either a charter vessel or a headboat and vessels may operate in both capacities. However, only federally-permitted headboats are required to submit harvest and effort information to the NMFS Southeast Region Headboat Survey (SRHS). Participation in the SRHS is based on determination by the Southeast Fishery Science Center that the vessel primarily operates as a headboat. As of February 22, 2016, 73 South Atlantic headboats were registered in the SRHS. As a result, the estimated 1,502 for-hire vessels that may be affected by this proposed rule are expected to consist of 1,429 charter vessels and 73 headboats. The average charter vessel is estimated to receive approximately \$117,000 (2014 dollars) in annual revenue. The average headboat is estimated to receive approximately \$207,000 (2014 dollars) in annual revenue.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. All of the commercial vessels directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard.

The SBA has established size standards for all major industry sectors in the U.S. including for-hire businesses (NAICS code 487210). A business

primarily involved in the for-hire fishing industry is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$7.5 million for all its affiliated operations worldwide. All of the for-hire vessels directly regulated by this proposed rule are believed to be small entities based on the SBA size criteria.

No other small entities that would be directly affected by this proposed rule have been identified.

There are currently 668 commercial vessels eligible to fish for the snapper-grouper species managed under the FMP. Based on the analysis included in Amendment 36, NMFS expects 438 of these vessels would be affected by this proposed rule (approximately 66 percent). In addition, there are 1,502 for-hire vessels eligible to fish for snapper-grouper species, all of which have the potential to be affected by this proposed rule. Because all of these commercial and for-hire fishing businesses are believed to be small entities, the issue of disproportionate effects on small versus large entities does not arise in the present case.

Amendment 36 would modify the SMZ procedures in the FMP to include protection of any area important for snapper-grouper spawning, including natural habitat, by designating spawning SMZs. Amendment 36 and this proposed rule would also modify the framework procedures for the FMP to include modifying or establishing spawning SMZs. These procedural changes would allow the Council to create or modify spawning SMZs, including areas of natural habitat, under the FMP framework process. However, the procedural changes to allow the Council to create or modify spawning SMZs would not directly regulate, nor restrict access to specific fishing grounds. As such, they would not be expected to directly affect the small entities identified in this analysis.

In addition to the procedural changes described above, this proposed rule would create specific spawning SMZs off North Carolina, South Carolina, and the east coast of Florida. Within each proposed spawning SMZ, fishing for, harvest, or possession of snapper-grouper species would be prohibited year-round. In addition, this proposed rule would move the existing Charleston Deep Artificial Reef MPA 1.4 mi (2.3 km) to the northwest to match the boundary of the U.S. Army Corps of Engineers' permitted artificial reef area. The size of the MPA would remain the same. No spawning SMZ would be

designated off Georgia. This proposed rule would allow vessels in possession of snapper-grouper species to transit through spawning SMZs as long as their fishing gear is properly stowed; however, anchoring would be prohibited in all spawning SMZs, except for Area 51 and Area 53.

The proposed 5.1-sq mi (13.2-sq km) South Cape Lookout Spawning SMZ off North Carolina is estimated to result in an annual decrease in total commercial ex-vessel revenues of \$588 (2014 dollars), assuming commercial vessels are unable to substitute landings from other areas. The proposed 3.03-sq mi (7.8-sq km) Devil's Hole/Georgetown Hole Spawning SMZ off South Carolina is estimated to result in an annual decrease in total ex-vessel revenue of \$86 (2014 dollars) using the same assumptions. Designation of the artificial reef sites, Area 51 and Area 53 (each 2.99 sq mi, 7.8 sq km), off South Carolina as spawning SMZs is not expected to affect ex-vessel revenue, because these artificial habitat locations were previously undisclosed to the public, and it is assumed there is very little fishing activity occurring there. The 3.6-sq mi (9.4-sq km) Warsaw Hole/50 Fathom Hole Spawning SMZ off the east coast of Florida is estimated to reduce total annual ex-vessel revenue by \$931 (2014 dollars). Again, this estimate assumes that commercial vessels will not substitute landings from other areas for the landings that are displaced by the spawning SMZs. For the proposed change to the Charleston Deep Artificial Reef MPA, because the size of the MPA would remain the same and there is little known fishing effort occurring near the existing MPA boundary, it is not expected to have a measurable effect on commercial ex-vessel revenue.

When all of the proposed spawning SMZs are analyzed together, they are estimated to result in an annual decrease in ex-vessel revenue of \$1,605 (2014 dollars). Divided across all of the commercial vessels expected to be affected by this proposed rule, this would result in a per-vessel annual decrease of only \$4. Even if the entire estimated reduction in revenue was borne by a single commercial vessel, it would represent a less than 4 percent reduction in total ex-vessel revenue on average. The model employed in this analysis assumed uniformly distributed effort within each logbook-reported area and did not account for potential redistribution of effort after each closure. If fishermen are harvesting species within the proposed spawning SMZ areas at a much higher rate than elsewhere in the South Atlantic, the effects of these closures on ex-vessel

revenue could be more substantial. Nevertheless, based on the small size of each area and the high likelihood that commercial vessels would substitute landings in other areas, it is assumed that any reduction in ex-vessel revenue from this proposed rule would be minimal. Also, because transit would be permitted through the spawning SMZs, any impact to travel costs resulting from the proposed rule is expected to be minimal as well. Finally, because commercial vessels would not be allowed to fish for snapper-grouper species in the spawning SMZs, the prohibition on anchoring would not be expected to result in any additional adverse economic effects.

With respect to for-hire businesses, the spawning SMZs in this proposed rule would place restrictions on where charter vessels and headboats can take paying customers but would not directly alter the services sold by these vessels. Therefore, direct effects on for-hire vessels resulting from this proposed rule would be limited to potential increases in travel time and fuel consumption from having to change their usual fishing locations, travel around the proposed spawning SMZs, or transit through them with their gear properly stowed. Because of the small size of the proposed spawning SMZs relative to all available fishing grounds, their substantial distance from shore, and the negligible amount of harvest from for-hire vessels estimated to occur in those areas, this proposed rule is not expected to have a measurable effect on for-hire vessel costs. With respect to potential changes in for-hire revenue, any impact that results from the proposed spawning SMZs would be a consequence of a change in recreational angler demand for for-hire services and, therefore, an indirect effect of the proposed rule. Because these potential revenue effects are indirect, they fall outside the scope of the RFA.

Finally, the sunset provision contained in this proposed rule would remove most of the spawning SMZs 10 years after implementation if not reauthorized by the Council, except for the Area 51 and Area 53 Spawning SMZs, which would remain. Although this sunset provision sets a deadline for evaluating the success of spawning SMZs and reauthorizing them, it is not expected to directly influence the duration of each spawning SMZ, because the Council would have the authority to modify the spawning SMZs at any time through the FMP framework procedures as described in this proposed rule. Therefore, the sunset provision would not be expected to

directly affect commercial or for-hire fishing businesses.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed rule. Accordingly, this proposed rule does not implicate the Paperwork Reduction Act.

The information provided above supports a determination that this proposed rule would not have a significant economic impact on a substantial number of small entities. Because this proposed rule, if implemented, is not expected to have a significant economic impact on any small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Marine protected area, South Atlantic, Special management zone.

Dated: January 10, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.183, revise the table in paragraph (a)(1)(i)(D) and add paragraph (a)(2) to read as follows:

§ 622.183 Area and seasonal closures.

- (a) * * *
- (1) * * *
- (i) * * *
- (D) * * *

Point	North lat.	West long.
A	32°05.04'	79°13.575'.
B	32°09.65'	79°09.2'.
C	32°07.155'	79°05.595'.
D	32°02.36'	79°09.975'.
A	32°05.04'	79°13.575'.

* * * * *

(2) *Spawning SMZs.* (i) Any fishing vessel in a spawning SMZ is prohibited to fish for or harvest species in the snapper-grouper fishery management unit year-round. For a fishing vessel to possess snapper-grouper species on board while in a spawning SMZ, the vessel must be in transit and fishing

gear must be appropriately stowed, as specified in paragraph (a)(2)(vii) of this section. Except for spawning SMZs of Area 51 and Area 53, the spawning SMZs in this paragraph are effective until [date 10 years and 30 days from the publication of the final rule in the *Federal Register*]. A person on board a fishing vessel may not anchor, use an anchor and chain, or use a grapple and chain while in the spawning SMZs specified in paragraph (a)(2) of this section. The anchoring prohibition does not apply to fishing vessels in the spawning SMZs of Area 51 and Area 53.

(ii) *South Cape Lookout Spawning SMZ* is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	33°53.040' ...	76°28.617'.
B	33°52.019' ...	76°27.798'.
C	33°49.946' ...	76°30.627'.
D	33°51.041' ...	76°31.424'.
A	33°53.040' ...	76°28.617'.

(iii) *Devil's Hole/Georgetown Hole Spawning SMZ* is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	32°34.311' ...	78°33.220'.
B	32°34.311' ...	78°34.996'.
C	32°32.748' ...	78°34.996'.
D	32°32.748' ...	78°33.220'.
A	32°34.311' ...	78°33.220'.

(iv) *Area 51 Spawning SMZ* is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	32°35.25'	79°28.6'.
B	32°35.25'	79°27'.
C	32°33.75'	79°27'.
D	32°33.75'	79°28.6'.
A	32°35.25'	79°28.6'.

(v) *Area 53 Spawning SMZ* is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	32°22.65'	79°22.25'.
B	32°22.65'	79°20.5'.
C	32°21.15'	79°20.5'.
D	32°21.15'	79°22.25'.
A	32°22.65'	79°22.25'.

(vi) *Warsaw Hole/50 Fathom Hole Spawning SMZ* is bounded by rhumb lines connecting, in order, the following points:

Points	North lat.	West long.
A	24°22.277' ...	82°20.417'.
B	24°22.277' ...	82°18.215'.
C	24°20.932' ...	82°18.215'.
D	24°20.932' ...	82°20.417'.
A	24°22.277' ...	82°20.417'.

(vii) For the purpose of paragraph (a)(2)(i) of this section, transit means direct, non-stop progression through the spawning SMZ. Fishing gear appropriately stowed means—

(A) A longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck. Hooks cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.

(B) Trawl doors and nets must be out of the water, but the doors are not required to be on deck or secured on or below deck.

(C) A gillnet, stab net, or trammel net must be left on the drum. Any additional such nets not attached to the drum must be stowed below deck.

(D) Terminal gear (*i.e.*, hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. Sinkers must be disconnected from the down rigger and stowed separately.

(E) A crustacean trap, golden crab trap, or sea bass pot cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.

* * * * *

■ 3. In § 622.194, revise paragraph (a) to read as follows:

§ 622.194 Adjustment of management measures.

* * * * *

(a) Biomass levels, age-structured analyses, target dates for rebuilding overfished species, MSY (or proxy), OY, ABC, TAC, quotas (including a quota of zero), annual catch limits (ACLs), annual catch targets (ACTs), AMs, maximum fishing mortality threshold (MFMT), minimum stock size threshold (MSST), trip limits, bag limits, size limits, gear restrictions (ranging from regulation to complete prohibition), seasonal or area closures, fishing year, rebuilding plans, definitions of essential fish habitat, essential fish habitat, essential fish habitat HAPCs or Coral HAPCs, restrictions on gear and fishing activities applicable in essential fish habitat and essential fish habitat

HAPCs, and establish or modify spawning SMZs.

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[FR Doc. 2017-00859 Filed 1-13-17; 4:15 pm]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 160422356-7026-01]

RIN 0648-XE587

Pacific Island Fisheries; 2016 Annual Catch Limits and Accountability Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Proposed specifications; request for comments.

SUMMARY: NMFS proposes annual catch limits (ACLs) for Pacific Island bottomfish, crustacean, precious coral, and coral reef ecosystem fisheries, and accountability measures (AMs) to correct or mitigate any overages of catch limits. The proposed ACLs and AMs would be effective for fishing year 2016. The fishing year for each fishery begins on January 1 and ends on December 31, except for precious coral fisheries, which begin July 1 and end on June 30 the following year. Although the 2016 fishing year has ended for most stocks, we will evaluate 2016 catches against these proposed ACLs when data become available in mid-2017. The proposed ACLs and AMs support the long-term sustainability of fishery resources of the U.S. Pacific Islands.

DATES: NMFS must receive comments by February 2, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2016-0049, by either of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0049>, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- **Mail:** Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

Instructions: NMFS may not consider comments sent by any other method, to

any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible.

NMFS prepared environmental analyses that describe the potential impacts on the human environment that would result from the proposed ACLs and AMs. NMFS provided additional background information in the 2015 proposed and final specifications (80 FR 43046, July 21, 2015; 80 FR 52415, August 31, 2015). Copies of the environmental analyses and other documents are available at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Matt Dunlap, NMFS PIR Sustainable Fisheries, 808-725-5177.

SUPPLEMENTARY INFORMATION: Fisheries in the U.S. Exclusive Economic Zone (EEZ, or Federal waters) around the U.S. Pacific Islands are managed under archipelagic fishery ecosystem plans (FEPs) for American Samoa, Hawaii, the Pacific Remote Islands, and the Mariana Archipelago (Guam and the Commonwealth of the Northern Mariana Islands (CNMI)). A fifth FEP covers pelagic fisheries. The Western Pacific Fishery Management Council (Council) developed the FEPs, and NMFS implemented them under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, 16 U.S.C. 1801, *et seq.*).

Each FEP contains a process for the Council and NMFS to specify ACLs and AMs; that process is codified at Title 50, Code of Federal Regulations, Section 665.4 (50 CFR 665.4). The regulations require NMFS to specify, every fishing year, an ACL for each stock and stock complex of management unit species (MUS) included in an FEP, as recommended by the Council and considering the best available scientific, commercial, and other information about the fishery. If a fishery exceeds an ACL, the regulations require the Council to take action, which may include reducing the ACL for the subsequent fishing year by the amount of the overage, or other appropriate action.

NMFS proposes to specify ACLs for bottomfish, crustacean, precious coral, and coral reef ecosystem fishery MUS in American Samoa, Guam, the CNMI, and Hawaii. NMFS based the proposed

specifications on recommendations from the Council at its 164th meeting held October 21–22, 2015, and at its 166th meeting held June 6–10, 2016. In all, the Council recommended 112 ACLs: 26 in American Samoa, 26 in Guam, 26 in the CNMI, and 34 in Hawaii. The Council also recommended that NMFS specify multi-year ACLs and AMs in fishing years 2015–2018. NMFS proposes to implement the specifications for 2017 and 2018 separately, prior to each fishing year.

Except for bottomfish in American Samoa, Guam, and the CNMI, and Guam jacks, Hawaii crabs, and Hawaii octopus, the proposed 2016 ACLs are identical to those that NMFS specified for 2015 (80 FR 52415, August 31, 2015).

For bottomfish in American Samoa, Guam, and the Northern Mariana Islands, the 2016 ACLs are based on new estimates of maximum sustainable yield (MSY) contained in a 2016 stock assessment updated by the NMFS Pacific Islands Fisheries Science Center (PIFSC). This stock assessment update represents the best scientific information available for specifying ACLs.

For Guam jacks, Hawaii crabs, and Hawaii octopus, NMFS and the Council determined that the average 2013–2015 catch for each of these three stock complexes exceeded their respective 2015 ACLs. Specifically, average 2013–2015 catch for Guam jacks was 37,399 lb and exceeded the 2015 ACL of 29,300 lb by 8,099 lb. For Hawaii crabs, average 2013–2015 catch was 40,363 lb and exceeded the 2015 ACL of 33,500 lb by 6,863 lb. For Hawaii octopus, average 2013–2015 catch was 40,237 lb and exceeded the 2015 ACL of 35,700 lb by 4,537 lb. In accordance with the 2015 AMs (80 FR 52415, August 31, 2015), and in consideration of the best available scientific information available, NMFS proposes to reduce the 2016 ACLs from the 2015 ACL by the amount of the 2015 overages for each of the three stocks. As a result, the proposed ACL for Guam jacks is 21,201 lb, 26,637 lb for Hawaii crabs, and 31,163 lb for Hawaii mollusks.

In addition, NMFS prepared an updated environmental assessment for Pacific Island crustacean and precious coral fisheries to account for new information on the fisheries. In December 2015, NMFS and the Council received new information on the historical and projected stock status of Hawaii Kona crab. The information indicates that the Hawaii Kona crab stock was likely to be overfished as of 2006. However, an independent review identified data gaps and methodological

concerns with the 2015 stock assessment. NMFS PIFSC also noted concerns with the data used in the recent stock assessment, but found the assessment provided useful information regarding stock status within the last decade. Because of the uncertainty in the projected stock status and structure of Hawaii Kona crab after 2006, the Council did not account for this information with other relevant information in recommending the 2016 Hawaii Kona crab ACL. For this reason, NMFS will not set an ACL for Hawaii Kona crab for fishing year 2016. Instead, NMFS will continue to work with the Council and other partners to review the available data and to set an acceptable biological catch and an ACL for the Hawaii Kona crab stock, consistent with the Magnuson-Stevens Act, for fishing year 2017.

NMFS is also not proposing ACLs for MUS that are currently subject to Federal fishing moratoria or

prohibitions. These MUS include all species of gold coral (78 FR 32181, May 29, 2013), the three Hawaii seamount groundfish (pelagic armorhead, alfonsin, and raftfish (75 FR 69015, November 10, 2010), and deepwater precious corals at the Westpac Bed Refugia (75 FR 2198, January 14, 2010). The current prohibitions on fishing for these MUS serve as the functional equivalent of an ACL of zero.

Additionally, NMFS is not proposing ACLs for bottomfish, crustacean, precious coral, or coral reef ecosystem MUS identified in the Pacific Remote Islands Area (PRIA) FEP. This is because fishing is prohibited in the EEZ within 12 nm of emergent land, unless authorized by the U.S. Fish and Wildlife Service (USFWS) (78 FR 32996, June 3, 2013). To date, NMFS has not received fishery data that would support any such approvals. In addition, there is no suitable habitat for these stocks beyond the 12-nm no-fishing zone, except at

Kingman Reef, where fishing for these resources does not occur. Therefore, the current prohibitions on fishing serve as the functional equivalent of an ACL of zero. However, NMFS will continue to monitor authorized fishing within the Pacific Remote Islands Monument in consultation with the U.S. Fish and Wildlife Service, and may develop additional fishing requirements, including monument-specific catch limits for species that may require them.

NMFS is also not proposing ACLs for pelagic MUS at this time, because NMFS previously determined that pelagic species are subject to international fishery agreements or have a life cycle of approximately one year and, therefore, are statutorily excepted from the ACL requirements.

Proposed Annual Catch Limit Specifications

The following four tables list the proposed ACL specifications for 2016.

TABLE 1—AMERICAN SAMOA

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Bottomfish multi-species stock complex	106,000
Crustacean	Deepwater shrimp	80,000
	Spiny lobster	4,845
	Slipper lobster	30
	Kona crab	3,200
Precious Coral	Black coral	790
	Precious corals in the American Samoa Exploratory Area	2,205
Coral Reef Ecosystem	<i>Selar crumenophthalmus</i> —atule, bigeye scad	37,400
	Acanthuridae—surgeonfish	129,400
	Carangidae—jacks	19,900
	Carcharhinidae—reef sharks	1,615
	Crustaceans—crabs	4,300
	Holocentridae—squirrelfish	15,100
	Kyphosidae—rudderfishes	2,000
	Labridae—wrasses	16,200
	Lethrinidae—emperors	19,600
	Lutjanidae—snappers	63,100
	Mollusks—turbo snail; octopus; giant clams	18,400
	Mugilidae—mullets	4,600
	Mullidae—goatfishes	11,900
	Scaridae—parrotfish	272,000
	Serranidae—groupers	25,300
	Siganidae—rabbitfishes	200
	<i>Bolbometopon muricatum</i> —bumphead parrotfish	235
	<i>Cheilinus undulatus</i> —Humphead (Napoleon) wrasse	1,743
	All other CREMUS combined	18,400

TABLE 2—MARIANA ARCHIPELAGO—GUAM

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Bottomfish multi-species stock complex	66,000
Crustaceans	Deepwater shrimp	48,488
	Spiny lobster	3,135
	Slipper lobster	20
	Kona crab	1,900
Precious Coral	Black coral	700
	Precious corals in the Guam Exploratory Area	2,205
Coral Reef Ecosystem	<i>Selar crumenophthalmus</i> —atulai, bigeye scad	50,200

TABLE 2—MARIANA ARCHIPELAGO—GUAM—Continued

Fishery	Management unit species	Proposed ACL specification (lb)
	Acanthuridae—surgeonfish	97,600
	Carangidae—jacks	21,201
	Carcharhinidae—reef sharks	1,900
	Crustaceans—crabs	7,300
	Holocentridae—squirrelfish	11,400
	Kyphosidae—chubs/rudderfish	9,600
	Labridae—wrasses	25,200
	Lethrinidae—emperors	53,000
	Lutjanidae—snappers	18,000
	Mollusks—octopus	23,800
	Mugilidae—mullets	17,900
	Mullidae—goatfish	15,300
	Scaridae—parrotfish	71,600
	Serranidae—groupers	22,500
	Siganidae—rabbitfish	18,600
	<i>Bolbometopon muricatum</i> —bumphead parrotfish	* 797
	<i>Cheilinus undulatus</i> —humphead (Napoleon) wrasse	1,960
	All other CREMUS combined	185,000

* CNMI and Guam combined.

TABLE 3—MARIANA ARCHIPELAGO—CNMI

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Bottomfish multi-species stock complex	228,000
Crustacean	Deepwater shrimp	275,570
	Spiny lobster	7,410
	Slipper lobster	60
	Kona crab	6,300
Precious Coral	Black coral	2,100
	Precious corals in the CNMI Exploratory Area	2,205
Coral Reef Ecosystem	<i>Selar crumenophthalmus</i> —Atulai, bigeye scad	77,400
	Acanthuridae—surgeonfish	302,600
	Carangidae—jacks	44,900
	Carcharhinidae—reef sharks	5,600
	Crustaceans—crabs	4,400
	Holocentridae—squirrelfishes	66,100
	Kyphosidae—rudderfishes	22,700
	Labridae—wrasses	55,100
	Lethrinidae—emperors	53,700
	Lutjanidae—snappers	190,400
	Mollusks—turbo snail; octopus; giant clams	9,800
	Mugilidae—mullets	4,500
	Mullidae—goatfish	28,400
	Scaridae—parrotfish	144,000
	Serranidae—groupers	86,900
	Siganidae—rabbitfish	10,200
	<i>Bolbometopon muricatum</i> —Bumphead parrotfish	* 797
	<i>Cheilinus undulatus</i> —Humphead (Napoleon) wrasse	2,009
	All other CREMUS combined	7,300

* CNMI and Guam combined.

TABLE 4—HAWAII

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Non-Deep 7 bottomfish	178,000
Crustacean	Deepwater shrimp	250,773
	Spiny lobster	15,000
	Slipper lobster	280
	Kona crab	None
Precious Coral	Auau Channel black coral	5,512
	Makapuu Bed—Pink coral	2,205
	Makapuu Bed—Bamboo coral	551
	180 Fathom Bank—Pink coral	489

TABLE 4—HAWAII—Continued

Fishery	Management unit species	Proposed ACL specification (lb)
Coral Reef Ecosystem	180 Fathom Bank—Bamboo coral	123
	Brooks Bank—Pink coral	979
	Brooks Bank—Bamboo coral	245
	Kaena Point Bed—Pink coral	148
	Kaena Point Bed—Bamboo coral	37
	Keahole Bed—Pink coral	148
	Keahole Bed—Bamboo coral	37
	Precious corals in the Hawaii Exploratory Area	2,205
	<i>Selar crumenophthalmus</i> —akule, bigeye scad	988,000
	<i>Decapterus macarellus</i> —opelu, mackerel scad	438,000
	Acanthuridae—surgeonfishes	342,000
	Carangidae—jacks	161,200
	Carcharhinidae—reef sharks	9,310
	Crustaceans—crabs	26,637
	Holocentridae—squirrelfishes	148,000
	Kyphosidae—rudderfishes	105,000
	Labridae—wrasses	205,000
	Lethrinidae—emperors	35,500
	Lutjanidae—snappers	330,300
	Mollusks—octopus	31,163
	Mugilidae—mulletts	19,200
	Mullidae—goatfishes	165,000
	Scaridae—parrotfishes	239,000
	Serranidae—groupers	128,400
	All other CREMUS combined	485,000

Accountability Measures

Each year, NMFS and local resource management agencies in American Samoa, Guam, the CNMI, and Hawaii collect information about MUS catches and apply them toward the appropriate ACLs. Pursuant to 50 CFR 665.4, when the available information indicates that a fishery is projected to reach an ACL for a stock or stock complex, NMFS must notify permit holders that fishing for that stock or stock complex will be restricted in Federal waters on a specified date. The restriction serves as the AM to prevent an ACL from being exceeded, and may include closing the fishery, closing specific areas, changing to bag limits, or restricting effort.

However, local resource management agencies do not have the resources to process catch data in near-real time, so fisheries statistics are generally not available to NMFS until at least six months after agencies collect and analyze the data. Additionally, Federal logbook information and other reporting from fisheries in Federal waters is not sufficient to monitor and track catches for the evaluation of fishery performance against the proposed ACL specifications. This is because most fishing for bottomfish, crustacean, precious coral, and coral reef ecosystem MUS occurs in state waters, generally 0–3 nm from shore. For these reasons, NMFS proposes to continue to specify the Council's recommended AM, which is to apply a three-year average catch to

evaluate fishery performance against the proposed ACLs. Specifically, NMFS and the Council would use the average catch of fishing years 2014, 2015, and 2016 to evaluate fishery performance against the 2016 ACL for a particular fishery. At the end of each fishing year, the Council would review catches relative to each ACL. If NMFS and the Council determine the three-year average catch for any fishery exceeds the specified ACL, NMFS would reduce the ACL in the subsequent year for that fishery by the amount of the overage.

NMFS will consider public comments on the proposed ACLs and AMs and will announce the final specifications in the **Federal Register**. NMFS must receive any comments by the date provided in the **DATES** heading, not postmarked or otherwise transmitted by that date. Regardless of the final ACL specifications and AMs, all other management measures will continue to apply in the fisheries.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator for Fisheries has determined that these proposed specifications are consistent with the applicable FEPs, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that these proposed specifications, if adopted, would not have a significant economic impact on a substantial number of small entities. A description of the proposed action, why it is being considered, and the legal basis for it are contained in the preamble to these proposed specifications.

The proposed action would specify annual catch limits (ACLs) and accountability measures (AMs) for Pacific Island bottomfish, crustacean, precious coral, and coral reef ecosystem fishery management unit species (MUS) for 2016. Except for Hawaii kona crab, the 2016 ACLs and AMs for all crustaceans, spiny lobster, Hawaii non-Deep 7 bottomfish, and precious corals MUS are identical to those NMFS specified for the 2015 fishing year (80 FR 52415, August 31, 2015). The proposed ACL for bottomfish MUS in American Samoa is 106,000 lb, which is 5,000 lb higher than the 2015 ACL. The proposed ACL for Guam bottomfish MUS is 66,000 lb, which is 800 lb lower than the 2015 ACL. The proposed ACL for CNMI bottomfish MUS would remain the same as the 2015 ACL of 228,000 lb.

The proposed ACLs and AMs for coral reef ecosystem MUS are identical to those implemented in 2015 (80 FR 52415, August 31, 2015), with three exceptions. For Guam jacks, Hawaii crabs and Hawaii octopus, NMFS determined that the average 2013–2015 catch for each of these three stock complexes exceeded their respective 2015 ACLs. Specifically, average 2013–2015 catch for Guam jacks was 37,399 lb and exceeded the 2015 ACL of 29,300 lb by 8,099 lb. For Hawaii crabs, average 2013–2015 catch was 40,363 lb and exceeded the 2015 ACL of 33,500 lb by 6,863 lb. For Hawaii octopus, average 2013–2015 catch was 40,237 lb and exceeded the 2015 ACL of 35,700 lb by 4,537 lb. In accordance with the 2015 AMs (80 FR 52415, August 31, 2015), and in consideration of the best available scientific information, NMFS proposes to reduce the 2016 ACLs from the 2015 ACL by the amount of the 2015 overages for each of the three stocks. As a result, the proposed ACL for Guam jacks is 21,201 lb, 26,637 lb for Hawaii crabs and 31,163 lb for Hawaii mollusks.

The vessels impacted by this action are federally permitted to fish under the FEPs for American Samoa, the Marianas Archipelago (Guam and the CNMI), and Hawaii. The numbers of vessels permitted under these Fishery Ecosystem Plans affected by this action are as follows: American Samoa (0), Marianas Archipelago (19), and Hawaii (8). For Regulatory Flexibility Act purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial

fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. Based on available information, NMFS has determined that all impacted entities are small entities under the SBA definition of a small entity, *i.e.*, they are engaged in the business of fish harvesting, are independently owned or operated, are not dominant in their field of operation, and have annual gross receipts not in excess of \$11 million. Therefore, there would be no disproportionate economic impacts between large and small entities. Furthermore, there would be no disproportionate economic impacts among the universe of vessels based on gear, home port, or vessel length.

Even though this proposed action would apply to a substantial number of vessels, the implementation of this action should not result in significant adverse economic impact to individual vessels. The Council and NMFS are not considering in-season closures in any of the fisheries to which these ACLs apply because fishery management agencies are not able to track catch relative to the ACLs during the fishing year. As a result, fishermen would be able to fish throughout the entire year. In addition, the ACLs, as proposed, would not change the gear types, areas fished, effort, or participation of the fishery during the 2016 fishing year. A post-season review of the catch data is

required to determine whether any fishery exceeded its ACL by comparing the ACL to the most recent three-year average catch for which data is available. If an ACL is exceeded, the Council and NMFS would take action in future fishing years to correct the operational issue that caused the ACL overage. NMFS and the Council would evaluate the environmental, social, and economic impacts of future actions, such as changes to future ACLs or AMs, after the required data are available. Specifically, if NMFS and the Council determine that the three-year average catch for a fishery exceeds the specified ACL, NMFS would reduce the ACL in the subsequent year for that fishery by the amount of the overage.

The proposed action does not duplicate, overlap, or conflict with other Federal rules, and is not expected to have significant impact on small entities (as discussed above), organizations, or government jurisdictions. The proposed action also will not place a substantial number of small entities, or any segment of small entities, at a significant competitive disadvantage to large entities. As such, an initial regulatory flexibility analysis is not required and none has been prepared.

This action has been determined to be exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2017.

Samuel D. Rauch III,

*Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.*

[FR Doc. 2017-00901 Filed 1-17-17; 8:45 am]

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Notices

Federal Register

Vol. 82, No. 11

Wednesday, January 18, 2017

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2016–0069]

Availability of a Final Environmental Assessment and Finding of No Significant Impact for a Biological Control Agent for Giant Reed

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared a final environmental assessment and finding of no significant impact relative to the release of *Lasioptera donacis* for the biological control of giant reed, *Arundo donax*, in the continental United States. Based on its finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

FOR FURTHER INFORMATION CONTACT: Dr. Colin D. Stewart, Assistant Director, Pests, Pathogens, and Biocontrol Permits, Permitting and Compliance Coordination, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2327, email: Colin.D.Stewart@aphis.usda.gov.

SUPPLEMENTARY INFORMATION: Giant reed (*Arundo donax*), a native of the Mediterranean and Middle East, has become one of the most pervasive non-native plants to invade the riparian areas of the Southwest United States, especially in California and the Rio Grande area of Texas. Giant reed infestations in riparian habitats lead to loss of biodiversity, stream bank erosion, altered channel morphology, enhanced survival of cattle fever ticks, damage to bridges, increased costs for chemical and mechanical control along transportation corridors, and impede

law enforcement activities on the international border. Many Federal and State agencies, as well as private entities, conduct programs to manage giant reed, as well as other -invasive weeds.

The Animal and Plant Health Inspection Service (APHIS) is proposing to issue permits for the field release of a gall-forming fly, *Lasioptera donacis*, into the continental United States to reduce the severity of giant reed infestations.

On November 8, 2016, we published in the **Federal Register** (81 FR 78567–78568, Docket No. APHIS–2016–0069) a notice¹ in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the proposed release of this biological control agent into the continental United States.

We solicited comments on the EA for 30 days ending December 8, 2016. We received 14 comments by that date. A written response to all comments received on the EA can be found in appendix 5 of the final EA (see footnote 1).

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the release of *L. donacis* into the continental United States for use as a biological control agent to reduce the severity of giant reed infestations. The finding, which is based on the EA, reflects our determination that release of this biological control agent will not have a significant impact on the quality of the human environment.

The EA and FONSI may be viewed on the *Regulations.gov* Web site (see footnote 1). Copies of the EA and FONSI are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

¹ To view the notice, environmental assessment, finding of no significant impact, and the comments we received, go to <https://www.regulations.gov/docket?D=APHIS-2016-0069>.

The EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b); and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017–01018 Filed 1–17–17; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2016–0070]

Availability of an Environmental Assessment for Field Testing a Vaccine for Use Against Infectious Bursal Disease, Marek's Disease, and Newcastle Disease

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment concerning authorization to ship for the purpose of field testing, and then to field test, an unlicensed Bursal Disease-Marek's Disease-Newcastle Disease Vaccine, Serotype 3, Live Marek's Disease Vector. Based on the environmental assessment, risk analysis, and other relevant data, we have reached a preliminary determination that field testing this veterinary vaccine will not have a significant impact on the quality of the human environment. We are making the documents available to the public for review and comment.

DATES: We will consider all comments that we receive on or before February 17, 2017.

ADDRESSES: You may submit comments by either of the following methods:

• *Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0070>.*

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2016–0070, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0070> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 7997039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Malloy, Operational Support Section, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 4700 River Road, Unit 148, Riverdale, MD 20737–1231; phone (301) 851–3426, fax (301) 734–4314.

For information regarding the environmental assessment or the risk analysis, or to request a copy of the environmental assessment (as well as the risk analysis with confidential business information redacted), contact Dr. Patricia L. Foley, Risk Manager, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 1920 Dayton Avenue, P.O. Box 844, Ames, IA 50010; phone (515) 337–6100, fax (515) 337–6120.

SUPPLEMENTARY INFORMATION: Under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) is authorized to promulgate regulations designed to ensure that veterinary biological products are pure, safe, potent, and efficacious before a veterinary biological product license may be issued. Veterinary biological products include viruses, serums, toxins, and analogous products of natural or synthetic origin, such as vaccines, antitoxins, or the immunizing components of microorganisms intended for the diagnosis, treatment, or prevention of diseases in domestic animals.

APHIS issues licenses to qualified establishments that produce veterinary biological products and issues permits to importers of such products. APHIS also enforces requirements concerning production, packaging, labeling, and shipping of these products and sets standards for the testing of these products. Regulations concerning

veterinary biological products are contained in 9 CFR parts 101 to 124.

A field test is generally necessary to satisfy preclicensing requirements for veterinary biological products. Prior to conducting a field test on an unlicensed product, an applicant must obtain approval from APHIS, as well as obtain APHIS' authorization to ship the product for field testing.

To determine whether to authorize shipment and grant approval for the field testing of the unlicensed product referenced in this notice, APHIS considers the potential effects of this product on the safety of animals, public health, and the environment. Based upon a risk analysis and other relevant data, APHIS has prepared an environmental assessment (EA) concerning the field testing of the following unlicensed veterinary biological product:

Requester: Biomune Company.

Product: Bursal Disease-Marek's Disease-Newcastle Disease Vaccine, Serotype 3, Live Marek's Disease Vector.

Possible Field Test Locations:

Alabama, Delaware, Georgia, Maryland, North Carolina, Pennsylvania, and Virginia.

The above-mentioned product is a live Marek's Disease serotype 3 vaccine virus containing a gene from the Newcastle disease virus and a gene from the infectious bursal disease virus. This vaccine would be the recombinant fraction used in combination with a conventional live Marek's disease vaccine virus, either a serotype 1 or serotype 2 strain, during the field safety tests. The attenuated vaccine is intended for use in healthy 18-day-old or older embryonated eggs or day-old chickens, as an aid in the prevention of infectious bursal disease, Marek's disease, and Newcastle disease.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

We are publishing this notice to inform the public that we will accept written comments regarding the EA from interested or affected persons for a period of 30 days from the date of this notice. Unless substantial issues with adverse environmental impacts are raised in response to this notice, APHIS intends to issue a finding of no significant impact (FONSI) based on the

EA and authorize shipment of the above product and the two products with a conventional live Marek's disease vaccine virus, either a serotype 1 or serotype 2 strain, that incorporate it as a recombinant fraction, for the initiation of field tests following the close of the comment period for this notice.

Because the issues raised by field testing and by issuance of a license are identical, APHIS has concluded that the EA that is generated for field testing would also be applicable to the proposed licensing action. Provided that the field test data support the conclusions of the original EA and the issuance of a FONSI, APHIS does not intend to issue a separate EA and FONSI to support the issuance of the associated product licenses, and would determine that an environmental impact statement need not be prepared. APHIS intends to issue a veterinary biological product license for this vaccine and the two associated products containing it following satisfactory completion of the field test, provided no adverse impacts on the human environment are identified and provided the product meets all other requirements for licensing.

Authority: 21 U.S.C. 151–159.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017–01010 Filed 1–17–17; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2016–0079]

Updates to the Biotechnology Regulatory Services BQMS Program

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that Biotechnology Regulatory Services of the Animal and Plant Health Inspection Service (APHIS) is updating its Biotechnology Quality Management System Program and renaming it the Biotechnology Quality Management Support Program to offer a more flexible, more customizable, and less costly program that is easily accessible to a wider universe of researchers and developers conducting biotechnology activities under APHIS' regulations. These updates represent the next step in

the continual improvement to this voluntary quality management program.

FOR FURTHER INFORMATION CONTACT: Ms. Rochelle Langley, Quality Management Specialist, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 146, Riverdale, MD 20737-1228; 301-851-3906, *Rochelle.A.Langley@aphis.usda.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), regulates the importation, interstate movement, and environmental release of genetically engineered (GE) organisms that are, or may be, plant pests. In September 2007, APHIS' Biotechnology Regulatory Services (BRS) announced a voluntary, audit-based compliance assistance program known as the Biotechnology Quality Management System (BQMS) Program to assist the regulated community in achieving and maintaining compliance with requirements for field trials and movements of GE organisms under its regulations in 7 CFR part 340.

Under the BQMS Program, APHIS-BRS has provided support for the voluntary adoption by participants of a quality management system to improve their management of domestic research and development of regulated GE organisms in order to fully comply with regulations. The BQMS Program included a mandatory audit standard that provided extensive criteria for the development, implementation, and an objective evaluation of the participant's quality management system.

We are notifying the public that BRS is updating its BQMS Program and renaming it the Biotechnology Quality Management Support Program, which will use the same BQMS acronym, in order to reach a broader audience. After engaging with current and prospective BQMS participants, APHIS-BRS determined a modularized, more flexible, Web-based approach reaches a wider universe of researchers and developers conducting biotechnology activities. Small organizations, academics, and first-time users now have access to a program that previously was only within the means of a select few with considerable resources. The new BQMS Program is no longer audit-based, and no longer requires an "all or nothing" quality management system that relies on a BRS-developed audit standard, a required 3-day BRS-led training session for all participants, and a third-party audit cycle to maintain Program recognition. The new BQMS Program remains a voluntary compliance assistance program but with fewer impediments to users—no

required multi-day training, no cost-prohibitive third-party audits and associated travel expenses, and no exhaustive resource commitments.

The new BQMS Program is a flexible, Web-based, modular approach designed to enhance compliance by enabling organizations large and small to develop sound quality management practices. Users can select any or all critical control points applicable to their organizations' compliance assistance needs such as: Site selection planning, procedures for storage, transportation (interstate movement and importation), environmental release planning and monitoring, post-harvest handling and transfer, devitalization and final disposition, potential regulatory compliance incidents, and a reporting form for regulatory compliance incidents. User costs should decrease with the ability to easily choose only the modules they need to meet their unique compliance assistance needs.

The new BQMS Program offers a comprehensive repository of user-friendly, Web-based templates, guidelines, and checklists to assist users in the implementation of processes, procedures, and the foundation for a quality management system. No matter how big or small their organization, BQMS users will continue to have the option of requesting one-on-one tailored assistance from BRS staff, as in the past.

Organizations participating in the voluntary program will be encouraged to use BQMS resources as a foundation to ensure all personnel are properly trained regarding the requirements for working with GE organisms; identify and develop control measures to minimize the risk or occurrence of unauthorized releases; and monitor quality management practices and procedures.

These updates are the next step in the continual improvement of the voluntary BQMS Program.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-01017 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2016-0113]

Notice of Request for Extension of Approval of an Information Collection; Interstate Movement of Fruit From Hawaii

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the interstate movement of fruit from Hawaii.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0113>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2016-0113, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0113> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for the interstate movement of fruit from Hawaii, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road, Unit 150, Riverdale, MD 20737; (301) 851-2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Interstate Movement of Fruit From Hawaii.

OMB Control Number: 0579–0331.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. The regulations in 7 CFR part 318, State of Hawaii and Territories Quarantine Notices, prohibit or restrict the interstate movement of fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam to the continental United States to prevent the spread of plant pests or noxious weeds.

In accordance with the regulations in § 318.13–26, breadfruit, jackfruit, fresh pods of cowpea and its relatives, dragon fruit, mangosteen, moringa pods, and melon must meet certain conditions for interstate movement from Hawaii into the continental United States. These conditions involve information collection activities, such as compliance agreements, certificates and limited permits, among other things.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.22 hours per response.

Respondents: Importers of fruit from Hawaii.

Estimated annual number of respondents: 110.

Estimated annual number of responses per respondent: 25.

Estimated annual number of responses: 2,782.

Estimated total annual burden on respondents: 618 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017–01009 Filed 1–17–17; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2015–0096]

The Scotts Co. and Monsanto Co.; Determination of Nonregulated Status of Creeping Bentgrass Genetically Engineered for Resistance to Glyphosate

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that creeping bentgrass designated as event ASR368, which has been genetically engineered for resistance to the herbicide glyphosate by the Scotts Company and Monsanto Company is no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by the Scotts Company and Monsanto Company in its petition for a determination of nonregulated status, our analysis of publically available scientific data, and comments received from the public on the petition for nonregulated status and its associated environmental impact statement and plant pest risk assessment. This notice also announces the availability of our written determination and record of decision.

DATES: Effective January 18, 2017.

ADDRESSES: You may read the documents referenced in this notice and

any comments we received in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming. Those documents are also available on the Internet at http://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml under APHIS Petition Number 15–300–01p and are posted with the comments we received on the *Regulations.gov* Web site at <http://www.regulations.gov/#/docketDetail;D=APHIS-2015-0096>.

FOR FURTHER INFORMATION CONTACT: Dr. John Turner, Director, Environmental Risk Analysis Programs, Biotechnology Regulatory Services, APHIS, 4700 River Road, Unit 147, Riverdale, MD 20737–1236; (301) 851–3954, email: john.t.turner@aphis.usda.gov. To obtain copies of the documents referenced in this notice, contact Ms. Cindy Eck at (301) 851–3892, email: cynthia.a.eck@aphis.usda.gov.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, “Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,” regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered (GE) organisms and products are considered “regulated articles.”

The regulations in § 340.6(a) provide that any person may submit a petition to APHIS seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS received a petition from the Scotts Company of Marysville, OH, and Monsanto Company of St. Louis, MO (Scotts/Monsanto), seeking a determination of nonregulated status of creeping bentgrass (*Agrostis stolonifera* L.) designated as event ASR368, which has been genetically engineered for resistance to the herbicide glyphosate. The Scotts/Monsanto petition states that information collected during field trials

and laboratory analyses indicates that ASR368 bentgrass is not likely to be a plant pest and therefore should not be a regulated article under APHIS' regulations in 7 CFR part 340.

In a notice¹ published in the **Federal Register** on January 8, 2016 (81 FR 902–903, Docket No. APHIS–2015–0096), APHIS announced the availability of the Scotts/Monsanto petition for public comment. APHIS solicited comments on the petition for 60 days ending on March 8, 2016. The notice also announced that APHIS would prepare either an environmental assessment or an environmental impact statement (EIS) in accordance with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*, NEPA) to provide the Agency with a review and analysis of any potential environmental impacts associated with the petition request.

Following review of public comments, we published another notice² in the **Federal Register** on August 3, 2016 (81 FR 51174–51176, Docket No. APHIS–2015–0096), advising the public of our intent to prepare an EIS for the potential determination of nonregulated status requested by the petition. APHIS decided to prepare an EIS in order to perform a comprehensive environmental analysis of the potential environmental impacts that may occur as a result of granting determinations of nonregulated status for this event.

National Environmental Policy Act and Record of Decision

To provide the public with documentation of APHIS' review and analysis of the potential environmental impacts associated with a determination of nonregulated status of ASR368 bentgrass, an EIS has been prepared in accordance with: (1) NEPA, as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b); and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

A notice of availability regarding the draft EIS prepared by APHIS was published by the Environmental Protection Agency (EPA) in the **Federal Register** on September 30, 2016 (81 FR

67348–67349, Docket No. ER–FRL–9029–3). Along with the draft EIS, APHIS also made available the plant pest risk assessment (PPRA) for the petition. APHIS reviewed and evaluated all of the public comments received on the draft EIS and prepared formal responses to them as part of the final EIS.

A notice of availability regarding the final EIS prepared by APHIS was published by EPA in the **Federal Register** on December 9, 2016 (81 FR 89095–89096, Docket No. ER–FRL–9030–6). The NEPA implementing regulations in 40 CFR 1506.10 require a minimum 30-day review period between the time the notice of availability of a final EIS is published and the time an agency makes a decision on an action covered by the EIS. APHIS has reviewed and evaluated the comments received during the 30-day review period and has concluded that it has fully and appropriately analyzed the relevant environmental issues covered by the final EIS and those comments. Based on our final EIS, the response to public comments, and other pertinent scientific data, APHIS has prepared a record of decision for the final EIS.

Determination of Nonregulated Status

Based on APHIS' analysis of field and laboratory data submitted by Scotts/Monsanto, references provided in the petitions, peer-reviewed publications, information analyzed in the EIS, the PPRA, comments provided by the public, and APHIS' evaluation of and response to those comments, APHIS has determined that is unlikely to pose a plant pest risk. Accordingly, the petition requesting a determination of nonregulated status is approved and ASR368 bentgrass is no longer subject to our regulations governing the introduction of certain genetically engineered organisms and to the plant pest provisions of the Plant Protection Act.

Copies of the signed determination document and the signed record of decision, as well as copies of the final EIS and the PPRA are available as indicated in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections of this notice.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 12th day of January 2017.

Michael C. Gregoire,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017–01077 Filed 1–17–17; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2016–0107]

Notice of Request for Extension of Approval of an Information Collection; Importation of Emerald Ash Borer Host Material From Canada

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the importation of emerald ash borer host material from Canada to prevent the introduction and spread of emerald ash borer in the United States.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0107>.

- **Postal Mail/Commercial Delivery:** Send your comment to Docket No. APHIS–2016–0107, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0107> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for the importation of emerald ash borer host

¹ To view the notice, the petition, the comments we received, and other supporting documents, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0096>.

² To view the draft EIS, final EIS, supporting documents, and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0096>.

material from Canada, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737; (301) 851-2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Emerald Ash Borer Host Material from Canada.

OMB Control Number: 0579-0319.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States.

As authorized by the PPA, the Animal and Plant Health Inspection Service (APHIS) regulates the importation of plants for planting into the United States from certain parts of the world as provided in "Subpart—Plants for Planting" (7 CFR 319.37 through 319.37-14). This subpart restricts, among other things, the importation of living plants, plant parts, and seeds for propagation. In addition, APHIS regulates the importation of lumber and other wood articles as provided in "Subpart—Logs, Lumber, and Other Wood Articles" (7 CFR 319.40-1 through 319.40-11). This subpart lists requirements for the importation of various logs, lumber, and other unmanufactured wood products into the United States. Both subparts contain regulations that restrict or prohibit the importation of emerald ash borer (EAB) host material from Canada to prevent the introduction and spread of EAB into the United States. EAB (*Agrilus planipennis*) is a destructive wood-boring insect that attacks ash trees. These regulations involve information collection activities, including phytosanitary certificates, permit applications, notices, notifications, agreements, records, and certificates of inspection.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our

information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.56 hours per response.

Respondents: Importers of plants for planting and logs, lumber, and other wood articles from Canada; and the Canadian Food Inspection Agency.

Estimated annual number of respondents: 7.

Estimated annual number of responses per respondent: 6.

Estimated annual number of responses: 39.

Estimated total annual burden on respondents: 22 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-01016 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2016-0110]

Notice of Request for Extension of Approval of an Information Collection; Importation of Fresh Beans, Shelled or in Pods, From Jordan Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the importation of fresh beans, shelled or in pods, from Jordan into the continental United States.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0110>.

- *Postal Mail/Commercial Delivery:*

Send your comment to Docket No. APHIS-2016-0110, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0110> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of fresh beans, shelled or in pods, from Jordan into the continental United States, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737; (301) 851-2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Fresh Beans, Shelled or in Pods, From Jordan Into the Continental United States.

OMB Control Number: 0579-0405.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate

movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. As authorized by the PPA, the Animal and Plant Health Inspection Service (APHIS) regulates the importation of certain fruits and vegetables in accordance with the regulations in "Subpart—Fruits and Vegetables" (7 CFR 319.56–1 through 319.56–76).

Section 319.56–62 provides the requirements for the importation of fresh beans (*Phaseolus vulgaris* L.), shelled or in pods (French, green, snap, and string) from Jordan into the continental United States. These commodities may be imported into the United States under certain conditions to prevent the introduction of plant pests into the United States. The regulations require information collection activities, including packinghouse registration, box labeling, and a phytosanitary certificate attesting that the conditions in § 319.56–62 have been met and that each consignment has been inspected and found free the pests listed in that section.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.78 hours per response.

Respondents: Importers of fresh beans, shelled or in pods, from Jordan and the national plant protection organization of Jordan.

Estimated annual number of respondents: 6.

Estimated annual number of responses per respondent: 7.

Estimated annual number of responses: 40.

Estimated total annual burden on respondents: 31 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017–01026 Filed 1–17–17; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2016–0108]

Notice of Request for Extension of Approval of an Information Collection; Importation of Avocados From Continental Spain

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of avocados from continental Spain.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0108>.

- **Postal Mail/Commercial Delivery:** Send your comment to Docket No. APHIS–2016–0108, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0108> or in our reading room, which is located in room 1141 of

the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of avocados from continental Spain, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road, Unit 150, Riverdale, MD 20737; (301) 851–2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Avocados From Continental Spain.

OMB Control Number: 0579–0400.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests, including fruit flies, into the United States or their dissemination within the United States. Regulations authorized by the PPA concerning the importation of fruits and vegetables into the United States from certain parts of the world are contained in "Subpart—Fruits and Vegetables" (7 CFR 319.56–1 through 319.56–76).

In accordance with § 319.56–64, fresh avocados from continental Spain are subject to certain conditions before entering the United States to ensure that certain quarantine plant pests are not introduced into the United States. The regulations require the use of information collection activities, including an operational workplan, trust fund agreement, production site and packinghouse registration, agreements, box labeling and shipping documents, a phytosanitary certificate, and recordkeeping.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.03 hours per response.

Respondents: Growers and importers of avocados from continental Spain and the national plant protection organization of Spain.

Estimated annual number of respondents: 28.

Estimated annual number of responses per respondent: 517.

Estimated annual number of responses: 14,484.

Estimated total annual burden on respondents: 484 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-01028 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2016-0109]

Notice of Request for Extension of Approval of an Information Collection; Importation of Fresh Apricots From Continental Spain

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of fresh apricots from continental Spain.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0109>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2016-0109, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0109> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of fresh apricots from continental Spain, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737; (301) 851-2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Fresh Apricots From Continental Spain.

OMB Control Number: 0579-0402.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests, including fruit flies, into the United States or their dissemination within the United States. Regulations authorized by the PPA concerning the importation of fruits and vegetables into the United States from

certain parts of the world are contained in "Subpart—Fruits and Vegetables" (7 CFR 319.56-1 through 319.56-76).

In accordance with § 319.56-63, fresh apricots from continental Spain are subject to certain conditions before entering the United States to ensure that certain quarantine plant pests are not introduced into the United States. The regulations require the use of information collection activities, including an operational workplan, trust fund agreement, production site and packinghouse registration, box labeling and shipping documents, a phytosanitary certificate, and recordkeeping.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 2.55 hours per response.

Respondents: Growers and importers of apricots from continental Spain and the national plant protection organization of Spain.

Estimated annual number of respondents: 22.

Estimated annual number of responses per respondent: 4.

Estimated annual number of responses: 84.

Estimated total annual burden on respondents: 214 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request

for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-01014 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2016-0106]

Notice of Request for Extension of Approval of an Information Collection; Cooperative Agricultural Pest Survey

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the Cooperative Agricultural Pest Survey.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0106>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2016-0106, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0106> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the Cooperative Agricultural Pest Survey, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance

Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road, Unit 150, Riverdale, MD 20737; (301) 851-2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Cooperative Agricultural Pest Survey.

OMB Control Number: 0579-0010.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized, either independently or in cooperation with the States, to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests and noxious weeds that are new to or not widely distributed within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS).

To carry out this mission, APHIS' Plant Protection and Quarantine (PPQ) program has joined forces with the States and other agencies to create a program called the Cooperative Agricultural Pest Survey (CAPS). The CAPS program coordinates efforts through cooperative agreements with the States and other agencies to collect and manage data on plant pests, noxious weeds, and biological control agents, which may be used to control plant pests or noxious weeds.

This program allows the States and PPQ to conduct surveillance activities to detect and measure the presence of exotic plant pests and weeds and to input surveillance data into a uniform national system. Among other things, this allows APHIS to obtain a more comprehensive picture of plant pest conditions in the United States.

The CAPS program involves certain information collection activities, such as cooperative agreements, pest detection surveys, a disclosure form, a form for determination of specimens, and various application forms.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the

Agency, including whether the information will have practical utility;

- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

- (3) Enhance the quality, utility, and clarity of the information to be collected; and

- (4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.24 hours per response.

Respondents: State cooperators participating in CAPS and not-for-profit organizations.

Estimated annual number of respondents: 54.

Estimated annual number of responses per respondent: 271.

Estimated annual number of responses: 14,634.

Estimated total annual burden on respondents: 3,573 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-01020 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2016-0111]

Notice of Request for Extension of Approval of an Information Collection; Federally Recognized State Managed Phytosanitary Program

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to

request an extension of approval of an information collection associated with Federal recognition of a State's plant pest containment, eradication, or exclusion program as a Federally Recognized State Managed Phytosanitary Program.

DATES: We will consider all comments that we receive on or before March 20, 2017.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0111>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2016-0111, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0111> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the Federally Recognized State Managed Phytosanitary Program, contact Dr. Robert Baca, Assistant Director, Permitting and Compliance Coordination, Compliance and Environmental Coordination Branch, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737; (301) 851-2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

SUPPLEMENTARY INFORMATION:

Title: Federally Recognized State Managed Phytosanitary Program.

OMB Control Number: 0579-0365.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to prohibit or restrict the importation, entry, or interstate movement of plants, plant products, or other articles if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the

Animal and Plant Health Inspection Service (APHIS).

As part of this mission, APHIS' Plant Protection and Quarantine (PPQ) program responds to introductions of plant pests to eradicate, suppress, or contain them through various programs to prevent their interstate spread. APHIS' plant pest containment and eradication programs qualify as "official control programs," as defined by the International Plant Protection Convention (IPPC), recognized by the World Trade Organization as the standard-setting body for international plant quarantine issues. "Official control" is defined as "the active enforcement of mandatory phytosanitary regulations and the application of mandatory phytosanitary procedures with the objective of containment or eradication of quarantine pests or for the management of regulated non-quarantine pests." As a contracting party to the IPPC, the United States has agreed to observe IPPC principles as they relate to international trade.

APHIS is aware that individual States enforce phytosanitary regulations and procedures within their borders to address pests of concern, and that those pests are not always also the subject of an APHIS response program or activity. To strengthen APHIS' safeguarding system to protect agriculture and to facilitate agriculture trade through effective management of phytosanitary measures, APHIS initiated the Federally Recognized State Managed Phytosanitary (FRSMP) Program, which establishes an administrative process for granting Federal recognition to certain State-managed official control programs for plant pest eradication or containment and State-managed pest exclusion programs. (The FRSMP Program was previously referred to as the Official Control Program.) Federal recognition of a State's pest control activities will justify actions by Federal inspectors at ports of entry to help exclude pests that are under a phytosanitary program in a destination State. This process involves the use of information collection activities, including the submission of a petition for protocol for quarantine pests of concern, a petition for regulated non-quarantine pests, State cooperative agreements, and audit review annual accomplishment reports.

We are asking OMB to approve these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our

information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 34.7 hours per response.

Respondents: State plant health regulatory officials.

Estimated annual number of respondents: 1.

Estimated annual number of responses per respondent: 7.

Estimated annual number of responses: 7.

Estimated total annual burden on respondents: 243 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 11th day of January 2017.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-01023 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Section 538 Guaranteed Rural Rental Housing Program 2017 Industry Forums—Open Teleconference and/or Web Conference Meetings

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: This Notice announces a series of teleconference and/or web conference meetings regarding the U.S. Department of Agriculture (USDA) Section 538 Guaranteed Rural Rental

Housing (GRRH) program, which are scheduled to occur during 2017 and 2018. This Notice also outlines suggested discussion topics for the meetings and is intended to notify the general public of their opportunity to participate in the teleconference and/or web conference meetings.

DATES: The dates and times for the teleconference and/or web conference meetings will be announced via email to parties registered as described below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to register for the calls and obtain the call-in number, access code, web link and other information for any of the public teleconference and/or web conference meetings may contact Monica Cole, Financial and Loan Analyst, at: (202) 720-1251, fax: (844) 875-8075, or email: monica.cole@wdc.usda.gov. Those who request registration less than 15 calendar days prior to the date of a teleconference and/or web conference meetings may not receive notice of that teleconference and/or web conference meeting, but will receive notice of future teleconference and/or web conference meetings. The Agency expects to accommodate each participant's preferred form of participation by telephone or via web link. However, if it appears that existing capabilities may prevent the Agency from accommodating all requests for one form of participation, each participant will be notified and encouraged to consider an alternative form of participation. Individuals who plan to participate and need reasonable accommodations or language translation assistance should inform Monica Cole within 10 business days in advance of the meeting date.

SUPPLEMENTARY INFORMATION: The objectives of this series of teleconferences are as follows:

- Enhance the effectiveness of the Section 538 GRRH program.
- Update industry participants and Rural Housing Service (RHS) staff on developments involving the Section 538 GRRH program.

- Enhance RHS' awareness of the market and other forces that impact the Section 538 GRRH program.

Topics to be discussed could include, but will not be limited to, the following:

- Updates on USDA's Section 538 GRRH program activities.
- Perspectives on the current state of debt financing and its impact on the Section 538 GRRH program.
- Enhancing the use of Section 538 GRRH program financing with the transfer and/or preservation of Section 515 developments.

- The impact of the Low Income Housing Tax Credits program changes on Section 538 GRRH program financing.

Non-Discrimination Requirements

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.ascr.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by:

- (1) *By mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250-9410
- (2) *Fax:* (202) 690-7442; or
- (3) *Email:* program.intake@usda.gov.

Dated: January 6, 2017.

David Lipsetz,

Acting Administrator, Rural Housing Service.

[FR Doc. 2017-01078 Filed 1-17-17; 8:45 am]

BILLING CODE 3410-XV-P

DEPARTMENT OF COMMERCE

Bureau of the Census

Census Bureau 2020 Advisory Committee; Extension of Nominations Submission Period

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of request for nominations; extension of nominations submission period.

SUMMARY: The Bureau of the Census (Census Bureau) is issuing this document to extend the nominations submission period for the Census Bureau 2020 Advisory Committee; Notice of Request for Nominations, which was published in the **Federal Register** on December 20, 2016. The nominations submission period, which would have ended on January 19, 2017, is now extended until February 17, 2017.

DATES: Nomination submissions on the notice of request for nominations published on December 20, 2016 (81 FR 92776) must be received by February 17, 2017.

ADDRESSES: Please submit nominations to Tara Dunlop Jackson, Branch Chief for Advisory Committees, Customer Liaison and Marketing Services Office, tara.t.dunlop@census.gov, Department of Commerce, U.S. Census Bureau, Room 8H177, 4600 Silver Hill Road, Washington, DC 20233, telephone 301-763-5222.

FOR FURTHER INFORMATION CONTACT: Tara Dunlop Jackson, Branch Chief for Advisory Committees, Customer Liaison Marketing Services Offices, U.S. Census Bureau, Room 8H177, 4600 Silver Hill Road, Washington, DC 20233, telephone (301) 763-5222 or tara.t.dunlop@census.gov. For TTY callers, please use the Federal Relay Service 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau 2020 Advisory Committee is established in accordance with the Federal Advisory Committee Act, Title 5, United States Code, Appendix 2. For more information about the Committee, membership, and the nomination process, please see the original document on the notice of request for nominations published on December 20, 2016 (81 FR 92776).

In response to individuals and organizations who have requested more time to submit nominations of members to serve on the Census Bureau 2020 Advisory Committee, the Census Bureau

has decided to extend the nominations submission period to February 17, 2017. This document announces the extension of the nominations submission period.

Dated: January 11, 2017.

John H. Thompson,

Director, Bureau of the Census.

[FR Doc. 2017-01025 Filed 1-17-17; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of National Advisory Council on Innovation and Entrepreneurship Meeting

AGENCY: Economic Development Administration, Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The National Advisory Council on Innovation and Entrepreneurship (NACIE) will hold a public meeting on Thursday, February 2, 2017, from 1:00–3:00 p.m. Eastern Time (ET) and Friday, February 3, 2017, from 8:45 a.m.–12:30 p.m. ET. During this time, members will further develop their policy proposals and work plan for their two-year term. Topics to be covered include increasing access to capital in underserved markets, inclusive entrepreneurship practices, improving entrepreneurship education in schools and career development programs, and better aligning federal innovation and entrepreneurship programing.

DATES:

Thursday, February 2, 2017

Time: 1:00 p.m.–3:00 p.m. Eastern Time (ET)

Friday, February 3, 2017

Time: 8:45 a.m.–12:30 p.m. ET.

ADDRESSES: Herbert Clark Hoover Building, 1401 Constitution Ave. NW., Washington, DC 20230, Room 1894. Please enter through the library, located on the corner of 15th St. & Pennsylvania Ave. NW., Washington, DC 20230. Please note that pre-clearance is required in order to make a statement during our public comment portion. Please be sure to keep all comments to 5 minutes or less, and submit a brief statement summarizing your comment to Craig Buerstatte (see contact information below) no later than 11:59 p.m. ET on Monday, January 30, 2017.

Teleconference:

February 2–3, 2017

Dial-In: +1888-949-2793

Passcode: 4819803

SUPPLEMENTARY INFORMATION: The NACIE was chartered on November 10,

2009, to advise the Secretary of Commerce on matters related to innovation and entrepreneurship in the United States. NACIE's overarching focus is recommending transformational policies to the Secretary that will help U.S. communities, businesses, and the workforce become more globally competitive.

The NACIE operates as an independent entity within the Office of Innovation and Entrepreneurship (OIE), which is housed within the U.S. Commerce Department's Economic Development Administration. NACIE members are a diverse and dynamic group of successful entrepreneurs, innovators, and investors, as well as leaders from nonprofit organizations and academia.

The final agenda for the meeting will be posted on the NACIE Web site at <http://www.eda.gov/oie/nacie/> prior to the meeting. Any member of the public may submit pertinent questions and comments concerning the NACIE's affairs at any time before or after the meeting. Comments may be submitted to the Office of Innovation and Entrepreneurship at the contact information below. Those unable to attend the meetings in person but wishing to listen to the proceedings can do so through a conference call line accessible via +1888-949-2793 with passcode 4819803. Copies of the meeting minutes will be available by request within 90 days of the meeting date.

FOR FURTHER INFORMATION CONTACT:

Craig Buerstatte, Office of Innovation and Entrepreneurship, Room 78018, 1401 Constitution Avenue NW., Washington, DC 20230; email: nacie@doc.gov; telephone: +1202-482-8001; fax: +1202-273-4781. Please reference "NACIE February 2017 Meeting" in the subject line of your correspondence.

Dated: January 12, 2017.

Craig Buerstatte,

Acting Director, Office of Innovation and Entrepreneurship.

[FR Doc. 2017-01067 Filed 1-17-17; 8:45 am]

BILLING CODE 3510-WH-P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Request for Nominations for Members To Serve on National Institute of Standards and Technology Federal Advisory Committees

Correction

In notice document 2016-31835, appearing on pages 85 through 92 in the issue of Tuesday, January 3, 2017, make the following corrections:

1. On page 86, in the first column, on the fifth line, following the **DATES** paragraph, insert the following:

ADDRESSES: See below.

SUPPLEMENTARY INFORMATION:

Board of Overseers of the Malcolm Baldrige National Quality Award

2. On the same page, in the same column, beginning on the twenty-seventh line, following the **FOR FURTHER INFORMATION CONTACT** paragraph, remove the following:

SUPPLEMENTARY INFORMATION:

Board of Overseers of the Malcolm Baldrige National Quality Award

[FR Doc. C1-2016-31835 Filed 1-17-17; 8:45 am]

BILLING CODE 1301-00-D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF070

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish of the Gulf of Alaska; Central Gulf of Alaska Rockfish Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of standard prices and fee percentage.

SUMMARY: NMFS publishes the standard ex-vessel prices and fee percentage for cost recovery under the Central Gulf of Alaska Rockfish Program. This action is intended to provide participants in a rockfish cooperative with the standard prices and fee percentage for the 2016 fishing year, which was authorized from May 1 through November 15. The fee percentage is 2.54 percent. The fee payments are due from each rockfish cooperative on or before February 15, 2017.

DATES: Effective January 18, 2017.

FOR FURTHER INFORMATION CONTACT: Carl Greene, 907-586-7105.

SUPPLEMENTARY INFORMATION:

Background

The rockfish fisheries are conducted in Federal waters near Kodiak, AK, by trawl and longline vessels. Regulations implementing the Central Gulf of Alaska (GOA) Rockfish Program (Rockfish Program) are set forth at 50 CFR part 679. Exclusive harvesting privileges are allocated as quota share under the Rockfish Program for rockfish primary and secondary species. Each year, NMFS issues rockfish primary and secondary species cooperative quota (CQ) to rockfish quota share holders to authorize harvest of these species. The rockfish primary species are northern rockfish, Pacific ocean perch, and dusky rockfish. In 2012, dusky rockfish replaced the pelagic shelf rockfish species group in the GOA Groundfish Harvest Specifications (77 FR 15194, March 14, 2012). The rockfish secondary species include Pacific cod, rougheye rockfish, shortraker rockfish, sablefish, and thornyhead rockfish. Rockfish cooperatives began fishing under the Rockfish Program on May 1, 2012.

The Rockfish Program is a limited access privilege program established under the provisions of section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Sections 303A and 304(d) of the Magnuson-Stevens Act require NMFS to collect fees to recover the actual costs directly related to the management, data collection and analysis, and enforcement of any limited access privilege program. Therefore, NMFS is required to collect fees for the Rockfish Program under sections 303A and 304(d)(2) of the Magnuson-Stevens Act. Section 304(d)(2) of the Magnuson-Stevens Act also limits the cost recovery fee so that it may not exceed 3 percent of the ex-

vessel value of the fish harvested under the Rockfish Program.

Standard Prices

NMFS calculates cost recovery fees based on standard ex-vessel value price, rather than actual price data provided by each rockfish CQ holder. Use of a standard ex-vessel price is allowed under sections 303A and 304(d)(2) of the Magnuson-Stevens Act. NMFS generates a standard ex-vessel price for each rockfish primary and secondary species on a monthly basis to determine the average price paid per pound for all shoreside processors receiving rockfish primary and secondary species CQ.

Regulations at § 679.85(b)(2) require the Regional Administrator to publish rockfish standard ex-vessel values during the first quarter of each calendar year. The standard prices are described in U.S. dollars per pound for rockfish primary and secondary species CQ landings made during the previous year.

Fee Percentage

NMFS assesses a fee on the standard ex-vessel value of rockfish primary species and rockfish secondary species CQ harvested by rockfish cooperatives in the Central GOA and waters adjacent to the Central GOA when rockfish primary species caught by a cooperative are deducted from the Federal total allowable catch. The rockfish entry level longline fishery and trawl vessels that opt out of joining a cooperative are not subject to cost recovery fees because those participants do not receive rockfish CQ. Specific details on the Rockfish Program's cost recovery provision may be found in the implementing regulations set forth at § 679.85.

NMFS informs—by letter—each rockfish cooperative of the fee percentage applied to the previous year's landings and the total amount due. Fees are due on or before February 15 of each year. Failure to pay on time will result in the permit holder's

rockfish quota share becoming non-transferable, and the person will be ineligible to receive any additional rockfish quota share by transfer. In addition, cooperative members will not receive any rockfish CQ the following year until full payment of the fee is received by NMFS.

NMFS calculates and publishes in the **Federal Register** the fee percentage in the first quarter of each year according to the factors and methods described in Federal regulations at § 679.85(c)(2). NMFS determines the fee percentage that applies to landings made in the previous year by dividing the total Rockfish Program management, data collection and analysis, and enforcement costs (direct program costs) during the previous year by the total standard ex-vessel value of the rockfish primary species and rockfish secondary species for all rockfish CQ landings made during the previous year (fishery value). NMFS captures the direct program costs through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. Fee collections in any given year may be less than, or greater than, the direct program costs and fishery value for that year, because, by regulation, the fee percentage is established in the first quarter of the calendar year based on the program costs and the fishery value of the previous calendar year.

Using the fee percentage formula described above, the estimated percentage of program costs to value for the 2016 calendar year is 2.54 percent of the standard ex-vessel value. The fee percentage for 2016 is a decrease from the 2015 fee percentage of 3.0 percent (81 FR 10591, March 1, 2016). Program costs for 2016 were lower than in 2015, with a specific reduction in the costs of observer coverage for the Alaska Fisheries Science Center due to efficiencies achieved in the deployment of observers in the Rockfish Program.

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2016 ROCKFISH PROGRAM SEASON IN KODIAK, ALASKA

Species	Period ending	Standard ex-vessel price per pound
Dusky rockfish *	May 31	\$0.17
	June 30	0.17
	July 31	0.17
	August 31	0.17
	September 30	0.17
	October 31	0.17
	November 30	0.17
Northern rockfish	May 31	0.16
	June 30	0.17
	July 31	0.16
	August 31	0.16
	September 30	0.16

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2016 ROCKFISH PROGRAM SEASON IN KODIAK, ALASKA—Continued

Species	Period ending	Standard ex-vessel price per pound
Pacific cod	October 31	0.16
	November 30	0.16
	May 31	0.28
	June 30	0.29
	July 31	0.30
	August 31	0.29
	September 30	0.30
	October 31	0.30
Pacific ocean perch	November 30	0.31
	May 31	0.19
	June 30	0.19
	July 31	0.19
	August 31	0.19
	September 30	0.19
	October 31	0.19
	November 30	0.19
Rougheye rockfish	May 31	0.15
	June 30	0.16
	July 31	0.15
	August 31	0.15
	September 30	0.15
	October 31	0.15
	November 30	0.15
Sablefish	May 31	3.14
	June 30	3.28
	July 31	3.20
	August 31	3.20
	September 30	3.48
	October 31	3.20
	November 30	3.20
Shortraker rockfish	May 31	0.17
	June 30	0.20
	July 31	0.18
	August 31	0.22
	September 30	0.18
	October 31	0.18
	November 30	0.18
Thornyhead rockfish	May 31	0.38
	June 30	0.58
	July 31	0.49
	August 31	0.49
	September 30	0.49
	October 31	0.49
	November 30	0.49

* The pelagic shelf rockfish species group has been changed to “dusky rockfish.”

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Pub. L. 108–447; Pub. L. 111–281.

Dated: January 10, 2017.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 2017–00715 Filed 1–17–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Coral Reef Conservation Program

AGENCY: Coral Reef Conservation Program, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of public meeting, notice of public comment.

SUMMARY: Notice is hereby given of a public meeting of the U.S. Coral Reef Task Force (USCRTF). The meeting will be held Thursday, February 23, 2017, at

9:00 a.m. in Washington, DC, at the U.S. Department of Interior, 1925 Constitution Avenue NW., 20006. The meeting provides a forum for coordinated planning and action among federal agencies, state and territorial governments, and nongovernmental partners. Registration is requested for all events associated with the meeting. This meeting has time allotted for public comment. All public comments must be submitted in written format. A written summary of the meeting will be posted on the USCRTF Web site within two months of occurrence. For information about the meeting, registering and submitting public comments, go to <http://www.coralreef.gov>.

Commenters may address the meeting, the role of the USCRTF, or general coral reef conservation issues. Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment, including personal identifying information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Established by Presidential Executive Order 13089 in 1998, the U.S. Coral Reef Task Force mission is to lead, coordinate and strengthen U.S. government actions to better preserve and protect coral reef ecosystems. Co-chaired by the Departments of Commerce and Interior, Task Force members include leaders of 12 federal agencies, seven U.S. states and territories and three freely associated states.

FOR FURTHER INFORMATION CONTACT: Jennifer Koss, NOAA USCRTF Steering Committee Point of Contact, NOAA Coral Reef Conservation Program, 1305 East-West Highway, N/OCRM, Silver Spring, MD 20910 at 301-533-0777 or Liza Johnson, USCRTF Executive Secretary, U.S. Department of Interior, MS-3530-MIB, 1849 C Street NW., Washington, DC 20240 at (202) 208-5004 or visit the USCRTF Web site at <http://www.coralreef.gov>

Dated: January 10, 2017.

Christopher Cartwright,
Chief Financial Officer, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2017-00845 Filed 1-17-17; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF164

Fisheries of the Gulf of Mexico and the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Pre-Workshop Webinar for Southeastern U.S. Black Grouper; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of SEDAR 48 pre-Data Workshop webinar for Southeastern U.S. black grouper.

SUMMARY: The SEDAR 48 assessment process of Southeastern U.S. black grouper will consist of a Data Workshop, an Assessment Workshop and a series of assessment webinars, and a Review Workshop. See

SUPPLEMENTARY INFORMATION.

DATES: The SEDAR 48 pre-Data Workshop webinar will be held February 14, 2017, from 11 a.m. to 1 p.m. Eastern Time.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571-4366; email: Julie.neer@safmc.net.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) a Review Workshop. The product of the Data Workshop is a report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and

NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the pre-data workshop webinar are as follows:

Panelists will present summary data and discuss data needs and treatments.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 11, 2017.

Jeffrey N. Lonergan,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2017-00959 Filed 1-17-17; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF116

Endangered Species; File Nos. 19641, 17861, 20314, 20340, 20347, 20351, 20528, 20548, and 20651

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of applications.

SUMMARY: Notice is hereby given that nine applicants have applied in due form for permits to take Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) and shortnose sturgeon (*Acipenser brevirostrum*) for purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before February 17, 2017.

ADDRESSES: The applications and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting corresponding File No. from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

Written comments on the applications should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to NMFS.Pr1Comments@noaa.gov. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on the application(s) would be appropriate.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Erin Markin, (301) 427-8401.

SUPPLEMENTARY INFORMATION: The subject permits are requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

Each application is summarized below. Please refer to the associated application for specific take numbers. Permits may be valid for up to 10 years.

File No. 19641: Tom Savory, Connecticut Department of Energy and Environmental Protection, Marine Fisheries, P.O. Box 719, Old Lyme, CT 06371, requests a permit to collect, examine and tag shortnose and Atlantic sturgeon in Connecticut waters. Shortnose sturgeon research would be conducted in the Connecticut River from the mouth to the Holyoke Dam. Researchers would monitor for presence, abundance, age and sex composition, habitat utilization, and seasonal movement. Atlantic and shortnose sturgeon would be measured, tissue sampled, passive integrated transponder (PIT) tagged, photographed, and weighed prior to release. A subset of fish also would be fin ray sampled, blood sampled, acoustic tagged, and gastric lavaged. Up to three sturgeon of

each species may unintentionally die annually during research.

File No. 17861: Douglas Peterson, University of Georgia Warnell School of Forestry and Natural Resources Fisheries Division, Athens, GA 30602, requests a permit to better understand the ecology, population dynamics, and status of Atlantic and shortnose sturgeon in Georgia and Florida river systems. Spring and fall sampling would occur for Atlantic and shortnose. Fish would be PIT tagged, tissue sampled, measured, and weighed prior to release. A subset of fish would be acoustically tagged, fin ray sampled for aging, blood sampled, gonadal sampled, and endoscopic sex determination. Early life stages of each species would be intentionally collected and killed to document occurrence of spawning in systems. Up to eight Atlantic sturgeon and six shortnose sturgeon may unintentionally die annually in all river systems.

File No. 20314: Albert Spells, U.S. Fish and Wildlife Service, 11110 Kimages Road, Charles City 23030, requests a permit to conduct research in Maryland and Virginia tributaries to the Chesapeake Bay as well as within the Chesapeake Bay proper. The objectives of the research are to (1) identify the overall health of the DPS, (2) monitor reproductive success, spawning adult and juvenile abundance in tributaries, and (3) evaluate movement patterns and habitat preferences in and between tributaries of the Bay. Sampling gear would include anchored/floating gillnets and other nets. Fish would be PIT tagged, tissue sampled, measured, and weighed prior to release. Individual fish would receive a T-bar, acoustic, and/or satellite tag. A subset of fish would be fin ray sampled. Early life stages of Atlantic sturgeon would be intentionally collected and killed to document occurrence of spawning in systems. Up to two Atlantic sturgeon may unintentionally die annually during research.

File No. 20340: Kim McKown, New York State Department of Environmental Conservation, 205 Belle Mead Road, East Setuaket, NY 11733, requests a permit to conduct research on Atlantic and shortnose sturgeon to determine movement of adult sturgeon in the Hyde Park area, movement of age-1 sturgeon in the Hudson River, population estimates, and habitat utilization. Fish would be collected by gill nets year-round during ice-free periods. Studies would involve acoustic telemetry and mark-recapture. Upon capture, fish would be measured, weighed, PIT tagged, tissue sampled, and photographed. A subset of fish

would be externally and/or internally tagged, fin ray sampled for aging, gastric lavaged, gonadal biopsied, and blood sampled. Early life stages of Atlantic sturgeon would be intentionally collected and killed to document occurrence of spawning in systems. Up to four Atlantic sturgeon and three shortnose sturgeon may unintentionally die annually during research.

File 20347: Gayle Zydlewski, University of Maine, requests a permit to conduct research on Atlantic and shortnose sturgeon to (1) determine spawning periodicity and age class distribution, and (2) identify critical habitat and movement within and between river systems. Research on Atlantic and shortnose sturgeon in the Gulf of Maine would continue in several river systems: Penobscot River, Kennebec River, Saco River, and Merrimack River. All sampling would occur in riverine or near coastal areas annually. Adults, subadults, and juveniles would be sampled with gill nets, trammel nets, trot lines, and a miniature Missouri trawl in the spring, summer, and fall annually. Upon capture, fish would be measured, weighed, PIT tagged, tissue sampled, and photographed. A subset of fish would be acoustically tagged, fin ray, apical scute sampled, gastric lavaged, borescopy, and blood sampled. Early life stages of each species would be intentionally collected and killed to document occurrence of spawning in systems. Up to four sturgeon of each species may unintentionally die annually during research.

File No. 20351: Michael Frisk, the School of Marine and Atmospheric Sciences, Stony Brook University, Stony Brook, NY 11794, requests a permit to conduct research on Atlantic and shortnose sturgeon to continue a long-term study examining the movements among and within Atlantic sturgeon marine aggregation areas located in New York, New Jersey, Delaware, and Connecticut waters and to conduct research to examine (1) sex-specific movements, (2) genetic stock identification, and (3) acquisition of diet, age, and parasite-prevalence data. Additional research would target adults within the marine aggregation areas, and target early life stage and juvenile Atlantic and shortnose sturgeon within riverine and estuarine areas of the Hudson and Delaware Rivers. Upon capture, fish would be measured, weighed, PIT tagged, tissue sampled, and photographed. A subset of fish would be externally and/or internally tagged, fin ray sampled, gastric lavaged, gonadal sampled, apical scute sampled, ultrasound, and blood sampled. Early

life stages of each species would be intentionally collected and killed to document occurrence of spawning in systems. Up to three Atlantic sturgeon and two shortnose sturgeon may unintentionally die annually during research.

File No. 20528: Bill Post, South Carolina Department of Natural Resources, 217 Fort Johnson Road, Charleston, SC 29412, requests a permit to conduct research on Atlantic and shortnose sturgeon to determine their presence, status, health, habitat use, and movements in South Carolina waters. Studies would involve using gill nets to capture fish. Upon capture, fish would be measured, weighed, PIT tagged, tissue sampled, and photographed. A subset of individuals would be acoustically tagged, fin ray sampled, and gonadal biopsied. Early life stages of each species would be intentionally collected and killed to document occurrence of spawning in systems. Up to two sturgeon of each species may unintentionally die annually during research.

File No. 20548: Dewayne Fox, Delaware State University, Department of Agriculture and Natural Resources, 1200 North DuPont Highway, Dover, DE 19901, requests a permit to conduct research on Atlantic and shortnose sturgeon using gillnets, D-ring nets, egg pad collectors, biotelemetry, and hydroacoustic tools in the Delaware River/Estuary, Hudson River/Estuary, and coastal environment between Virginia and New York to develop quantitative estimates of run size, recruitment, and habitat assessment. Upon capture, fish would be measured, weighed, PIT tagged, tissue sampled, and photographed. A subset of individuals would be externally and/or internally tagged, fin ray sampled, blood sampled, and gonadal biopsied. Early life stages of Atlantic sturgeon would be intentionally collected and killed to document occurrence of spawning in systems. Up to one sturgeon of each species may unintentionally die annually during research.

File No. 20651: Anthony Vitale, Entergy Indian Point, 450 Broadway, Buchanan, NY 10511, requests a permit to conduct research on Atlantic and shortnose sturgeon for the Hudson River Biological Monitoring Program (HRBMP) using trawls and seines. The HRBMP takes place within in the Hudson River estuary and involves fisheries sampling to monitor ichthyoplankton and juvenile fish abundance and distribution from Battery Park, Manhattan, upstream to Troy Dam during March through October, and in portions of New York

Harbor during November through April. Upon capture, individual fish would be measured, weighed, PIT tagged, tissue sampled, and photographed. Early life stages of each species would be intentionally collected and killed to document occurrence of spawning in systems.

Dated: January 11, 2017.

Julia Harrison,

Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.

[FR Doc. 2017-00956 Filed 1-17-17; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF148

Marine Mammals; File No. 20294

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Robert DiGiovanni, Jr., 6 Wakefield Rd. Hampton Bays, New York 11946, has applied in due form for a permit to conduct research on North Atlantic right whales (*Eubalaena glacialis*) and 44 other protected marine mammal and sea turtle species.

DATES: Written, telefaxed, or email comments must be received on or before February 17, 2017.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 20294 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to NMFS.Pr1Comments@noaa.gov. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request

to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT:

Courtney Smith or Amy Hapeman, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222-226).

The applicant proposes to conduct aerial, vessel, and ground surveys of North Atlantic right whales (*Eubalaena glacialis*) and 44 other protected cetaceans, pinnipeds, and sea turtles in the Mid-Atlantic U.S. waters, from Massachusetts to North Carolina. Nine of the target species are threatened or endangered: North Atlantic right, blue (*Balaenoptera musculus*), fin (*B. physalus*), sei (*B. borealis*), and sperm (*Physeter macrocephalus*) whales; and green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*), and leatherback (*Dermochelys coriacea*) sea turtles. Surveys will be conducted using fixed wing aircraft and vessels to assess seasonal abundance and distribution of marine mammals in the area. Ground surveys will be conducted on foot and with remote cameras to obtain counts of seals throughout different tidal cycles and to document prevalence of human interaction around seal haul-out sites accessible to the public. Seal scat will be collected for health assessment studies. The permit would be valid for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: January 11, 2017.

Julia Harrison,

Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.

[FR Doc. 2017-00952 Filed 1-17-17; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF160

Fisheries of the Exclusive Economic Zone Off Alaska; Application for an Exempted Fishing Permit

AGENCY: National Marine Fisheries
Service (NMFS), National Oceanic and
Atmospheric Administration (NOAA),
Commerce.

ACTION: Notice; receipt of application to
renew an exempted fishing permit.

SUMMARY: This notice announces receipt of an application from the Alaska Seafood Cooperative and co-applicants to renew exempted fishing permit (EFP) 2016-01 as modified on January 10, 2017. NMFS announced receipt of the application for EFP 2016-01 on January 25, 2016. NMFS issued EFP 2016-01 on May 6, 2016, and modified the EFP on January 10, 2017. If granted, this renewal would extend the expiration date of modified EFP 2016-01 from April 30, 2017, to December 31, 2017. The objective of EFP 2016-01 is to allow the applicants to remove halibut from a trawl codend on the deck, and release those halibut back to the water in a timely manner to increase survivability. Under the EFP, halibut are sampled by NMFS-trained observers for length and physical condition using standard International Pacific Halibut Commission halibut mortality assessment methods. The objectives of EFP 2016-01 are to (1) test methods for sorting halibut on deck for suitability as an allowable fish handling mode for the non-pollock catcher/processor trawl fisheries (Amendment 80, community development quota, and trawl limited access) in the Bering Sea and Aleutian Islands under an eventual regulated program; and (2) simplify and improve on elements that worked under a 2015 deck sorting EFP project. This experiment has the potential to promote the objectives of the Magnuson-Stevens Fishery Conservation and Management Act and the Northern Pacific Halibut Act of 1982.

DATES: Comments on this EFP application must be submitted to NMFS on or before February 7, 2017. The

North Pacific Fishery Management Council (Council) will consider the application at its meeting from January 30 through February 6, 2017, in Seattle, WA.

ADDRESSES: The Council meeting will be held at the Renaissance Seattle Hotel, 515 Madison Street, Seattle, WA 98104. The agenda for the Council meeting is available at <http://www.npfmc.org>. You may submit comments on this document, identified by NOAA-NMFS-2017-0006, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov#!/docketDetail;D=NOAA-NMFS-2017-0006, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Electronic copies of the EFP application, modified EFP 2016-01, and the basis for a categorical exclusion under the National Environmental Policy Act are available from the Alaska Region, NMFS Web site at <http://alaska.fisheries.noaa.gov/>.

FOR FURTHER INFORMATION CONTACT:
Brandee Gerke, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the domestic groundfish fisheries in the Bering Sea and Aleutian Islands management area (BSAI) under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP), which the Council prepared under the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing the BSAI groundfish fisheries appear at 50 CFR parts 600 and 679. The FMP and the implementing regulations at § 600.745(b) and § 679.6 allow the NMFS Regional Administrator to

authorize, for limited experimental purposes, fishing that would otherwise be prohibited. Procedures for issuing EFPs are contained in the implementing regulations.

The International Pacific Halibut Commission (IPHC) and NMFS manage fishing for Pacific halibut (*Hippoglossus stenolepis*) through regulations established under the authority of the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention) and the Northern Pacific Halibut Act of 1982. The IPHC promulgates regulations pursuant to the Convention. The IPHC's regulations are subject to approval by the Secretary of State with concurrence from the Secretary of Commerce (Secretary).

Background

Regulations implemented by the IPHC allow Pacific halibut to be commercially harvested by the directed North Pacific longline fishery. Halibut is a prohibited species in the groundfish fishery, requiring immediate return to the sea with a minimum of injury. Halibut caught incidentally by catcher/processors in the nonpelagic trawl groundfish fisheries must be weighed on a NMFS-approved scale, sampled by observers, and returned to the ocean as soon as possible. The Council establishes annual maximum halibut bycatch allowances and seasonal apportionments adjusted by an estimated halibut discard mortality rate (DMR) for groundfish fisheries. The DMRs are based on the best information available, including information contained in the annual Stock Assessment and Fishery Evaluation report, available at <http://www.alaskafisheries.noaa.gov/>. NMFS approves the halibut DMRs developed and recommended by the IPHC and the Council for the BSAI groundfish fisheries for use in monitoring the halibut bycatch allowances and seasonal apportionments.

Directed fishing in a groundfish fishery closes when the halibut mortality apportionment for the fishery is reached, even if the target species catch is less than the seasonal or annual quota for the directed fishery. In the case of the Bering Sea flatfish fishery, seasons have been closed before fishery quotas have been reached to prevent the fishery from exceeding the halibut mortality apportionment.

With the implementation of Amendment 80 to the FMP on September 14, 2007 (72 FR 52668), halibut mortality apportionments were established for the Amendment 80

sector and for Amendment 80 cooperatives. Amendment 80 is a catch share program that allocates several BSAI non-pollock trawl groundfish fisheries (including the flatfish fishery) among fishing sectors, and facilitates the formation of harvesting cooperatives in the non-American Fisheries Act trawl catcher/processor sector. Though halibut mortality apportionments provide Amendment 80 cooperatives more flexibility to use available mortality, halibut mortality continues to constrain fishing in some Amendment 80 fisheries. Therefore, this sector is actively exploring ways to continue to reduce halibut mortality.

Before incidentally caught halibut are returned to the sea, at-sea observers must estimate halibut and groundfish catch amounts. Regulations in 50 CFR part 679 assure that observer estimates of halibut and groundfish catch are credible and accurate, and that potential bias is minimized. For example, NMFS requires that all catch be made available for sampling by an observer; prohibits tampering with observer samples; prohibits removal of halibut from a codend, bin, or conveyance system prior to being observed and counted by an at-sea observer; and prohibits fish (including halibut) from remaining on deck unless an observer is present.

In 2009 and 2012, halibut mortality experiments were conducted by members of the Amendment 80 sector under EFP 09–02 (74 FR 12113, March 23, 2009) and EFP 12–01 (76 FR 70972, November 16, 2011). By regulation, all catch including halibut is moved across a flow scale below deck before the halibut is returned to the sea. Halibut mortality increases with increased handling and time out of water. Under the 2009 and 2012 EFPs, experimental methods for sorting catch on a vessel's deck allowed halibut to be returned to the sea in less time, with less handling relative to halibut routed below deck and over the flow scale. The halibut mortality during flatfish fishing under the 2009 and 2012 EFPs was estimated to be approximately 17 metric tons (mt) and 10.8 mt, respectively, less than the amounts estimated from the DMR for this fishery. The reduced halibut mortality under the 2009 and 2012 EFPs is attributed to the improved condition of halibut through reduced handling and time out of water.

In 2015, test fishing under EFP 2015–02 (80 FR 3222, January 22, 2015) expanded on results of the 2009 and 2012 EFPs to explore the feasibility of deck sorting halibut in additional fisheries, on more vessels, and during a longer interval of time during the fishing season. The primary objective

was to reduce halibut mortality in the Amendment 80 groundfish fisheries in 2015. Fishing under the EFP began in May and continued through November. The most prominent result from the 2015 EFP was that substantial halibut mortality savings were achieved from deck sorting on catcher/processors operating in Bering Sea non-pelagic trawl fisheries. The 2015 EFP is estimated to have saved 175 mt of halibut. For the nine vessels that participated in the 2015 EFP, all but one achieved mortality rates in the range of 41 percent to 53 percent, compared to the standard mortality rate of 80 percent in the Bering Sea flatfish fisheries without deck sorting (average across target fisheries of interest for the 2015 EFP).

Test fishing under EFP 2016–01 from May through November 2016 resulted in more participating vessels over more fisheries and yielded greater halibut savings relative to prior years. Twelve boats participated in test fishing under EFP 2016–01. In prior deck sorting EFPs, test fishing primarily occurred in the flathead sole and arrowtooth flounder fisheries. In 2016, test fishing expanded to fisheries for yellowfin sole, Pacific cod, Pacific ocean perch, and Atka mackerel to a much larger extent than in prior years. Based on preliminary results, EFP 2016–01 is estimated to have saved 288 mt of halibut in 2016. Though modified EFP 2016–01 is valid through April 30, 2017, no halibut savings data from 2017 are available to report at this time.

Through the course of EFP fishing in 2016, NMFS and the EFP participants identified modifications to EFP 2016–01 that would improve the effectiveness of the EFP and reduce the burden on industry to participate in the EFP. For example, EFP 2016–01 required participating vessels to carry three observers to collect data during EFP fishing. Through the course of the year, it became apparent that two observers could sufficiently collect the requisite data for EFP hauls. As a result, NMFS subsequently modified EFP 2016–01 to make it optional for participating vessels to carry more than two observers on EFP trips. Under modified EFP 2016–01 (see **ADDRESSES**) vessel operators may opt to carry more than two observers to maintain the pace at which fish are run through the factory while halibut are being sorted and sampled by an observer on deck or they may carry two observers with the condition that fish may not be run into the factory while the observer is on deck sampling the sorted halibut. Additional modifications to EFP 2016–01 included (a) changes in observer sampling

methods designed to increase consistency of observer sampling for the EFP with other, routine observer sampling in the fisheries; (b) changes to the persons named on the EFP as designated representatives; and (c) the addition of new vessels to the EFP.

Proposed Action

On January 10, 2017, the Alaska Seafood Cooperative (AKSC), an Amendment 80 cooperative, submitted an application to renew modified EFP 2016–01 through the end of 2017 to continue to build on the information collected in prior deck sorting EFPs and further reduce halibut mortality in the Amendment 80, community development quota (CDQ), and trawl limited access sectors. The proposed action would extend the effective date of modified EFP 2016–01 (see **ADDRESSES**) from April 30, 2017 to December 31, 2017. No other changes to modified EFP 2016–01 are proposed.

The renewed EFP would allow halibut to continue to be sorted, sampled, and released prior to being weighed on a flow scale, to achieve the experimental objectives of modified EFP 2016–01 and reduce halibut mortality. Halibut prohibited species catch (PSC) mortality for vessels engaged in experimental fishing would not exceed the 2017 halibut PSC mortality apportionments set out in Table 14 of the Final 2016 and 2017 Harvest Specifications (available at https://alaskafisheries.noaa.gov/sites/default/files/16_17bsaitable14.pdf). Participants request no additional groundfish or halibut quota as part of this EFP renewal application, and all groundfish catch will accrue against the appropriate Amendment 80, CDQ, or trawl limited access sector catch and PSC allowances.

Under the EFP, participants would be limited to their groundfish allocations under the 2017 harvest specifications (81 FR 14773, March 18, 2016). The amount of halibut mortality applied to the EFP activities would be subject to review and approval by NMFS.

In 2018, the AKSC would be required to submit to NMFS a report of the EFP results after EFP experimental fishing has ended in 2017. The report would include a comparison of halibut mortality from halibut sampled during the EFP and an estimate of halibut mortality under standard IPHC halibut mortality rates for those target fisheries. Additionally, the report should compare the estimated amount of halibut sampled by observers in the factory with the census of halibut collected in the factory by vessel crew to evaluate the precision and associated variance of sampled-based extrapolations and to

inform a decision of the best way to account for factory halibut in a regulated program.

This EFP would be valid upon renewal until either the end of 2017 or when the annual halibut mortality apportionment is reached in areas of the BSAI open to directed fishing by the various sectors, whichever occurs first. EFP-authorized fishing activities would not be expected to change the nature or duration of the groundfish fishery, gear used, or the amount or species of fish caught by the participants.

The fieldwork that would be conducted under this EFP is not expected to have a significant impact on the human environment as detailed in the categorical exclusion prepared for this action (see **ADDRESSES**).

In accordance with § 679.6, NMFS has determined that the renewal application warrants further consideration and has forwarded the application to the Council to initiate consultation. The Council is scheduled to consider the EFP renewal application during its February 2017 meeting, which will be held at the Renaissance Seattle Hotel, Seattle WA. The applicant has been invited to appear in support of the renewal application.

Public Comments

Interested persons may comment on the application at the February 2017 Council meeting during public testimony or until February 7, 2017. Information regarding the meeting is available at the Council's Web site at <http://www.npfmc.org>. Copies of the renewal application and categorical exclusion are available for review from NMFS (see **ADDRESSES**). Comments also may be submitted directly to NMFS (see **ADDRESSES**) by the end of the comment period (see **DATES**).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 12, 2017.

Samuel D. Rauch III,

*Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.*

[FR Doc. 2017-01063 Filed 1-17-17; 8:45 am]

BILLING CODE 3510-22-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Compliance Bulletin 2016-03: Detecting and Preventing Consumer Harm From Production Incentives

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance Bulletin.

SUMMARY: The Bureau recognizes that many supervised entities may choose to implement incentive programs to achieve business objectives. When properly implemented and monitored, reasonable incentives can benefit consumers and the financial marketplace as a whole.

This bulletin compiles guidance that has previously been given by the CFPB in other contexts and highlights examples from the CFPB's supervisory and enforcement experience in which incentives contributed to substantial consumer harm. It also describes compliance management steps supervised entities should take to mitigate risks posed by incentives.

DATES: The Bureau released this Compliance Bulletin on its Web site on November 28, 2016

FOR FURTHER INFORMATION CONTACT: Vanessa Careiro, Attorney-Advisor, Office of Supervision Policy, 1700 G Street NW., 20552, (202) 435-9394.

SUPPLEMENTARY INFORMATION:

1. Compliance Bulletin

Financial services companies, including entities supervised by the Consumer Financial Protection Bureau (CFPB or Bureau), may accomplish business objectives through programs that tie outcomes to certain benchmarks, both required and optional. Companies may apply these production incentives, including sales and other incentives, ("incentives") to employees or service providers or both. The risks these incentives may pose to consumers are significant and both the intended and unintended effects of incentives can be complex, which makes this subject worthy of more careful attention by institutional leadership, compliance officers, and regulators alike. We thus will continue to invite further dialogue and discussion around the issues addressed in this Bulletin.

The Bureau acknowledges that incentives have been common across many economic sectors, including the market for consumer financial products and services. When properly implemented and monitored, reasonable incentives can benefit all stakeholders and the financial marketplace as a whole. For instance, companies may be able to attract and retain high-performing employees to enhance their overall competitive performance. Consumers may also benefit if these programs lead to improved customer service or introduce them to products or services that are beneficial to their financial interests.

Such incentives can affect a wide range of outcomes for employees or

service providers, from their compensation levels to whether they will continue to be employed or retained at all. Incentives are found in many markets for consumer financial products and services, and span the life cycle from marketing to sales, servicing, and collection. Common examples include sales or referrals of new products or services to existing consumers ("cross-selling"), sales of products or services to new customers, sales at higher prices where pricing discretion exists, quotas for customer calls completed, and collections benchmarks.

This Bulletin compiles guidance the CFPB has already given in other contexts and highlights examples from the CFPB's supervisory and enforcement experience in which incentives contributed to substantial consumer harm. It also describes compliance management steps that supervised entities should take to mitigate risks posed by incentives.

A. Risks to Consumers From Incentives

Despite their potential benefits, incentive programs can pose risks to consumers, especially when they create an unrealistic culture of high-pressure targets. When such programs are not carefully and properly implemented and monitored, they may create incentives for employees or service providers to pursue overly aggressive marketing, sales, servicing, or collections tactics. Through its supervisory and enforcement programs, the CFPB has taken action where employees have opened accounts or enrolled consumers in services without consent or where employees or service providers have misled consumers into purchasing products the consumers did not want, were unaware would harm them financially, or came with an unexpected ongoing periodic fee.

Depending on the facts and circumstances, such incentives may lead to outright violations of Federal consumer financial law¹ and other risks to the institution, such as public enforcement, supervisory actions, private litigation, reputational harm,

¹ Selected examples of these violations previously identified by the Bureau include the Dodd-Frank Act's prohibition of unfair, deceptive, and/or abusive acts or practices (UDAAPs) (Dodd-Frank Act, §§ 1031 & 1036(a), codified at 12 U.S.C. 5531 & 5536(a); the Electronic Fund Transfer Act (EFTA), as implemented by Regulation E (15 U.S.C. 1693 *et seq.*; 12 CFR part 1005); the Fair Credit Reporting Act, as implemented by Regulation V (15 U.S.C. 1681-1681x; 12 CFR part 1022); the Truth in Lending Act (TILA), as implemented by Regulation Z (15 U.S.C. 1601 *et seq.*; 12 CFR part 1026); and the Fair Debt Collection Practices Act (15 U.S.C. 1692-1692p).

and potential alienation of existing and future customers. Specific examples of problems include:

- Sales goals may encourage employees, either directly or indirectly, to open accounts or enroll consumers in services without their knowledge or consent. Depending on the type of account, this may further result in, for example:

- Improperly incurred fees;
- Improper collections activities;

and/or

- Negative effects on consumer credit scores.

- Sales benchmarks may encourage employees or service providers to market a product deceptively to consumers who may not benefit from or even qualify for it;

- Paying compensation based on the terms or conditions of transactions (such as interest rate) may encourage employees or service providers to overcharge consumers, to place them in less favorable products than they qualify for, or to sell them more credit or services than they had requested or needed;

- Paying more compensation for some types of transactions than for others that were or could have been offered to meet consumer needs, which could lead employees or service providers to steer consumers to transactions not in their interests; and

- Unrealistic quotas to sign consumers up for financial services may incentivize employees to achieve this result without actual consent or by means of deception.

Whether conduct like that described in this Bulletin violates Federal consumer financial law will depend on all relevant facts related to the practices encouraged by the incentives. Further detail on some of the Bureau's work and findings in these areas is recapped below:

Credit Card Add-On Matters

To date, the CFPB has resolved 12 different cases involving improper practices to market credit card add-on products or to retain consumers once enrolled in these products.² The Bureau notes that incentives frequently enhanced the risk that banks would engage in such improper practices. In some cases, employees or service providers received incentives, and a lack of proper controls allowed deceptive marketing practices to continue unchecked for many years.

Tapes of sales calls showed that employees and service providers deviated from the prepared call scripts in order to market the add-on products more aggressively, and often deceptively, to sign up more consumers. In all these matters, the companies' compliance monitoring, vendor management, and quality assurance programs failed to prevent, identify, or correct these practices in a timely manner.

Overdraft Opt-In Matters

Incentives played a role in at least one matter where consumers were deceived into opting in to overdraft services. The Bureau found that, as a result of incentives for hitting specific targets, a bank's telemarketing service provider had deceptively marketed overdraft services and enrolled certain bank consumers in those services without their consent.

Unfair and Abusive Sales Practices

In another public enforcement action, a Bureau investigation revealed that thousands of bank employees had opened unauthorized deposit and credit card accounts to satisfy sales goals and earn financial rewards under the bank's incentives. Specifically, the Bureau found that employees engaged in "simulated funding" by opening hundreds of thousands of deposit accounts without consumers' knowledge or consent, which caused consumers to incur improper fees. The Bureau also found that employees issued tens of thousands of unauthorized credit cards that incurred improper fees, opened debit cards and created PINs to activate them without consumers' knowledge or consent, and enrolled consumers in online banking services using false email addresses.

B. The CFPB's Expectations

The CFPB expects supervised entities that choose to utilize incentives to institute effective controls for the risks these programs may pose to consumers, including oversight of both employees and service providers involved in these programs. As the CFPB has emphasized repeatedly, a robust compliance management system (CMS) is necessary to detect and prevent violations of Federal consumer financial law.³ An entity's CMS should reflect the risk, nature, and significance of the incentive

programs to which they apply.

Accordingly, the strictest controls will be necessary where incentives concern products or services less likely to benefit consumers or that have a higher potential to lead to consumer harm, reward outcomes that do not necessarily align with consumer interests, or implicate a significant proportion of employee compensation. While the CFPB does not mandate any particular CMS structure and recognizes that CMS structures may appropriately vary based on the size and complexity of an organization, the Bureau's supervisory experience has found that an effective CMS commonly has the following components:

- Board of directors and management oversight;

- *Compliance program, which includes:*

- Policies and procedures;
- Training; and
- Monitoring and corrective action;
- Consumer complaint management program; and

- Independent compliance audit.

To limit incentives from leading to violations of law, supervised entities should take steps to ensure their CMS is effective. These steps may include, but are not limited to:

- *Board of directors and management oversight:* Fostering a culture of strong customer service related to incentives. In product sales, for example, ensuring that consumers are only offered products likely to benefit their interests;

- Board members and senior management should consider not only the outcomes these programs seek to achieve, but also how they may incidentally incentivize outcomes that harm consumers. They should authorize compliance personnel to design and implement CMS elements that address both intended and unintended outcomes, and provide adequate resources to do so.

- The "tone from the top" should empower all employees to report suspected incidents of improper behavior without fear of retaliation, providing easily accessible means to do so.

- *Policies and procedures:* Ensuring that the policies and procedures for incentives contain:

- Employee sales/collections quotas that, if a part of an entity's incentive program, are transparent to employees and reasonably attainable;

- Clear controls for managing the risk inherent in each stage of the product life cycle (as applicable): marketing, sales (including account opening), servicing, and collections;

² For more information on all of the matters noted in this Bulletin, please refer to the Bureau's Web site at <http://www.consumerfinance.gov/policy-compliance/enforcement/actions/>.

³ Supervision and Examination Manual: Compliance Management Review, available at <http://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/>; Supervisory Highlights, multiple editions, available at <http://www.consumerfinance.gov/policy-compliance/guidance/supervisory-highlights/>.

- Mechanisms to identify potential conflicts of interest posed for supervisory personnel who are covered by incentives but also are responsible for monitoring the quality of customer treatment and customer satisfaction; and
- Fair and independent processes for investigating reported issues of suspected improper behavior.

- **Training:** Implementing comprehensive training that addresses:
 - Expectations for incentives, including standards of ethical behavior;
 - Common risky behaviors for employees and service providers to foster greater awareness of primary risk areas;

- Terms and conditions of the institution's products and services so that they can be effectively described to consumers; and

- Regulatory and business requirements for obtaining and maintaining evidence of consumer consent.

- **Monitoring:** Designing overall compliance monitoring programs that track key metrics—and outliers—that may indicate incentives are leading to improper behavior by employees or service providers. Examples of possible monitoring metrics include, but are not limited to:

- Overall product penetration rates by consumer and household;
- Specific penetration rates for products and services (such as overdraft, add-on products, and online banking), as well as penetration rates by consumer segment;

- Employee turnover and employee satisfaction or complaint rates;

- Spikes and trends in sales (both completed and failed sales) by specific individuals and by units;

- Financial incentive payouts; and

- Account opening/product enrollment and account closure/product cancellation statistics, including by specific individuals and by units, taking into account the terms of the incentive programs (*i.e.*, requirements that accounts be open for a period of time or funded in order for employees to obtain credit under the program).

- **Corrective Action:** Promptly implementing corrective actions to address any incentive issues identified by monitoring reviews as areas of weakness:

- Corrective actions should include the termination of employees, service providers, and managers, as necessary, and these termination statistics should be analyzed for trends and root cause(s);

- Corrective actions should include changes to the structure of incentives, training on these programs, and return of funds to all affected consumers as

appropriate in light of failed sales or heightened levels of customer dissatisfaction;

- All corrective actions should ensure that the root causes of deficiencies are identified and resolved; and

- Findings should be escalated to management and the board, particularly where they appear to pose significant risks to consumers.

- **Consumer complaint management program:** Collecting and analyzing consumer complaints for indications that incentives are leading to violations of law or harm to consumers in order to identify and resolve the root causes of any such issues; and

- **Independent compliance audit:** Scheduling audits to address incentives and consumer outcomes across all products or services to which they apply, ensuring audits are conducted independently of both the compliance program and the business functions, and ensuring that all necessary corrective actions are promptly implemented.

For more information pertaining to the oversight of incentive programs, please review the CFPB's Supervision and Examination Manual.⁴ Specific modules referencing these programs include: Compliance Management Review, Unfair, Deceptive, and Abusive Acts or Practices, Debt Collection, Credit Card Account Management, Consumer Reporting, Mortgage Origination, Short-Term Small Dollar Lending, and the Equal Credit Opportunity Act. Other relevant Bureau guidance includes: CFPB Bulletin 2012–06 (Marketing of Credit Card Add-on Products),⁵ and CFPB Bulletin 2016–02 (Service Providers, amending and reissuing CFPB Bulletin 2012–03).⁶

2. Regulatory Requirements

This Compliance Bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final

⁴ CFPB Supervision and Examination Manual, available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.

⁵ CFPB Bulletin 2012–06, available at http://files.consumerfinance.gov/f/201207_cfpb_marketing_of_credit_card_addon_products.pdf.

⁶ CFPB Bulletin 2016–02, available at http://www.consumerfinance.gov/documents/1385/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf.

regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The Bureau has determined that this Compliance Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

Dated: January 5, 2017.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2017–01021 Filed 1–17–17; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF THE ARMY

Notice of Intent To Prepare an Environmental Impact Statement in Connection With Dakota Access, LLC's Request for an Easement To Cross Lake Oahe, North Dakota

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: This notice advises the public that the Department of the Army (Army), as lead agency, is gathering information necessary to prepare an environmental impact statement (EIS) in connection with Dakota Access, LLC's request to grant an easement to cross Lake Oahe, which is on the Missouri River and owned by the US Army Corps of Engineers (Corps). This notice opens the public scoping phase and invites interested parties to identify potential issues, concerns, and reasonable alternatives that should be considered in an EIS.

DATES: To ensure consideration during the development of an EIS, written comments on the scope of an EIS should be sent no later than February 20, 2017. The date of all public scoping meetings will be announced at least 15 days in advance through a notice to be published in the local North Dakota newspaper (The Bismarck Tribune) and online at <https://www.army.mil/asacw>.

ADDRESSES: You may mail or hand deliver written comments to Mr. Gib Owen, Office of the Assistant Secretary of the Army for Civil Works, 108 Army Pentagon, Washington, DC 20310–0108. Advance arrangements will need to be made to hand deliver comments. Please include your name, return address, and “NOI Comments, Dakota Access Pipeline Crossing” on the first page of your written comments. Comments may also be submitted via email to Mr. Gib Owen, at gib.a.owen.civ@mail.mil. If

emailing comments, please use “NOI Comments, Dakota Access Pipeline Crossing” as the subject of your email.

The location of all public scoping meetings will be announced at least 15 days in advance through a notice to be published in the local North Dakota newspaper (The Bismarck Tribune) and online at <https://www.army.mil/asacw>.

FOR FURTHER INFORMATION CONTACT: Mr. Gib Owen, Water Resources Policy and Legislation, Office of the Assistant Secretary of the Army for Civil Works, Washington, DC 20310-0108; telephone: (703) 695-6791; email: gib.a.owen.civ@mail.mil.

SUPPLEMENTARY INFORMATION: The proposed crossing of Lake Oahe by Dakota Access, LLC is approximately 0.5 miles upstream of the northern boundary of the Standing Rock Sioux Tribe’s reservation. The Tribe protests the crossing primarily because it relies on Lake Oahe for water for a variety of purposes, the Tribe’s reservation boundaries encompass portions of Lake Oahe downstream from the proposed crossing, and the Tribe retains water, treaty fishing, and hunting rights in the Lake.

The proposed crossing of Corps property requires the granting of a right-of-way (easement) under the Mineral Leasing Act (MLA), 30 U.S.C. 185. To date, the Army has not made a final decision on whether to grant the easement pursuant to the MLA. The Army intends to prepare an EIS to consider any potential impacts to the human environment that the grant of an easement may cause.

Specifically, input is desired on the following three scoping concerns:

- (1) Alternative locations for the pipeline crossing the Missouri River;
- (2) Potential risks and impacts of an oil spill, and potential impacts to Lake Oahe, the Standing Rock Sioux Tribe’s water intakes, and the Tribe’s water, treaty fishing, and hunting rights; and
- (3) Information on the extent and location of the Tribe’s treaty rights in Lake Oahe.

On July 25, 2016, the Corps granted permission to applicant Dakota Access, LLC, under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. 408 (408 permission), for a proposed pipeline crossing of Lake Oahe. Lake Oahe is on the Missouri River and owned by the Corps. The approximate 1,172-mile pipeline connects the Bakken and Three Forks oil production areas in North Dakota to an existing crude oil market near Patoka, Illinois. The pipeline is 30 inches in diameter and is projected to transport approximately 570,000 barrels per day.

The 408 permission was accompanied by a Finding of No Significant Impact based on an Environmental Assessment (EA), as contemplated under the National Environmental Policy Act (NEPA). The EA included a brief description and characterization of factors used in evaluating a potential alternative crossing location that was considered and eliminated during the analysis phase. The alternative route, which was eliminated, would cross the Missouri River approximately 10 miles north of Bismarck, ND.

On December 4, 2016, the Army determined that a decision on whether to authorize the pipeline to cross Lake Oahe at the proposed location merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments as contemplated in the Council on Environmental Quality’s (CEQ’s) NEPA implementing regulations, 40 CFR 1502.14 and 1503.1. Currently, the Corps is developing a plan to implement the Army’s December 4, 2016 direction. This notice of public scoping should be integrated into the Corps’ plan of action.

Consistent with CEQ’s NEPA implementing regulations, an EIS will analyze, at a minimum:

- (1) Alternative locations for the pipeline crossing the Missouri River;
- (2) Potential risks and impacts of an oil spill, and potential impacts to Lake Oahe, the Standing Rock Sioux Tribe’s water intakes, and the Tribe’s water, treaty fishing, and hunting rights; and
- (3) Information on the extent and location of the Tribe’s treaty rights in Lake Oahe.

The range of issues, alternatives, and potential impacts may be expanded based on comments received in response to this notice and at public scoping meetings.

Public Comment Availability: Before including your address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment that your personal identifying information be withheld from public review, the Army cannot guarantee that this will occur.

Authority: This notice is published in accordance with sections 1503.1 and 1506.6 of the CEQ’s Regulations (40 CFR parts 1500–1508) implementing the procedural requirements of NEPA, as amended (42 U.S.C. 4321 *et seq.*), and the Army and Corps’ NEPA

implementation policies (32 CFR part 651 and 33 CFR part 230), and exercises the authority delegated to the Assistant Secretary of the Army (Civil Works) by General Orders No. 2017–1, January 5, 2017.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2017–00937 Filed 1–17–17; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board; Notice of Federal Advisory Committee Meetings

AGENCY: Department of Defense.

ACTION: Notice of Federal Advisory Committee Meetings.

SUMMARY: The 2017 Defense Science Board (DSB) Summer Study Task Force on Nuclear Deterrence in the 21st Century’s Multi-Polar, Multi-Threat Strategic Environment (“the Nuclear Deterrence Summer Study Task Force”) will meet in closed session on Tuesday, January 24, 2017, from 8:15 a.m. to 12:00 p.m. and 12:30 p.m. to 6:00 p.m. at the Virginia Tech Advanced Research Center, 900 Glebe Road, 7th Floor, Arlington, VA and Wednesday, January 25, 2017, from 8:00 a.m. to 3:00 p.m. at the Executive Conference Center, 4075 Wilson Blvd., Suite 350, Arlington, VA. **DATES:** Tuesday, January 24, 2017, from 8:15 a.m. to 6:00 p.m.; and Wednesday, January 25, 2017, from 8:00 a.m. to 3:00 p.m.

ADDRESSES: Virginia Tech Advanced Research Center, 900 Glebe Road, 7th Floor, Arlington, VA (January 24, 2017); and Executive Conference Center, 4075 Wilson Blvd., Suite 350, Arlington, VA (January 25, 2017).

FOR FURTHER INFORMATION CONTACT: Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140, via email at debra.a.rose20.civ@mail.mil, or via phone at (703) 571–0084 or the Defense Science Board Designated Federal Officer (DFO) Ms. Karen D.H. Saunders, Executive Director, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301, via email at karen.d.saunders.civ@mail.mil or via phone at (703) 571–0079.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer and the Department of Defense, the 2017 Defense Science Board Summer Study Task Force on Nuclear Deterrence in the

21st Century's Multi-Polar, Multi-Threat Strategic Environment was unable to provide public notification of its meetings on January 24–25, 2017, as required by 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

These meetings are being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

The mission of the Defense Science Board is to provide independent advice and recommendations on matters relating to the Department of Defense's (DoD) scientific and technical enterprise. The objective of the Nuclear Deterrence Summer Study Task Force is to address the topic of nuclear force modernization and recapitalization, focusing on ways to reduce the affordability problem and on ways to respond to the changing strategic environment through technical, programmatic, and operational innovation. The Nuclear Deterrence Summer Study Task Force will consider the critical issues associated with the status and trends in major power threats and proliferators that could threaten the United States or its allies, to include their nuclear, advanced conventional, and cyber capabilities that might threaten the operational viability of our nuclear deterrent; make our ability to control escalation through non-nuclear means problematic; or impact the assurance of U.S. extended deterrence globally. This two-day session will focus on providing general and nuclear threat briefings, to include briefings on China, Russia, and the Democratic Republic of Korea, from the National Intelligence Council and Defense Intelligence Agency, and the International Nuclear Deterrence Efforts and Perspective from the Executive Secretary of Nuclear Weapons Council on the Future of Nuclear Deterrence; a briefing on the 'Perspective of the Office of Net Assessment on the Future of Nuclear Deterrence' by the Office of Net Assessment; a DoD Policy Brief on the Nuclear Posture Review by Assistant Secretary of Defense for Nuclear and Missile Defense Policy; and a U.S. Nuclear Weapons Policy brief from Mr. Frank Miller.

In accordance with section 10(d) of the FACA and 41 CFR 102–2.155, the DoD has determined that the Nuclear Deterrence Summer Study Task Force meeting will be closed to the public.

Specifically, the Under Secretary of Defense (Acquisition, Technology, and Logistics), in consultation with the DoD Office of General Counsel, has determined in writing that all sessions will be closed to the public because matters covered by 5 U.S.C. 552b(c)(1) will be considered. The determination is based on the consideration that it is expected that discussions throughout will involve classified matters of national security concern. Such classified material is so intertwined with the unclassified material and non-proprietary information that it cannot reasonably be segregated into separate discussions without defeating the effectiveness and meaning of the overall meetings. To permit the meetings to be open to the public would preclude discussion of such matters and would greatly diminish the ultimate utility of the DSB's findings or recommendations to the Secretary of Defense and to the Under Secretary of Defense for Acquisition, Technology and Logistics.

In accordance with section 10(a)(3) of the FACA and 41 CFR 102–3.105(j) and 102–3.140, interested persons may submit a written statement for consideration by the Nuclear Deterrence Summer Study Task Force at any time regarding its mission or in response to the stated agenda of a planned meeting. Individuals submitting a written statement must submit their statement to the DSB's DFO—Ms. Karen D.H. Saunders, Executive Director, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301, via email at Karen.d.saunders.civ@mail.mil or via phone at (703) 571–0079 at any point; however, if a written statement is not received at least 3 calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the Nuclear Deterrence Summer Study Task Force. The DFO will review all submissions with the Nuclear Deterrence Summer Study Task Force co-Chairs and ensure they are provided to Nuclear Deterrence Summer Study Task Force members prior to the end of the two-day meeting on January 25, 2017.

Dated: January 12, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017–00981 Filed 1–17–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0126]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Principal Follow-Up Survey (PFS 2016–17) to the National Teacher and Principal Survey (NTPS 2015–16)

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection. **DATES:** Interested persons are invited to submit comments on or before February 17, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2016–ICCD–0126. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 224–84, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at NCES.Information.Collections@ed.gov.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that

is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Principal Follow-Up Survey (PFS 2016–17) to the National Teacher and Principal Survey (NTPS 2015–16).

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 7,240.

Total Estimated Number of Annual Burden Hours: 603.

Abstract: This request is to conduct data collection for the 2016–17 Principal Follow-up Survey (PFS), a one-year follow up of principals who responded to the 2015–16 National Teacher and Principal Survey (NTPS). PFS is conducted by the National Center for Education Statistics (NCES), of the Institute of Education Sciences (IES), within the U.S. Department of Education (ED). The PFS has been conducted two times previously: Beginning in 2008–09 as a follow up to the Schools and Staffing Survey (SASS) in 2007–08 (OMB# 1850–0598 v.5) and, subsequently, as a follow-up to SASS in 2012–2013 (OMB# 1850–0598 v.9). During the 2015–16 school year, NCES conducted the first NTPS (OMB #1850–0598 v.11), a redesign of SASS to improve the flexibility, efficiency, and timeliness of NCES data on the nation's K–12 schools, principals, and teachers. The 2016–17 PFS will be the first to launch from the redesigned NTPS. The PFS survey design and content remain highly consistent with earlier administrations. The 2016–17 PFS, like earlier PFS collections, will measure the one-year attrition rates of principals who leave the profession and will permit comparisons of stayers, movers, and leavers. “Stayers” are principals who remain in the same school between the NTPS year of data collection and the follow-up year; “movers” are principals who stay in the profession but change schools between the NTPS year and the

follow-up year; and “leavers” are NTPS respondents who leave the principal profession between the NTPS year and the follow-up year. The data collected in the 2016–17 PFS will be combined with data collected in the 2015–16 NTPS on principal characteristics, qualifications, and perceptions of the school environment. Together, NTPS and PFS provide national data on turnover in the principal workforce, including rates of entry and attrition from principalship, sources and characteristics of newly hired principals, and characteristics and destinations of leavers. The cross-sectional repeated design of PFS allows for analyses of trends related to these topics.

Dated: January 11, 2017

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–00943 Filed 1–17–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0118]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; GEPA Section 427 Guidance for All Grant Applications

AGENCY: Office of the Secretary (OS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 17, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2016–ICCD–0118. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance

Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 224–82, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Alfreida Pettiford, 202–245–6110.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: GEPA Section 427 Guidance for All Grant Applications.

OMB Control Number: 1894–0005.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 12,396.

Total Estimated Number of Annual Burden Hours: 18,594.

Abstract: On October 20, 1994, the Improving America's Schools Act, Public Law 103–382(The Act), became law. The Act added a provision to the General Education Provisions Act (GEPA). Section 427 of GEPA requires an applicant for assistance under Department programs to develop and describe in the grant application the steps it proposes to take to ensure equitable access to, and equitable participation in, its proposed project for students, teachers, and other program beneficiaries with special needs. The

current GEPA Section 427 guidance for discretionary grant applications and formula grant applications has approval through March 31, 2014 the Department is requesting an extension of this approval.

Dated: January 12, 2017.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017-01029 Filed 1-17-17; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2016-ICCD-0119]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Evaluation of the Comprehensive Technical Assistance Centers

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before February 17, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2016-ICCD-0119. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 224-84, Washington, DC 20202-4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Amy Johnson, 202-208-7849.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an

opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Evaluation of the Comprehensive Technical Assistance Centers.

OMB Control Number: 1850-NEW (previously 1850-0914).

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 649.

Total Estimated Number of Annual Burden Hours: 236.

Abstract: The National Evaluation of the Comprehensive Technical Assistance Centers will examine and document how the Comprehensive Center program and its individual centers intend to build SEA capacity and what types of activities they actually conduct to build capacity. The study will use surveys and interviews of center staff and technical assistance recipients, as well as technical assistance event observations, to collect information about how the Comprehensive Centers design their work, how they operate, and the results of their work.

The 60 day **Federal Register** notice for this collection (Vol. 81 FR 75388 on 10/31/2016) was issued under OMB #1850-0914. The Department of Education is requesting a new OMB number for this collection since the current collection was incorrectly issued as a common form. Once a new OMB number is issued for this collection, the current

OMB number #1850-0914 will be discontinued.

Dated: January 12, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017-00966 Filed 1-17-17; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2016-ICCD-0127]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Integrated Postsecondary Education Data System (IPEDS) 2017-18 Through 2019-20

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 17, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2016-ICCD-0127. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 224-84, Washington, DC 20202-4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at NCES.Information.Collections@ed.gov.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an

opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Integrated Postsecondary Education Data System (IPEDS) 2017–18 through 2019–20.

OMB Control Number: 1850–0582.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 77,600.

Total Estimated Number of Annual Burden Hours: 1,030,893.

Abstract: The National Center for Education Statistics (NCES) seeks authorization from OMB to make a change to the Integrated Postsecondary Education Data System (IPEDS) data collection. Current authorization expires 08/31/2019 (OMB# 1850–0582). NCES is requesting a new clearance for the 2017–18, 2018–19, and 2019–20 data collections to enable us to make a change to two of the IPEDS data collection components and to continue the IPEDS collection of postsecondary data over the next 3 years. IPEDS is a web-based data collection system designed to collect basic data from all postsecondary institutions in the United States and the other jurisdictions. IPEDS enables NCES to report on key dimensions of postsecondary education such as enrollments, degrees and other awards earned, tuition and fees, average net price, student financial aid, graduation rates, student outcomes, revenues and expenditures, faculty salaries, and staff employed. The IPEDS web-based data collection system was

implemented in 2000–01, and it collects basic data from approximately 7,500 postsecondary institutions in the United States and the other jurisdictions that are eligible to participate in Title IV Federal financial aid programs. All Title IV institutions are required to respond to IPEDS (Section 490 of the Higher Education Amendments of 1992 [Pub. L. 102–325]). IPEDS allows other (non-title IV) institutions to participate on a voluntary basis. About 200 elect to respond. IPEDS data are available to the public through the College Navigator and IPEDS Data Center Web sites. This clearance package includes a number of proposed changes to the data collection.

Dated: January 11, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–00944 Filed 1–17–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–315–B]

Application To Export Electric Energy; BP Energy Company

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: BP Energy Company (BP Energy or Applicant) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before February 17, 2017.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed to: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to Electricity.Exports@hq.doe.gov, or by facsimile to 202–586–8008.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of

the Federal Power Act (16 U.S.C. 824a(e)).

On January 17, 2012, DOE issued Order No. EA–315–A to BP Energy, which authorized the Applicant to transmit electric energy from the United States to Canada as a power marketer for a five-year term using existing international transmission facilities. That authority expires on January 17, 2017. On December 29, 2016, BP Energy filed an application with DOE for renewal of the export authority contained in Order No. EA–315 for an additional five-year term.

In its application, BP Energy states that it does not own or operate any electric generation or transmission facilities, and it does not have a franchised service area. The electric energy that BP Energy proposes to export to Canada would be purchased from third parties such as electric utilities and Federal power marketing agencies pursuant to voluntary agreements. The existing international transmission facilities to be utilized by BP Energy have previously been authorized by Presidential Permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214). Five copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments and other filings concerning BP Energy's application to export electric energy to Canada should be clearly marked with OE Docket No. EA–315–B. An additional copy is to be provided directly to both Betsy Carr, BP America Inc., 201 Helios Way, Houston, TX 77079, and Eric Schubert, BP Energy Company, 201 Helios Way, Houston, TX 77079.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the

sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at <http://energy.gov/node/11845>, or by emailing Angela Troy at Angela.Troy@hq.doe.gov.

Issued in Washington, DC, on January 11, 2017.

Christopher Lawrence,

Electricity Policy Analyst, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2017-01032 Filed 1-17-17; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

[OE Docket No. EA-314-B]

Application To Export Electric Energy; BP Energy Company

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: BP Energy Company (BP Energy or Applicant) has applied to renew its authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before February 17, 2017.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed to: Office of Electricity Delivery and Energy Reliability, Mail Code: OE-20, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585-0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to Electricity.Exports@hq.doe.gov, or by facsimile to 202-586-8008.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On May 3, 2012, DOE issued Order No. EA-314-A to BP Energy, which authorized the Applicant to transmit electric energy from the United States to Mexico as a power marketer for a five-year term using existing international transmission facilities. That authority

expires on February 21, 2017. On December 29, 2016, BP Energy filed an application with DOE for renewal of the export authority contained in Order No. EA-314 for an additional five-year term.

In its application, BP Energy states that it does not own or operate any electric generation or transmission facilities, and it does not have a franchised service area. The electric energy that BP Energy proposes to export to Mexico would be purchased from third parties such as electric utilities and Federal power marketing agencies pursuant to voluntary agreements. The existing international transmission facilities to be utilized by BP Energy have previously been authorized by Presidential Permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214). Five copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments and other filings concerning BP Energy's application to export electric energy to Mexico should be clearly marked with OE Docket No. EA-314-B. An additional copy is to be provided directly to both Betsy Carr, BP America Inc., 201 Helios Way, Houston, TX 77079, and Eric Schubert, BP Energy Company, 201 Helios Way, Houston, TX 77079.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at <http://energy.gov/node/11845>, or by emailing Angela Troy at Angela.Troy@hq.doe.gov.

Issued in Washington, DC, on January 11, 2017.

Christopher Lawrence,

Electricity Policy Analyst, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2017-01031 Filed 1-17-17; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Request for Information—Challenges and Opportunities for Sustainable Development of Hydropower in Undeveloped Stream Reaches of the United States; Notice of Reopening of Comment Period

AGENCY: Water Power Technologies Office, Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

ACTION: Notice of reopening of comment period.

SUMMARY: On November 9, 2016, the Water Power Technologies Office (WPTO) within the Department of Energy (DOE) issued a request for information (RFI) in the **Federal Register** to invite input from the public regarding challenges and opportunities associated with hydropower development in undeveloped stream-reaches. The WPTO is reopening the comment period until February 10, 2017, to provide interested parties with additional time to submit comments.

DATES: Responses must be received no later than 5:00 p.m. (ET) on Friday, February 10, 2017.

ADDRESSES: Responses to this RFI must be submitted electronically to HydroNextFOA@ee.doe.gov as Microsoft Word (.docx) attachments to an email, and be no more than 6 pages in length, 12 point font, 1 inch margins. It is recommended that attachments with file sizes exceeding 25 MB be compressed (i.e., zipped) to ensure message delivery. Please include in the subject line "Comments for RFI". Only electronic responses will be accepted.

FOR FURTHER INFORMATION CONTACT:

Questions may be directed to: Rajesh Dham, Water Power Technologies Office, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, Phone: (202) 287-6675, Email: Rajesh.Dham@ee.doe.gov.

SUPPLEMENTARY INFORMATION: On November 9, 2016, the Water Power Technologies Office (WPTO) within the Department of Energy (DOE) issued a request for information (RFI) in the

Federal Register (81 FR 78795) inviting input from the public regarding challenges and opportunities associated with hydropower development in undeveloped stream-reaches. Through the RFI, the WPTO also sought input on the focus and structure of a potential funding opportunity to support research and development of advanced and/or non-traditional transformative hydropower technologies and project designs capable of avoiding or minimizing environmental and social effects of new cost-competitive hydropower development in undeveloped stream-reaches of the United States. The comment period ended December 16, 2016. After receiving several requests for additional time to prepare and submit comments, the WPTO has decided to reopen the period for submitting comments.

The WPTO will accept responses to the RFI received no later than February 10, 2017, and deems any comments received by that time to be timely submitted.

Guidance for Submitting Documents: DOE invites all interested parties to submit responses by no later than 5:00 p.m. (ET) on February 10, 2017. Responses to this RFI must be submitted electronically to HydroNextFOA@ee.doe.gov as Microsoft Word (.docx) attachments to an email, and be no more than 6 pages in length, 12 point font, 1 inch margins. Only electronic responses will be accepted.

Respondents are requested to provide the following information at the start of their response to this RFI:

- Company/institution name;
- Company/institution contact;
- Contact's address, phone number, and email address.

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well marked copies: One copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non confidential" with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is

generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Issued in Washington, DC on January 11, 2017.

Jim Ahlgrimm,

Acting Director, Water Power Technologies Office.

[FR Doc. 2017-01037 Filed 1-17-17; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17-766-000]

Stream Energy Indiana LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stream Energy Indiana LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure

(18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 31, 2017.

The Commission encourages electronic submission of protests and

interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00992 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17-767-000]

Stream Energy Delaware LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stream Energy Delaware LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and

385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 31, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00993 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Number: PR17-15-000.

Applicants: Columbia Gas of Maryland, Inc.

Description: Tariff filing per 284.123(b), (e)/: CMD SOC to be effective 1/1/2017; Filing Type: 980.

Filed Date: 1/5/2017.

Accession Number: 201701055071.

Comments/Protests Due: 5 p.m. ET 1/26/17.

Docket Number: PR17-16-000.

Applicants: Columbia Gas of Ohio, Inc.

Description: Tariff filing per 284.123(b), (e)/: COH SOC to be effective 12/30/2016; Filing Type: 980.

Filed Date: 1/6/2017.

Accession Number: 201701065044.

Comments/Protests Due: 5 p.m. ET 1/27/17.

Docket Numbers: RP17-325-000.

Applicants: Northern Natural Gas Company.

Description: § 4(d) Rate Filing: 20161219 FDD Cycle Quantity Increase to be effective 6/1/2017.

Filed Date: 1/5/17.

Accession Number: 20170105-5083.

Comments Due: 5 p.m. ET 1/17/17.

Docket Numbers: RP17-326-000.

Applicants: Elba Express Company, L.L.C.

Description: § 4(d) Rate Filing: Shell Phase I Negotiated Rate to be effective 2/10/2017.

Filed Date: 1/5/17.

Accession Number: 20170105-5136.

Comments Due: 5 p.m. ET 1/17/17.

Docket Numbers: RP17-327-000.

Applicants: Rockies Express Pipeline LLC.

Description: § 4(d) Rate Filing: Neg Rate 2017-01-05 BP to be effective 1/6/2017.

Filed Date: 1/5/17.

Accession Number: 20170105-5170.

Comments Due: 5 p.m. ET 1/17/17.

Docket Numbers: RP17-328-000.

Applicants: Dominion Carolina Gas Transmission, LLC.

Description: § 4(d) Rate Filing: DCGT—Web site Notification to be effective 2/6/2017.

Filed Date: 1/6/17.

Accession Number: 20170106-5098.

Comments Due: 5 p.m. ET 1/18/17.

Docket Numbers: RP17-329-000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate Agreement—Castleton 510984 to be effective 1/8/2017.

Filed Date: 1/6/17.

Accession Number: 20170106-5133.

Comments Due: 5 p.m. ET 1/18/17.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and

§ 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP16-1179-002.

Applicants: Equitrans, L.P.

Description: Compliance filing Negotiated Rate Service Agreement—Revised EQT Energy OVC Agreement to be effective 10/1/2016.

Filed Date: 12/21/16.

Accession Number: 20161221-5081.

Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: RP17-197-002.

Applicants: Dominion Cove Point LNG, LP.

Description: Compliance filing DCP—2016 Section 4 General Rate Case Compliance to be effective 1/1/2017.

Filed Date: 1/5/17.

Accession Number: 20170105-5086.

Comments Due: 5 p.m. ET 1/17/17.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 9, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00924 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17-768-000]

Stream Energy Connecticut LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stream Energy Connecticut LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for

blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 31, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00994 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17-211-001.

Applicants: Mid-Atlantic Interstate Transmission, LL, PJM Interconnection, L.L.C.

Description: Tariff Amendment: MAIT submits response to Deficiency Letter issued Dec. 28, 2016 in ER17-211-000 to be effective 12/31/9998.

Filed Date: 1/10/17.

Accession Number: 20170110-5158.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-217-001.

Applicants: Jersey Central Power & Light, PJM Interconnection, L.L.C.

Description: Tariff Amendment: JCPL submits response to Deficiency Letter issued Dec. 28, 2016 in ER17-217-000 to be effective 1/1/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5165.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-764-000.

Applicants: Stream Ohio Gas & Electric, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 2/20/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5097.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-765-000.

Applicants: Stream Energy Illinois, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 2/20/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5102.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-766-000.

Applicants: Stream Energy Indiana, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 2/20/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5104.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-767-000.

Applicants: Stream Energy Delaware, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 2/20/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5105.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-768-000.

Applicants: Stream Energy Connecticut, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 2/20/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5108.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-769-000.

Applicants: Stream Energy Massachusetts, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 2/20/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5111.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17-770-000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: Calpine NITSA (fka Noble Americas) Rev 10 to be effective 1/1/2017.

Filed Date: 1/10/17.

Accession Number: 20170110-5137.

Comments Due: 5 p.m. ET 1/31/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00926 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-2722-007.

Applicants: Euris Combine Hills I LLC.

Description: Notice of Non-Material Change in Status of Euris Combine Hills I LLC.

Filed Date: 1/11/17.
Accession Number: 20170111–5096.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER16–1724–001.
Applicants: Paulding Wind Farm III LLC.
Description: Notice of Non-Material Change in Status of Paulding Wind Farm III LLC.

Filed Date: 1/11/17.
Accession Number: 20170111–5075.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–204–001.
Applicants: Quantum Power Corp.
Description: Tariff Amendment: MBR Tariff Amendment Filing to be effective 1/1/2017.

Filed Date: 1/11/17.
Accession Number: 20170111–5046.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–771–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Queue Position AB1–098, Original Service Agreement No. 4595 to be effective 12/12/2016.

Filed Date: 1/11/17.
Accession Number: 20170111–5031.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–772–000.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Order No. 825 Compliance Filing to be effective 5/11/2017.

Filed Date: 1/11/17.
Accession Number: 20170111–5077.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–773–000.
Applicants: Nevada Power Company.
Description: § 205(d) Rate Filing: Rate Schedule No. 154-Concurrence RS 76-Cancel RS 77 and RS147 to be effective 1/1/2017.

Filed Date: 1/11/17.
Accession Number: 20170111–5083.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–774–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: Compliance filing: Compliance with Order No. 825; Docket No. RM15–24–000 to be effective 12/1/2017.

Filed Date: 1/11/17.
Accession Number: 20170111–5084.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–775–000.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Compliance Filing pursuant to Commission's Final Rule in RM15–24; Order No. 825 to be effective 2/1/2018.

Filed Date: 1/11/17.
Accession Number: 20170111–5108.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–776–000.
Applicants: San Diego Gas & Electric Company.
Description: Initial rate filing: Certificate of Concurrence in LGIA to be effective 3/6/2017.

Filed Date: 1/11/17.
Accession Number: 20170111–5109.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–777–000.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2017–01–11 Order No. 825 Compliance to be effective N/A.

Filed Date: 1/11/17.
Accession Number: 20170111–5112.
Comments Due: 5 p.m. ET 2/1/17.
Docket Numbers: ER17–778–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Compliance filing: 2017–01–11 Order 825 Price Formation Compliance Filing to be effective 3/1/2018.

Filed Date: 1/11/17.
Accession Number: 20170111–5125.
Comments Due: 5 p.m. ET 2/1/17.
The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.
Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.
eFiling is encouraged. More detailed information relating to filing

requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017–00987 Filed 1–17–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting Notice

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: January 19, 2017 10:00 a.m.

PLACE: Room 2C, 888 First Street NE., Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Agenda

* *Note*—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION:

Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at <http://ferc.capitolconnection.org/> sing the eLibrary link, or may be examined in the Commission's Public Reference Room.

1034th—MEETING; REGULAR MEETING

[January 19, 2017, 10 a.m.]

Item No.	Docket No.	Company
ADMINISTRATIVE		
A–1	AD16–7–000	Customer Matters, Reliability, Security and Market Operations.
A–2	AD16–1–000	Agency Administrative Matters.

1034th—MEETING; REGULAR MEETING—Continued

[January 19, 2017, 10 a.m.]

Item No.	Docket No.	Company
ELECTRIC		
E-1	RM17-2-000	Uplift Cost Allocation and Transparency in Markets Operated by Regional Transmission Organizations and Independent System Operators.
E-2	PL17-2-000	Utilization of Electric Storage Resources for Multiple Services When Receiving
E-3	OMITTED	Cost-Based Rate Recovery.
E-4	OMITTED.	
E-5	OMITTED.	
E-6	OMITTED.	
E-7	ER09-1256-002,	Potomac-Appalachian Transmission Highline, LLC PJM Interconnection, L.L.C.
	ER12-2708-003	
E-8	ER13-2483-001	Old Dominion Electric Cooperative.
E-9	ER16-1483-002,	California Independent System Operator Corporation.
	ER16-1483-0004	
E-10	EL14-37-000	PJM Interconnection, L.L.C.
E-11	ER13-1654-001,	PJM Interconnection, L.L.C.
	ER13-1654-002	
E-12	RM16-7-000	Disturbance Control Standard—Contingency Reserve for Recovery from a Balancing Contingency Event Reliability Standard.
E-13	RM16-20-000	Remedial Action Schemes Reliability Standard.
E-14	RM15-11-001	Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events.
E-15	ER16-1807-000,	FirstEnergy Solutions Corp.
	ER10-1459-008	
	ER10-1469-004	The Cleveland Electric Illuminating Company.
	ER10-1467-004	Ohio Edison Company.
	ER10-1468-004	The Toledo Edison Company.
	ER13-785-003	FirstEnergy Generation, LLC.
	ER13-713-003	FirstEnergy Nuclear Generation, LLC.
	ER10-1453-004	FirstEnergy Generation Mansfield Unit 1 Corp.
E-16	ER16-835-000	New York Independent System Operator, Inc.
E-17	EL16-117-001	Vote Solar Initiative and
	Montana Environmental Information Center v. Montana Public Service Commission..	
E-18	ER16-1904-001	ISO New England Inc.
E-19	EL13-88-001	Northern Indiana Public Service Company v. Midcontinent Independent System Operator, Inc. and PJM Interconnection, L.L.C.
	ER16-1967-000	PJM Interconnection, L.L.C.
	ER16-1969-000	Midcontinent Independent System Operator, Inc.
	ER16-1969-001 (Not Consolidated).	
E-20	EL16-120-000	New England Power Generators Association, Inc. v. ISO New England Inc.
E-21	ER17-408-000	California Independent System Operator Corporation.
E-22	ER17-411-000	California Independent System Operator Corporation.
GAS		
G-1	RP17-303-000	Natural Gas Pipeline Company of America LLC.
G-2	RP17-302-000	Wyoming Interstate Company, L.L.C.
HYDRO		
H-1	P-1971-079	Idaho Power Company.
H-2	P-1864-164	Upper Peninsula Power Company.
H-3	P-2114-277	Public Utility District No. 2 of Grant County, Washington.
H-4	P-4254-011	Brentwood Dam Ventures, LLC.
CERTIFICATES		
C-1	OMITTED.	
C-2	OMITTED.	
C-3	CP15-514-000	Columbia Gas Transmission, LLC.
	CP15-539-000	Columbia Gulf Transmission, LLC.

Issued: January 12, 2017.

Kimberly D. Bose,
Secretary.

A free webcast of this event is available through <http://ferc.capitolconnection.org/>. Anyone with Internet access who desires to view this event can do so by navigating to www.ferc.gov's Calendar of Events and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the free webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit <http://ferc.capitolconnection.org/> or contact Danelle Springer or David Reininger at 703-993-3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 2017-01138 Filed 1-13-17; 11:15 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2305-058]

Sabine River Authority of Texas, Sabine River Authority, State of Louisiana; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request for approval of Final Drought Contingency Plan.

b. *Project No.:* 2305-058.

c. *Date Filed:* December 15, 2016.

d. *Applicant:* Sabine River Authority of Texas, Sabine River Authority, State of Louisiana.

e. *Name of Project:* Toledo Bend Hydroelectric Project.

f. *Location:* Sabine River on the Texas-Louisiana border in Panola, Shelby, Sabine, and Newton Counties in Texas and DeSoto, Sabine, and Vernon Parishes in Louisiana.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Jim Brown, Compliance Officer, Toledo Bend Project Joint Operation, Sabine River Authority, Texas, P.O. Box 579, Orange, TX 77631-0579, (409) 746-2192, jbrown@sratx.org.

i. *FERC Contact:* Mr. John Aedo, (415) 369-3335, or john.aedo@ferc.gov.

j. *Deadline for filing comments, motions to intervene, protests, and recommendations is February 9, 2017.* The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, or recommendations using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P-2305-058) on any comments, motions to intervene, protests, or recommendations filed. Comments emailed to Commission staff are not considered part of the Commission record.

k. *Description of Request:* The licensee requests Commission approval of its Drought Contingency Plan under License Article 416. The plan identifies the public access measures and reservoir public access measures that the licensees would implement during drought conditions. Specifically, the plan outlines actions that the licensee would implement when reservoir elevations drop to 168 feet-msl and lower, including changes to hydropower generation and water deliveries, implementation of conservation measures, public announcements, and agency notification.

1. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502-8371. This filing may also be viewed on the Commission's Web site at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number excluding the last three digits in the docket number field to access the document (P-2305-058). You may also register online at <http://www.ferc.gov/>

[docs-filing/esubscription.asp](http://www.ferc.gov/docs-filing/esubscription.asp) to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the

Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00933 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17-764-000]

Stream Ohio Gas & Electric LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stream Ohio Gas & Electric LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 31, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00990 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL17-37-000]

Notice of Complaint

American Municipal Power, Inc.
v.

PJM Interconnection, L.L.C.

Take notice that on January 9, 2017, pursuant to sections 206, 306, and 309 of the Federal Power Act, 16 U.S.C. 824e, 825e, and 825h, and Rules 206 and 212 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 and 385.212, American Municipal Power, Inc. (AMP or Complainant) filed a formal complaint against PJM Interconnection, L.L.C. (PJM or Respondent) alleging that PJM violated its Open Access Transmission Tariff and its Operating Agreement by improperly charging AMP for certain congestion charges associated with the transmission of energy from its facility, all as more fully explained in the complaint.

AMP certifies that copies of the complaint were served on the contacts for PJM as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of

intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on February 8, 2017.

Dated: January 9, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00929 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16-493-000]

Columbia Gas Transmission L.L.C.; Notice of Schedule for Environmental Review of the Central Virginia Connector Project

On August 12, 2016, Columbia Gas Transmission L.L.C. (Columbia) filed an application in Docket No. CP16-493-000 requesting a Certificate of Public Convenience and Necessity pursuant to section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the Central Virginia Connector Project (Project), and would provide an additional 45,000 dekatherms per day of natural gas capacity on Columbia's system and modernize compression at the Louisa Compressor Station.

On August 25, 2016 the Federal Energy Regulatory Commission

(Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA: February 28, 2017.
90-day Federal Authorization Decision
Deadline: May 29, 2017.

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

Columbia proposes to replace three Solar Saturn units with one Solar Centaur 50 unit at the existing Louisa Compressor Station, convert the replaced units to standby, increase the certificated horsepower (HP) at the Louisa Compressor Station from 4,050 HP to 6,130 HP, install pipe and valve modifications to make the existing point of delivery between Columbia's Mainline VM-108 and VM-109 at Boswell's Tavern Compressor Station bi-directional, install a new point of delivery meter station adjacent to Columbia's Goochland Compressor Station, and install other appurtenant facilities. All work would be performed in Louisa and Goochland Counties, Virginia.

Background

On September 27, 2016 the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Central Virginia Connector Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received a comment from the Virginia Department of Conservation and Recreation, which recommended strict adherence to the erosion and sediment control measures during all land disturbing activities.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in

specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to www.ferc.gov/docs-filing/esubscription.asp.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208-FERC or on the FERC Web site (www.ferc.gov). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.*, CP16-493), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208-3676, TTY (202) 502-8659, or at FERCOnlineSupport@ferc.gov. The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00985 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX17-1-000]

Wheatridge Wind Energy, LLC; Notice of Filing

Take notice that on January 6, 2017, pursuant to sections 210, 211, and 212 of the Federal Power Act, 16 U.S.C. 824i, 824j, and 824k, and Part 36 of the Federal Energy Regulatory Commission's (Commission) Regulations, 18 CFR part 36, Wheatridge Wind Energy, LLC submitted an application for an order directing the provision of interconnection and transmission service.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or

protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern time on January 27, 2017.

Dated: January 9, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00935 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17-61-000.

Applicants: Michigan Electric Transmission Company, LLC.

Description: Application Pursuant to Section 203 of the Federal Power Act of Michigan Electric Transmission Company, LLC.

Filed Date: 1/9/17.

Accession Number: 20170109-5366.

Comments Due: 5 p.m. ET 1/30/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-3124-004; ER10-3129-004; ER10-3130-004; ER10-3132-004; ER10-3134-004; ER10-3137-004; ER13-460-001.

Applicants: Noble Altona Windpark, LLC, Noble Bliss Windpark, LLC, Noble Clinton Windpark I, LLC, Noble

Chateaugay Windpark, LLC, Noble Ellenburg Windpark, LLC, Noble Great Plains Windpark, LLC, Noble Wethersfield Windpark, LLC.

Description: Notice of Non-Material Change in Status of the Noble Sellers.

Filed Date: 1/9/17.

Accession Number: 20170109–5370.

Comments Due: 5 p.m. ET 1/30/17.

Docket Numbers: ER17–761–000.

Applicants: ITC Midwest LLC.

Description: § 205(d) Rate Filing: Filing of a Joint Use Pole Agreement with Northern States to be effective 3/10/2017.

Filed Date: 1/9/17.

Accession Number: 20170109–5320.

Comments Due: 5 p.m. ET 1/30/17.

Docket Numbers: ER17–762–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3293 Thunderhead Wind Energy GIA to be effective 12/21/2016.

Filed Date: 1/10/17.

Accession Number: 20170110–5029.

Comments Due: 5 p.m. ET 1/31/17.

Docket Numbers: ER17–763–000.

Applicants: Wabash Valley Power Association, Inc.

Description: § 205(d) Rate Filing: Formulary Rate Tariff Depreciation Rates to be effective 1/10/2017.

Filed Date: 1/10/17.

Accession Number: 20170110–5039.

Comments Due: 5 p.m. ET 1/31/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017–00925 Filed 1–17–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–60–000.

Applicants: TerraForm Private LLC, Meadow Creek Project Company LLC, Goshen Phase II LLC, Wolverine Creek Goshen Interconnection LLC, Canadian Hills Wind, LLC, Rockland Wind Farm LLC, Burley Butte Wind Park, LLC, Golden Valley Wind Park, LLC, Milner Dam Wind Park, LLC, Oregon Trail Wind Park, LLC, Pilgrim Stage Station Wind Park, LLC, Thousand Springs Wind Park, LLC, Tuana Gulch Wind Park, LLC, Camp Reed Wind Park, LLC, Payne's Ferry Wind Park, LLC, Salmon Falls Wind Park, LLC, Yahoo Creek Wind Park, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act and Requests for Expedited Action and Waivers of Filing Requirements of TerraForm Private LLC.

Filed Date: 1/6/17.

Accession Number: 20170106–5187.

Comments Due: 5 p.m. ET 1/27/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2984–031.

Applicants: Merrill Lynch Commodities, Inc.

Description: Notice of Non-Material Change in Status of Merrill Lynch Commodities, Inc.

Filed Date: 1/6/17.

Accession Number: 20170106–5191.

Comments Due: 5 p.m. ET 1/27/17.

Docket Numbers: ER15–1387–003.

Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: Compliance per 12/9/2016 Order-ER15–1387–002 Sch. 12-Appx A Form 715 Criteria to be effective 5/25/2015.

Filed Date: 1/9/17.

Accession Number: 20170109–5208.

Comments Due: 5 p.m. ET 1/30/17.

Docket Numbers: ER17–75–003.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Substitute Second Revised Service Agreement No. 3837 to be effective 10/1/2016.

Filed Date: 1/6/17.

Accession Number: 20170106–5162.

Comments Due: 5 p.m. ET 1/20/17.

Docket Numbers: ER17–214–001.

Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: Tariff Amendment: MAIT's Response to Deficiency Letter issued Dec. 8, 2016 in ER17–214 to be effective 2/1/2017.

Filed Date: 1/6/17.

Accession Number: 20170106–5153.

Comments Due: 5 p.m. ET 1/27/17.

Docket Numbers: ER17–216–001.

Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: Tariff Amendment: MAIT's Response to Deficiency Letter issued Dec. 28, 2016 in ER17–216 to be effective 2/1/2017.

Filed Date: 1/6/17.

Accession Number: 20170106–5171.

Comments Due: 5 p.m. ET 1/27/17.

Docket Numbers: ER17–311–000.

Applicants: SR South Loving LLC.

Description: Third Supplement to November 4, 2016 SR South Loving LLC tariff filing.

Filed Date: 1/6/17.

Accession Number: 20170106–5195.

Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–740–001.

Applicants: Southern California Edison Company.

Description: Tariff Amendment: Resubmit Amended SGIA Pearlblossom to be effective 12/16/2016.

Filed Date: 1/6/17.

Accession Number: 20170106–5066.

Comments Due: 5 p.m. ET 1/27/17.

Docket Numbers: ER17–758–000.

Applicants: New York Independent System Operator, Inc.

Description: Application for tariff waiver of Services Tariff Sections 17.1.1 and 17.14 of the New York Independent System Operator, Inc.

Filed Date: 1/6/17.

Accession Number: 20170106–5188.

Comments Due: 5 p.m. ET 1/27/17.

Docket Numbers: ER17–759–000.

Applicants: Appleton Coated LLC.

Description: Baseline eTariff Filing: Appleton Coated Initial Baseline Filing to be effective 3/10/2017.

Filed Date: 1/9/17.

Accession Number: 20170109–5203.

Comments Due: 5 p.m. ET 1/30/17.

Docket Numbers: ER17–760–000.

Applicants: Commonwealth Edison Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: ComEd Transmission Interconnection Agreement SA No. 4582 with ATXI to be effective 1/9/2017.

Filed Date: 1/9/17.

Accession Number: 20170109–5227.

Comments Due: 5 p.m. ET 1/30/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 9, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017-00936 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98-1-000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt

of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the

document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

Docket No.	File date	Presenter or requester
Prohibited:		
1. CP15-17-000	12-27-2016	Mass Mailing ¹ .
2. CP16-10-000	12-27-2016	Megan K. Lawless.
3. CP16-10-000	12-29-2016	Mary M. Flora.
4. CP15-93-000	1-6-2017	John Dulmes.
5. CP15-93-000	1-6-2017	International Brotherhood of Teamsters.
Exempt:		
1. ER17-217-000	12-28-2016	U.S. House Representative Christopher H. Smith.
2. CP15-558-000	1-4-2017	U.S. House Representative Michael G. Fitzpatrick.
3. CP16-9-000	1-5-2017	U.S. Senators ² .

¹ Seven letters have been sent to FERC Commissioners and staff under this docket number.

² Senators Edward J. Markey and Elizabeth Warren.

Dated: January 10, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017-00934 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF17-1-000]

Western Area Power Administration; Notice of Filing

Take notice that on December 29, 2016, Western Area Power Administration submitted tariff filing per: Rate Order No. WAPA-176 to be effective 10/1/2017.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of

the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, DC. There is an “eSubscription” link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on January 30, 2017.

Dated: January 11, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00988 Filed 1–17–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–765–000]

Stream Energy Illinois LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stream Energy Illinois LLC’s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant’s request for blanket authorization, under 18 CFR part 34, of

future issuances of securities and assumptions of liability, is January 31, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission’s eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission’s Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 11, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00991 Filed 1–17–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–759–000]

Appleton Coated LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Appleton Coated LLC’s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888

First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant’s request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 30, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission’s eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission’s Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 10, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–00931 Filed 1–17–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL16–49–000]

Notice of Amended Complaint

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC GenOn Energy Management, LLC, Carroll County Energy LLC, C.P., Crane LLC, Essential Power,

LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power, Generation Infrastructure Fund, LLC.

v.
PJM Interconnection, L.L.C.

Take notice that on January 9, 2017, pursuant to sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824e and 825e (2012), and Rules 206, 212 and 215 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, 385.212, and 385.215 (2016), Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P., Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC. (Movants or Complainant) submitted an amendment to the March 21, 2016 filed formal complaint against PJM Interconnection, L.L.C. (PJM or Respondent) alleging that the PJM Open Access Transmission Tariff is unjust and unreasonable, all as more fully explained in its amended complaint.

Movants certify that a copies of the complaint were served on persons designated for service on the official service list compiled by the Secretary in this proceeding.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on January 30, 2017.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00928 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP17-330-000.

Applicants: Gas Transmission

Northwest LLC.

Description: Interruptible Transportation Refund Report for the Coyote Springs Lateral of Gas Transmission Northwest LLC under RP17-330.

Filed Date: 1/9/17.

Accession Number: 20170109-5102.

Comments Due: 5 p.m. ET 1/23/17.

Docket Numbers: RP17-331-000.

Applicants: Pine Needle LNG

Company, LLC.

Description: Compliance filing Implementation of Approved Stipulation and Agreement in Docket No. RP17-204-000 to be effective 1/1/2017.

Filed Date: 1/9/17.

Accession Number: 20170109-5205.

Comments Due: 5 p.m. ET 1/23/17.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP17-29-001.

Applicants: AEP Generation Resources Inc., AEP Generating Company, Lightstone Generation LLC.

Description: Amendment to Joint Petition for Temporary Waiver and Request for Expedited Action and Shortened Notice Period of AEP Generation Resources Inc., et. al. under RP17-29.

Filed Date: 1/6/17.

Accession Number: 20170106-5215.

Comments Due: 5 p.m. ET 1/11/17.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00961 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR17-5-000]

Stakeholder Midstream Crude Oil Pipeline, LLC; Notice of Petition for Declaratory Order

Take notice that on January 9, 2017, pursuant to Rule 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207(a)(2) (2016), Stakeholder Midstream Crude Oil Pipeline, LLC ("Stakeholder"), filed a petition for a declaratory order seeking approval of the overall tariff and rate structure and terms of service for its new crude oil gathering and transportation project in the San Andres formation of the Permian Basin in New Mexico and Texas, as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the

Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the

Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, DC. There is an “eSubscription” link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern time on February 9, 2017.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00932 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Revocation of Market-Based Rate Tariff

	Docket Nos.
Electric Quarterly Reports	ER02-2001-020
Bargain Energy, LLC	ER14-1343-001
CES Placerita, Incorporated	ER14-57-000
DES Wholesale, LLC	ER12-1770-001
DownEast Power Company, LLC	ER10-1304-002
Escanaba Green Energy, LLC	ER12-2307-001
LVI Power, LLC	ER12-2484-000
Madstone Energy Corp	ER11-4482-000
NiGen, LLC	ER15-567-001
R&R Energy, Inc	ER11-4711-002
Tall Bear Group, LLC	ER12-2374-000

On October 27, 2016, the Commission issued an order announcing its intent to revoke the market-based rate authority of the public utilities listed in the caption of that order, which had failed to file their required Electric Quarterly Reports.¹ The Commission directed those public utilities to file the required Electric Quarterly Reports within 15 days of the date of issuance of the order or face revocation of their authority to sell power at market-based rates and termination of their electric market-based rate tariffs.²

The time period for compliance with the October 27 Order has elapsed. The above-captioned companies failed to file their delinquent Electric Quarterly Reports. The Commission hereby revokes the market-based rate authority and terminates the electric market-based rate tariff of each of the companies who are named in the caption of this order.

Dated: January 9, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00930 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP17-197-000]

Dominion Cove Point LNG, LP; Notice of Technical Conference

The Commission’s December 30, 2016 order in the above-captioned proceeding¹ directed that a technical conference be held to address the effect of the tariff changes proposed by Dominion Cove Point LNG, LP in its November 23, 2016 filing in this docket.

Take notice that a technical conference will be held on Thursday February 2, 2017 at 10:00 a.m., in Hearing Room #2 at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to accessibility@ferc.gov or call toll free (866) 208-3372 (voice) or (202) 502-8659 (TTY), or send a fax to (202) 208-2106 with the required accommodations.

All interested persons and staff are permitted to attend. For further information please contact Tehseen Rana at (202) 502-8639 or tehseen.rana@ferc.gov.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00997 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16-28-000]

National Fuel Gas Supply Corporation; Notice of Schedule for Environmental Review of the Proposed Line QP, Line Q, and Queen Storage Project

On December 3, 2015, National Fuel Gas Supply Corporation (National Fuel) filed an application in Docket No. CP16-28-000 requesting a Certificate of Public Convenience and Necessity pursuant to Sections 7(b) and 7(c) of the Natural Gas Act to abandon, construct and operate certain natural gas pipeline facilities. The proposed project is known as the Line QP, Line Q, and Queen Storage Project (Project) located

¹ *Electric Quarterly Reports*, 157 FERC 61,058 (2016) (October 27 Order).

² *Id.* at Ordering Paragraph A.

¹ *Dominion Cove Point LNG, LP*, 157 FERC ¶ 61,249 (2016).

in Forest and Warren Counties, Pennsylvania.

On December 16, 2015, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA: April 13, 2017
90-day Federal Authorization Decision
Deadline: July 12, 2017

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

National Fuel seeks authorization to abandon by sale all of its facilities comprising its Queen Storage Field, including the base gas in the field, its Queen Compressor Station, and a segment of its Line Q, approximately 5.5 miles in length, beginning at the Queen Compressor Station and traversing northwest to a location just south of the Allegheny River (the "Line Q Segment"). Also, National Fuel seeks authorization to construct and operate approximately 5 miles of new 4-inch-diameter plastic pipeline ("Line QP") beginning at a point just north of the Allegheny River, and traversing southeast along or adjacent to the existing Line Q right-of-way, to a point approximately 2,000 feet west of the Queen Compressor Station.

Background

On January 20, 2016, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Line QP, Line Q, and Queen Storage Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received comments from the United States Army Corps of Engineers, Pittsburgh District (USACE). The USACE stated concern regarding the proposed Project's impact on

federally listed species within the Wild and Scenic River portion of the Allegheny River. The U.S. Forest Service, Allegheny National Forest office; USACE; and the Pennsylvania Fish and Boat Commission are cooperating agencies in the preparation of the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to www.ferc.gov/docs-filing/esubscription.asp.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208-FERC or on the FERC Web site (www.ferc.gov). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (i.e., CP16-28), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208-3676, TTY (202) 502-8659, or at FERCOnlineSupport@ferc.gov. The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: January 10, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00927 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17-769-000]

Stream Energy Massachusetts LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stream Energy Massachusetts LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 31, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00995 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission (Commission) hereby gives

notice that members of the Commission's staff may attend the following meetings related to the transmission planning activities of Tucson Electric Power Company, UNS Electric, Inc., Public Service Company of New Mexico, Arizona Public Service Company, El Paso Electric Company, Black Hills Power, Inc., Black Hills Colorado Electric Utility Company, LP, Cheyenne Light, Fuel, & Power Company, NV Energy, Inc., and Xcel Energy Services, Inc. on behalf of Public Service Company of Colorado:

Planning Management Committee Meeting

January 18, 2017, 9 a.m.–3 p.m. (MST)
Regional Stakeholder Meeting
February 16, 2017, 9 a.m.–4 p.m. (MST)

The Planning Management Committee Meeting will be held at: Ocotillo Training Center, 1701 E. Rio Salado Pkwy., Tempe, AZ 85281.

The Regional Stakeholder Meeting will be held at: SRP PERA Club, 1 E. Continental Drive Tempe, Arizona 85281.

The above-referenced meetings will be available via web conference and teleconference.

The above-referenced meetings are open to stakeholders.

Further information may be found at <http://www.westconnect.com/>.

The discussions at the meetings described above may address matters at issue in the following proceeding:

ER13–75, *Public Service Company of New Mexico; El Paso Electric Company*

For more information contact Nicole Cramer, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6775 or nicole.cramer@ferc.gov.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017–00996 Filed 1–17–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP17–28–000; PF16–7–000]

Eastern Shore Natural Gas Company; Notice of Application for Certificate of Public Convenience and Necessity

Take notice that on December 30, 2016 Eastern Shore Natural Gas Company (Eastern Shore), 1110 Forrest Avenue, Dover, Delaware 19904, filed in the above referenced docket an

application pursuant to section 7(c) of the Natural Gas Act (NGA) and part 157 of the Commission's regulations, requesting a certificate of public convenience and necessity authorizing Eastern Shore to construct, own, operate and maintain the 2017 Expansion Project. The Project is designed to provide 61,162 dekatherms per day of additional firm transportation service to seven of Eastern Shore's existing customers. Eastern Shore proposes to construct seven segments of buried natural gas pipeline totaling approximately 39.6 miles with miscellaneous appurtenances in Chester County, Pennsylvania, Cecil County, Maryland, as well as New Castle and Sussex Counties, Delaware and install additional 3,750 horsepower at the existing Daleville Compressor Station in Chester County, Pennsylvania. Eastern Shore proposes incremental recourse rate, as more fully set forth in the application which is on file with the Commission and open to public inspection.

The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Mark Parker P.E., Engineering Manager, Eastern Shore Natural Gas Company 1110 Forrest Avenue, Dover, DE 19904 by phone 1–844–366–3764 use or by email maparker@esng.com.

Specifically, Eastern Shore proposes (1) six 10-, 16-, and 24-inch-diameter pipeline loop segments totaling 22.7 miles, (2) 10-inch-diameter 16.9-mile-long mainline extension, (3) upgrades to an existing Meter and Regulator station and lateral piping at the existing interconnect with Texas Eastern in Lancaster County, Pennsylvania, and (4) the addition of two pressure control stations in Sussex County, Delaware. Eastern Shore requests that the Commission issue the requested authorizations by May 2017 in order to meet November 1, 2017 in-service date requested by the project shippers who are local utility, power, and industrial manufacturing companies. The total cost of the Project is estimated to be approximately \$98,578,673.

On May 17, 2016, the Commission staff granted Eastern Shore's request to utilize the Pre-Filing Process and assigned Docket No. PF16–7–000 to staff activities involved in the above

referenced project. Now, as of the filing of the December 30, 2016 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP17–28–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit five copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party

to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit original and five copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on February 1, 2017.

Dated: January 11, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-00986 Filed 1-17-17; 8:45 am]

BILLING CODE 6717-01-P

FARM CREDIT ADMINISTRATION

Market Access Agreement

AGENCY: Farm Credit Administration.

ACTION: Notice of approval of the Draft Third Amended and Restated Market Access Agreement.

SUMMARY: The Farm Credit Administration (FCA) announces that it has approved the Draft Third Amended and Restated Market Access Agreement (Draft Third Restated MAA) proposed to be entered into by all of the banks of the Farm Credit System (System or FCS) and the Federal Farm Credit Banks Funding Corporation (Funding Corporation). The Draft Third Restated MAA sets forth the rights and

responsibilities of each of the parties when the condition of a System bank falls below pre-established financial thresholds. In prior draft amended and restated MAAs, although not required, the FCA published the draft document for comment prior to its approval. The revisions in this draft are minor, consisting primarily of replacing references to the previous FCA regulatory capital standards with references to the new FCA regulatory capital standards that became effective on January 1, 2017, as well as updating addresses. Therefore, the FCA has determined to approve the Draft Third Restated MAA without a request for comments prior to approval; we will, however, review and consider any subsequent comments we may receive.

DATES: You may send comments on or before February 17, 2017.

ADDRESSES: For accuracy and efficiency reasons, commenters are encouraged to submit comments by e-mail or through the FCA's Web site. We are no longer accepting comments submitted by facsimile (fax). Please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- **E-mail:** Send us an e-mail at reg-comm@fca.gov.
- **FCA Web site:** <http://www.fca.gov>. Select "Public Commenters," then "Public Comments," and follow the directions for "Submitting a Comment."
- **Federal E-Rulemaking Web site:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Mail:** Send mail to Barry F. Mardock, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

You may review copies of comments we receive at our office in McLean, Virginia, or on our Web site at <http://www.fca.gov>. Once you are in the Web site, select "Public Commenters," then "Public Comments," and follow the directions for "Reading Submitted Public Comments." We will show your comments as submitted, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove e-mail addresses to help reduce Internet spam.

FOR FURTHER INFORMATION, CONTACT:

David J. Lewandowski, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean,

VA 22102-5090, (703) 883-4212, TTY (703) 883-4434,
or

Rebecca S. Orlich, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4020, TTY (703) 883-4020.

SUPPLEMENTARY INFORMATION: System banks and the Funding Corporation entered into the original Market Access Agreement (original MAA) on September 1, 1994, to help control the risk of each System bank by outlining each party's respective rights and responsibilities in the event the condition of a System bank fell below certain financial thresholds. As part of the original MAA, System banks and the Funding Corporation agreed to periodic reviews of the terms of the MAA to consider whether any amendments were appropriate. The original MAA was updated by the parties in 2003 in the Amended and Restated MAA and received FCA approval following notice and request for public comments in the **Federal Register**.¹

On December 3, 2010, the FCA Board approved amendments to the Amended and Restated MAA that would conform its provisions to the System banks' proposed Joint and Several Liability Reallocation Agreement (Reallocation Agreement) to ensure that the MAA provisions did not impede operation of the Reallocation Agreement; the amendments also provided that the MAA and the Reallocation Agreement are separate agreements, and invalidation of one does not affect the other. The FCA published these amendments in the **Federal Register**.² The proposed Reallocation Agreement is an agreement among the banks and the Funding Corporation that establishes a procedure for non-defaulting banks to pay maturing System-wide debt on behalf of defaulting banks prior to a statutory joint and several call by the FCA under section 4.4 of the Farm Credit Act of 1971, as amended (Act).³ The FCA Board approved the proposed Reallocation Agreement on October 14, 2010, and notice of the approval was published in the **Federal Register**.⁴

The MAA was updated again by the parties in 2011 in the Second Amended and Restated MAA, as the first Amended and Restated MAA was set to expire at the end of 2011. The FCA approved the draft document on December 9, 2011 following notice and request for public comments, and notice

¹ 68 FR 19539 (April 21, 2003).

² 75 FR 76729 (December 9, 2010).

³ 12 U.S.C. 2155.

⁴ 75 FR 64727 (October 20, 2010).

of approval was published in the **Federal Register**.⁵

The Second Amended and Restated MAA established certain financial thresholds at which conditions are placed on the activities of a bank or restrictions are placed on a bank's access to participation in System-wide and consolidated obligations. The MAA established three categories, which are based on each bank's net collateral ratio, permanent capital ratio, and scores under the Contractual Inter-bank Performance Agreement, which is an agreement among the banks and the Funding Corporation that establishes certain financial performance criteria.

The Second Amended and Restated MAA has a termination date of December 31, 2025. The System banks and the Funding Corporation have requested the FCA to approve the Draft Third Restated MAA at this time in order to incorporate references to the FCA's new capital regulations, which became effective at on January 1, 2017. The parties propose to enter into the Draft Third Restated MAA by January 31, 2017, with a retroactive effective date of January 1, 2017.

The Draft Third Restated MAA retains the same general framework and most of the provisions of the Second Amended and Restated MAA. In Sections 1.04 through 1.07, the Net Collateral and Permanent Capital ratio levels would be replaced with the Tier 1 Leverage and Total Capital ratio levels, respectively, that would place a bank in either Category I, Category II, or Category III. The revisions take into account the new capital requirements set forth in § 628.10—Minimum Capital Standards and § 628.11—Capital Buffer Amounts. A bank would fall into revised Category I when either its Tier 1 Leverage or its Total Capital ratio drops below the relevant Capital Buffer floor. Further declines in either or both ratios below specified thresholds would cause the bank to fall into Category II and Category III. In addition, paragraph (g) of Section 6.03 has been revised to include "whether the Bank has evaluated and disclosed that it has substantial doubt about its ability to continue as a Going Concern" in addition to the criterion in the Second Amended and Restated MAA that the committee consider whether a Bank's independent public accountants have included a Going Concern qualification in the Bank's most recent combined financial statements. In addition, the addresses of the System banks and the Funding Corporation have been updated.

The FCA Board hereby approves the Draft Third Amended and Restated MAA pursuant to sections 4.2(c), 4.2(d) and 4.9(b)(2) of the Farm Credit Act of 1971, as amended. The FCA's approval of the Draft Third Amended and Restated MAA is conditioned on the board of directors of each bank and the Funding Corporation approving the Draft Third Amended and Restated MAA. Neither the Draft Third Amended and Restated MAA, when it becomes effective, nor FCA approval of it shall in any way restrict or qualify the authority of the FCA or the FCSIC to exercise any powers, rights, or duties granted by law to the FCA or the FCSIC. Finally, the FCA retains the right to modify or revoke its approval of the Draft Third Amended and Restated MAA at any time.

The Draft Third Amended and Restated MAA, together with the recitals to the amendment, is as follows:

THIRD AMENDED AND RESTATED MARKET ACCESS AGREEMENT AMONG

AgFirst Farm Credit Bank, AgriBank, FCB, CoBank, ACB, Farm Credit Bank of Texas and Federal Farm Credit Banks Funding Corporation

This THIRD AMENDED AND RESTATED MARKET ACCESS AGREEMENT (the "Restated MAA") is entered into among AgFirst Farm Credit Bank, AgriBank, FCB, CoBank, ACB, the Farm Credit Bank of Texas, (collectively, the "Banks") and the Federal Farm Credit Banks Funding Corporation ("Funding Corporation"). Capitalized terms used herein shall be as defined in Article IX.

Whereas, the Banks and the Funding Corporation entered into that certain Market Access Agreement dated September 1, 1994 and effective as of November 23, 1994, (the "Original Agreement") for the reasons stated therein; and

Whereas, the Original Agreement was subsequently amended by that certain Amended and Restated Market Access Agreement, dated July 1, 2003, referred to herein as the "First Restated MAA," for the reasons stated therein; and

Whereas, the First Restated MAA was subsequently amended by that certain Second Amended and Restated Market Access Agreement, dated December 14, 2011, and effective January 1, 2012, referred to herein as the "Second Restated MAA," for the reasons stated therein; and

Whereas, pursuant to Section 7.05 of the Second Restated MAA, the Banks and the Funding Corporation have reviewed the Second Restated MAA to

consider whether any amendments to it are appropriate in view of recent changes to new FCA capital requirements applicable to the Banks; and

Whereas, representatives of the Banks and the Funding Corporation met various times in connection with such review and recommended certain amendments to the Second Restated MAA for presentation to the Committee; and

Whereas, the Committee met various times in connection with the review and recommended certain amendments to the Second Restated MAA for presentation to the Banks and the Funding Corporation; and

Whereas, the boards of directors of the Banks and of the Funding Corporation approved this Restated MAA in principle; and

Whereas, thereafter, this Restated MAA was submitted to the FCA for approval and to the Insurance Corporation for an expression of support; and

Whereas, the FCA published this Restated MAA in the **Federal Register** and sought comments thereon; and

Whereas, the FCA approved this Restated MAA, subject to approval of this Restated MAA by the boards of directors of the Banks and the Funding Corporation, and a notice of such approval was published in the **Federal Register**; and

Whereas, the Insurance Corporation expressed its support of this Restated MAA; and

Whereas, the Parties are mindful of the FCA's independent authority under section 5.17(a)(10) of the Act to ensure the safety and soundness of the Banks, the FCA's independent authority under sections 4.2 and 4.9 of the Act to approve the terms of specific issuances of Debt Securities, the Insurance Corporation's independent authority under section 5.61 of the Act to assist troubled Banks, and the Banks' independent obligations under section 4.3(c) of the Act to maintain necessary collateral levels for Debt Securities; and

Whereas, the Banks are entering into this Restated MAA pursuant to, *inter alia*, section 4.2(c) and (d) of the Act; and

Whereas, the Funding Corporation is prepared to adopt as the "conditions of participation" that it understands to be required by section 4.9(b)(2) of the Act each Bank's compliance with the terms and conditions of this Restated MAA; and

Whereas, the Funding Corporation believes the execution and implementation of this Restated MAA will materially accomplish the

⁵ 76 FR 77998 (December 15, 2011).

objectives which it has concluded are appropriate for a market access program under section 4.9(b)(2) of the Act; and

Whereas, prior to the adoption of the Original Agreement, the Funding Corporation adopted and maintained in place a Market Access and Risk Alert Program designed to fulfill what it understood to be its responsibilities under section 4.9(b)(2) of the Act with respect to determining “conditions of participation,” which Program was discontinued by the Funding Corporation in accordance with the terms of the Original Agreement; and

Whereas, the Funding Corporation is entering into this Restated MAA pursuant to, *inter alia*, section 4.9(b)(2) of the Act; and

Whereas, the Parties believe that the execution and implementation of this Restated MAA will accomplish the objectives intended to be achieved by the Original Agreement,

Now therefore, in consideration of the foregoing, the mutual promises and agreements herein contained, and other good and valuable consideration, receipt of which is hereby acknowledged, the Parties, intending to be legally bound hereby, agree as follows:

ARTICLE I—CATEGORIES

Section 1.01. *Scorekeeper*. The Scorekeeper, for purposes of this Restated MAA, shall be the Funding Corporation.

Section 1.02. *CIPA Oversight Body*. The CIPA Oversight Body, for purposes of this Restated MAA, shall be the same as the Oversight Body under Section 5.1 of CIPA.

Section 1.03. *CIPA Scores*. Net Composite Scores and Average Net Composite Scores, for purposes of this Restated MAA, shall be the same as those determined under Article II of CIPA and the Model referred to therein, as in effect on June 30, 2011, and as amended under CIPA or replaced by successor provisions under CIPA in the future, to the extent such future amendments or replacements are by agreement of all the Banks.

Section 1.04. *Tier 1 Leverage Ratio and Total Capital Ratio*. Each Bank shall report to the Scorekeeper within 15 days after the end of each month its Tier 1 Leverage Ratio and Total Capital Ratio as of the last day of that month. Should any Bank later correct or revise, or be required to correct or revise, any past financial data in a way that would cause any previously reported Tier 1 or Total Capital Ratio hereunder to have been different, the Bank shall promptly report a revised Ratio to the Scorekeeper. Should the Scorekeeper consider it necessary to verify any Tier

1 Leverage Ratio and Total Capital Ratio, it shall so report to the Committee, or, if the Committee is not in existence, to the CIPA Oversight Body, and the Committee or the CIPA Oversight Body, as the case may be, may verify the Ratios as it deems appropriate, through reviews of Bank records by its designees (including experts or consultants retained by it) or otherwise. The reporting Bank shall cooperate in any such verification, and the other Banks shall provide such assistance in conducting any such verification as the Committee or the CIPA Oversight Body, as the case may be, may reasonably request.

Section 1.05. *Category I*. A Bank shall be in Category I if it (a) has an Average Net Composite Score of 50.0 or more, but less than 60.0, for the most recent calendar quarter for which an Average Net Composite Score is available, (b) has a Net Composite Score of 45.0 or more, but less than 60.0, for the most recent calendar quarter for which a Net Composite Score is available, (c) has a Tier 1 Leverage Ratio of 4.00 percent or more, but less than 5.00 percent for the last day of the most recent month or (d) has a Total Capital Ratio of 8.00 percent or more, but less than 10.50 percent for the period ending on the last day of the most recent month.

Section 1.06. *Category II*. A Bank shall be in Category II if it (a) has an Average Net Composite Score of 35.0 or more, but less than 50.0, for the most recent calendar quarter for which an Average Net Composite Score is available, (b) has a Net Composite Score of 30.0 or more, but less than 45.0, for the most recent calendar quarter for which a Net Composite Score is available, (c) has a Tier 1 Leverage Ratio of 3.00 percent or more, but less than 4.00 percent for the last day of the most recent month, (d) has a Total Capital Ratio of 7.00 percent or more, but less than 8.00 percent for the period ending on the last day of the most recent month, or (e) is in Category I and has failed to provide information to the Committee as required by Article III within 2 Business Days after receipt of written notice from the Committee of such failure.

Section 1.07. *Category III*. A Bank shall be in Category III if it (a) has an Average Net Composite Score of less than 35.0 for the most recent calendar quarter for which an Average Net Composite Score is available, (b) has a Net Composite Score of less than 30.0 for the most recent calendar quarter for which a Net Composite Score is available, (c) has a Tier 1 Leverage Ratio of less than 3.00 percent for the last day of the most recent month, (d) has a Total Capital Ratio of less than 7.00 percent

for the period ending on the last day of the most recent month, or (e) is in Category II and has failed to provide information to the Committee as required by Article III within 2 Business Days after receipt of written notice from the Committee of such failure.

Section 1.08. *Highest Category*. If a Bank would come within more than one Category by reason of the various provisions of Sections 1.05 through 1.07, it shall be considered to be in the highest-numbered Category for which it qualifies (e.g., Category III rather than Category II).

Section 1.09. *Notice by Scorekeeper*. Within 20 days of the end of each month, after receiving the reports due under Section 1.04 within 15 days of the end of the prior month, the Scorekeeper shall provide to all Banks, all Associations discounting with or otherwise receiving funding from a Bank that is in Category I, Category II or Category III, the FCA, the Insurance Corporation, the Funding Corporation, and either the CIPA Oversight Body or, if it is in existence, the Committee a notice identifying the Banks, if any, that are in Categories I, II and III, or stating that no Banks are in such Categories.

ARTICLE II—THE COMMITTEE

Section 2.01. *Formation*. A Monitoring and Advisory Committee (the “Committee”) shall be formed at the instance of the CIPA Oversight Body within 7 days of the date that it receives a notice from the Scorekeeper under Section 1.09 that any Bank is in Category I, Category II or Category III (unless such a Committee is already in existence). The Committee shall remain in existence thereafter for so long as the most recent notice from the Scorekeeper under Section 1.09 indicates that any Bank is in Category I, Category II or Category III. If not already in existence, the Committee may also be formed (a) at the instance of the CIPA Oversight Body at any other time, in order to consider a Continued Access Request that has been submitted or is expected to be submitted, (b) for purposes of preparing the reports described in Section 7.05, and (c) as provided for in Section 8.04(b).

Section 2.02. *Composition*. The Committee shall be made up of two representatives of each Bank and two representatives of the Funding Corporation. One of the representatives of each Bank shall be that Bank’s representative on the CIPA Oversight Body. The other representative of each Bank shall be an individual designated by the Bank’s board of directors, who may be a member of the Bank’s board of directors or a senior officer of the

Bank, in the discretion of the Bank's board. One of the representatives of the Funding Corporation shall be an outside director of the Funding Corporation designated by the Funding Corporation board of directors. The other representative of the Funding Corporation shall be designated by the board of directors of the Funding Corporation from among the members of its board and/or its senior officers. The removal and replacement of the Committee members designated directly by Bank boards of directors and by the Funding Corporation shall be in the sole discretion of each Bank board and of the Funding Corporation, respectively. A replacement for a member of the CIPA Oversight Body shall automatically replace such member on the Committee.

Section 2.03. *Authority and Responsibilities.* The Committee shall have the authority and responsibilities specified in this Article II, in Sections 1.04, 3.01, 3.02, 3.05, 3.06, 4.02, 7.05, 8.04 and 8.08, and in Article VI, and such incidental powers as are necessary and appropriate to effectuating such authority and responsibilities.

Section 2.04. *Meetings.* Notwithstanding anything herein to the contrary, at all times, the Banks entitled to vote on Committee business shall be all Banks other than (i) those in Category II and Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, and (ii) in the case of a Bank requesting a Continued Access Decision, such Bank. The initial meeting of the Committee shall be held at the call of the Chairman of the CIPA Oversight Body or a majority of the Parties entitled to vote on Committee business. Thereafter, the Committee shall meet at such times and such places at the call of the Chairman of the Committee or a majority of the Parties entitled to vote on Committee business. For all voting and quorum purposes each Party entitled to vote on Committee business shall act through at least one of its representatives. Written notice of each meeting shall be given to each member by the Chairman or his or her designee not less than 48 hours prior to the time of the meeting. A meeting may be held without such notice upon the signing of a waiver of notice by all of the Parties entitled to vote on Committee business. All of the Parties entitled to vote on Committee business shall constitute a quorum for the conduct of business. A meeting may be held by a telephone conference arrangement or similar communication method allowing each speaker to be heard by all others in attendance at the same time.

Section 2.05. *Action Without a Meeting.* Action may be taken by the Committee without a meeting if each Bank and the Funding Corporation consent in writing to consideration of a matter without a meeting and all of the Parties entitled to vote on Committee business approve the action in writing, which writings shall be kept with the minutes of the Committee.

Section 2.06. *Voting.* The Funding Corporation and each Bank entitled to vote on Committee business shall have one vote on Committee business. Voting on Committee business (including recommendations on Continued Access Decisions, but not the ultimate vote on Continued Access Decisions, which is addressed in Article VI) shall be by unanimity of the Parties entitled to vote on Committee business that are present (physically, by telephone conference or similar communication method allowing each speaker to be heard by all others in attendance at the same time) through at least one representative. If a Bank or the Funding Corporation has two representatives present, they shall agree in casting the vote of the Bank or the Funding Corporation, and if they cannot agree on a particular matter, that Bank or the Funding Corporation shall not cast a vote on that matter, and, in determining unanimity, shall not be counted as a Party entitled to vote on that matter.

Section 2.07. *Officers.* The Committee shall elect from among its members a Chairman, a Vice Chairman, a Secretary and such other officers as it shall from time to time deem appropriate. The Chairman shall chair the meetings of the Committee and have such other duties as the Committee may delegate to him or her. The Vice Chairman shall perform such duties of the Chairman as the Chairman is unable or fails to perform, and shall have such other duties as the Committee may delegate to him or her. The Secretary shall keep the minutes and maintain the minute book of the Committee. Other officers shall have such duties as the Committee may delegate to them. Should the Chairman be a representative of either a Category II or Category III Bank, such individual will no longer be eligible to serve as Chairman. The Vice Chairman will thereafter perform the duties of Chairman, and if the Vice Chairman is unable, the Committee may elect a new Chairman from among its members.

Section 2.08. *Retention of Staff, Consultants and Experts.* The Committee shall be authorized to retain staff, consultants and experts as it deems necessary and appropriate in its sole discretion.

Section 2.09. *Expenses.* Any compensation of each member of the Committee for time spent on Committee business and for his or her out-of-pocket expenses, such as travel, shall be paid by the Party that designated that member to the Committee or to the CIPA Oversight Body. All other expenses incurred by the Committee shall be borne by the Banks and assessed by the Funding Corporation based on the formula then used by the Funding Corporation to allocate its operating expenses.

Section 2.10. *Custody of Records.* All information received by the Committee pursuant to this Restated MAA, and all Committee minutes, shall be lodged, while not in active use by the Committee, at the Funding Corporation, and shall be deemed records of the Funding Corporation for purposes of FCA examination. The Parties agree that documents in active use by the Committee may also be examined by the FCA.

ARTICLE III—PROVISION OF INFORMATION

Section 3.01. *Information To Be Provided By All Banks in Categories I, II and III.* If a Bank is in Category I, Category II or Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, and if the prior monthly notice by the Scorekeeper did not indicate that the Bank was in any Category, then the Bank shall within 30 days of receipt of the latest notice provide to the Committee: (a) a detailed explanation of the causes of its being in that Category, (b) an action plan to improve its financial situation so that it is no longer in any of the three Categories, (c) a timetable for achieving that result, (d) at the discretion of the Committee, the materials and information listed in Attachment 1 hereto (in addition to fulfilling the other obligations specified in Attachment 1 hereto) and (e) such other pertinent materials and information as the Committee shall, within 7 days of receiving notice from the Scorekeeper, request in writing from the Bank. Such Bank shall summarize, aggregate or analyze data, as well as provide raw data, in such manner as the Committee may request. Such information shall be promptly updated (without any need for a request by the Committee) whenever the facts significantly change, and shall also be updated or supplemented as the Committee so requests in writing of the Bank by such deadlines as the Committee may reasonably specify.

Section 3.02. *Additional Information To Be Provided By Banks in Categories*

II and III. If a Bank is in Category II or Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, and if the prior monthly notice by the Scorekeeper did not indicate that the Bank was in Category II or Category III, then the Bank shall within 30 days of receipt of the latest notice provide to the Committee, in addition to the information required by Section 3.01, at the discretion of the Committee, the materials and information listed in Attachment 2 hereto (in addition to fulfilling the other obligations specified in Attachment 2 hereto). Such information shall be promptly updated (without any need for a request by the Committee) whenever the facts significantly change, and shall also be updated or supplemented as the Committee so requests in writing of the Bank by such deadlines as the Committee may reasonably specify.

Section 3.03. *Documents or Information Relating to Communications With FCA or the Insurance Corporation.* Notwithstanding Sections 3.01 and 3.02, a Bank shall not disclose to the Committee any communications between the Bank and the FCA or the Insurance Corporation, as the case may be, or documents describing such communications, except as consented to by, and subject to such restrictive conditions as may be imposed by, the FCA or the Insurance Corporation, as the case may be. However, facts regarding the Bank's condition or plans that pre-existed a communication with the FCA or the Insurance Corporation and then were included in such a communication are not barred from disclosure by this section. The Committee shall decide on a case-by-case basis whether to request copies of such communications and documents from the FCA or the Insurance Corporation, as the case may be. Each Bank hereby consents to the disclosure of such communications and documents to the Committee if consented to by the FCA or the Insurance Corporation, as the case may be. Nothing in this section shall preclude a Bank from making disclosures to the System Disclosure Agent necessary to allow the System Disclosure Agent to comply with its obligations under the securities laws or other applicable law or regulations with regard to disclosure to investors.

Section 3.04. *Sources of Information; Certification.* Information provided to the Committee under Sections 3.01 and 3.02 shall, to the extent applicable, be data used in the preparation of financial statements in accordance with generally accepted accounting principles, or data used in the preparation of call reports

submitted to the FCA pursuant to 12 CFR 621, as amended from time to time, or any successor thereto. A Bank shall certify, through its chief executive officer or, if there is no chief executive officer, a senior executive officer, the completeness and accuracy of all information provided to the Committee under Sections 3.01 and 3.02.

Section 3.05. *Failure to Provide Information.* If a Bank fails to provide information to the Committee as and when required under Sections 3.01 and 3.02, and does not correct such failure within 2 Business Days of receipt of the written notice by the Committee of the failure, then the Committee shall so advise the Scorekeeper.

Section 3.06. *Provision of Information to Banks.* Any information provided to the Committee under Sections 3.01 and 3.02 shall be provided by the Committee to any Bank upon request. A Bank shall not have the right under this Restated MAA to obtain information directly from another Bank.

Section 3.07. *Cessation of Obligations.* A Bank's obligation to provide information to the Committee under Section 3.01 shall cease as soon as the Bank is no longer in Category I, Category II or Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09. A Bank's obligation to provide to the Committee information under Section 3.02 shall cease as soon as the Bank is no longer in Category II or Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09.

ARTICLE IV—RESTRICTIONS ON MARKET ACCESS

Section 4.01. *Final Restrictions.* As of either,

(i) The 10th day after a Bank receives a notification from the Scorekeeper that it is in Category II, as indicated in the most recent notice from the Scorekeeper under Section 1.09, if it has not by said 10th day submitted a Continued Access Request to the Committee; or

(ii) If the Bank has submitted a Continued Access Request to the Committee by the 10th day after its receipt of notice from the Scorekeeper that it is in Category II, the 7th day following the day a submitted Continued Access Request is denied,

A Bank in Category II, as indicated in the most recent notice from the Scorekeeper under Section 1.09, (a) shall be permitted to participate in issues of Debt Securities only to the extent necessary to roll over the principal (net of any original issue discount) of maturing debt, and (b) shall comply with the Additional Restrictions.

Section 4.02. *Category II Interim Restrictions.* From the day that a Bank receives a notice from the Scorekeeper that it is in Category II until: (a) 10 days thereafter, if the Bank does not by that day submit a Continued Access Request to the Committee, or (b) if the Bank by such 10th day after it has received a notice from the Scorekeeper that it is in Category II does submit a Continued Access Request to the Committee, the 7th day following the day that notice is received by the Bank that the Continued Access Request is granted or denied, the Bank (i) may participate in issues of Debt Securities only to the extent necessary to roll over the principal (net of any original issue discount) of maturing debt unless the Committee, taking into account the criteria in Section 6.03, shall specifically authorize participation to a greater extent, and (ii) shall comply with the Additional Restrictions. Notwithstanding the foregoing, the Category II Interim Restrictions shall not go into effect if a Continued Access Request has already been granted in anticipation of the formal notice that the Bank is in Category II.

Section 4.03. *FCA Action.* The Final Restrictions and the Category II Interim Restrictions shall go into effect without the need for case-by-case approval by FCA.

Section 4.04. *Cessation of Restrictions.* The Final Restrictions and the Category II Interim Restrictions shall cease as soon as the Bank is no longer in Category II, as indicated in the most recent notice from the Scorekeeper under Section 1.09. The Bank shall continue, however, to be subject to such other obligations under this Restated MAA as may apply to it by reason of its being in another Category.

Section 4.05. *Relationship to the Joint and Several Liability Reallocation Agreement.* A Category II Bank shall not be subject to the Final Restrictions and Category II Interim Restrictions, to the extent that the Final Restrictions and Category II Interim Restrictions would prohibit such Category II Bank from issuing debt required to fund such Category II Bank's liabilities and obligations under the Joint and Several Liability Reallocation Agreement, if and when the Joint and Several Liability Reallocation Agreement is in effect among the Parties.

ARTICLE V—PROHIBITION OF MARKET ACCESS

Section 5.01. *Final Prohibition.* As of either,

(i) The 10th day after a Bank receives a notification from the Scorekeeper that it is in Category III, as indicated in the

most recent notice from the Scorekeeper under Section 1.09, if it has not by said 10th day submitted a Continued Access Request to the Committee; or

(ii) If the Bank has submitted a Continued Access Request to the Committee by the 10th day after its receipt of notice from the Scorekeeper that it is in Category III, the 7th day following the day a submitted Continued Access Request is denied,

A Bank in Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, (a) shall be prohibited from participating in issues of Debt Securities, and (b) shall comply with the Additional Restrictions.

Section 5.02. Category III Interim Restrictions. From the day that a Bank receives a notice from the Scorekeeper that it is in Category III until: (a) 10 days thereafter, if the Bank does not by that day submit a Continued Access Request to the Committee, or (b) if the Bank by such 10th day after it has received a notice from the Scorekeeper that it is in Category III does submit a Continued Access Request to the Committee, the 7th day following the day that notice is received by the Bank that the Continued Access Request is granted or denied, the Bank (i) may participate in issues of Debt Securities only to the extent necessary to roll over the principal (net of any original issue discount) of maturing debt, and (ii) shall comply with the Additional Restrictions. Notwithstanding the foregoing, the Category III Interim Restrictions shall not go into effect if a Continued Access Request has already been granted in anticipation of the formal notice that the Bank is in Category III.

Section 5.03. FCA Action. The Category III Interim Restrictions shall go into effect without the need for case-by-case approval by the FCA. The Parties agree that the Final Prohibition shall go into effect without the need for approval by the FCA; *provided, however*, that the FCA may override the Final Prohibition, for such time period up to 60 days as the FCA may specify (or, if the FCA does not so specify, for 60 days), by so ordering before the date upon which the Final Prohibition becomes effective pursuant to Section 5.01, and may renew such an override once only, for such time period up to 60 additional days as the FCA may specify (or, if the FCA does not so specify, for 60 days), by so ordering before the expiration of the initial override period. If the Final Prohibition is overridden by the FCA, the Category III Interim Restrictions shall remain in effect.

Section 5.04. Cessation of Restrictions. The Final Prohibition and

the Category III Interim Restrictions shall cease as soon as the Bank is no longer in Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09. The Bank shall continue, however, to be subject to such other obligations under this Restated MAA as may apply to it by reason of its being in another Category.

Section 5.05. Relationship to the Joint and Several Liability Reallocation Agreement. A Category III Bank shall not be subject to the Final Prohibition or Category III Interim Restrictions, to the extent that the Final Prohibition or Category III Interim Restrictions would prohibit such Category III Bank from issuing debt required to fund such Category III Bank's liabilities and obligations under the Joint and Several Liability Reallocation Agreement, if and when the Joint and Several Liability Reallocation Agreement is in effect among the Parties.

ARTICLE VI—CONTINUED ACCESS DECISIONS

Section 6.01. Process. The process for action on Continued Access Requests shall be as follows:

(a) **Submission of Request.** A Bank may submit a Continued Access Request for consideration by the Committee at any time, including (i) prior to formal notice from the Scorekeeper that it is in Category II or Category III, if the Bank anticipates such notice, and (ii) prior to the 10th day after a Bank receives a notification from the Scorekeeper that it is in Category II or the 10th day after a Bank receives a notification from the Scorekeeper that it is in Category III.

(b) **Committee Recommendation.** After a review of the Request, the supporting information and any other pertinent information available to the Committee, the Committee shall arrive at a recommendation regarding the Request (including, if the recommendation is to grant the Request, recommendations as to the expiration date of the Continued Access Decision and as to any conditions to be imposed on the Decision). The Funding Corporation, drawing upon its expertise and specialized knowledge, shall provide to the Committee all pertinent information in its possession (and the Banks authorize the Funding Corporation to provide such information to the Committee for its use as provided herein, and, to that limited extent only, waive their right to require the Funding Corporation to maintain the confidentiality of such information). The Committee shall send its recommendation and a statement of the reasons therefor, including a description of any considerations that were

expressed for and against the recommendation by members of the Committee during its deliberations, together with the Request, the supporting information, a report of how the members of the Committee voted on the recommendation, a report by the Funding Corporation concerning its position on the recommendation, and any other material information that was considered by the Committee, to all Banks and the Funding Corporation by a nationally recognized overnight delivery service within 14 days after receiving the Request. If the Committee fails to act within such 14-day period, the Continued Access Request shall be deemed forwarded to all Banks entitled to vote thereon for their consideration. If the Committee has failed to act, the Funding Corporation shall send to all Banks, within 2 days following the deadline for Committee action, a report concerning the position of the Funding Corporation on the Continued Access Request.

(c) **Vote on the Request.** Unless otherwise expressly stated herein, the Banks entitled to vote on the Request shall be all Banks other than those in Category II and Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, and other than the Bank requesting the Continued Access Decision. Within 10 days of receiving the Committee's recommendation and the accompanying materials (or, if the Committee failed to act within 14 days, within 10 days following the 14th day), the board of directors of each Bank entitled to vote on the Request, or its designee, after review of the recommendation, the accompanying materials, the report of the Funding Corporation, and any other pertinent information, shall vote to grant or deny the Request (as modified or supplemented by any recommendations of the Committee as to the expiration date of the Continued Access Decision and as to conditions to be imposed on the Decision), and shall provide written notice of its vote to the Committee. If the Committee has recommended in favor of a Continued Access Decision, the vote of a Bank shall be either to accept or reject the Committee's recommendation, including the recommended expiration date and conditions; if the Committee has recommended against a Continued Access Decision or has failed to act, the vote of a Bank shall be either to grant the Continued Access Request on the terms requested by the requesting Bank, or to deny it. Failure to vote within the 10-day period shall be considered a "no" vote. A Continued Access Request

shall be granted only upon a 100-percent Vote within the 10-day period, and shall be considered denied if a 100-percent Vote is not forthcoming by that day.

(d) *Notice.* The Committee shall promptly provide written notice to the Parties, the FCA and the Insurance Corporation of the granting or denial of the Continued Access Request, and, if the Continued Access Request was granted, of all the particulars of the Continued Access Decision.

Section 6.02. *Provision of Information to FCA and the Insurance Corporation.* The FCA and the Insurance Corporation shall be advised by the Committee of the submission of a Continued Access Request, shall be provided by the Committee with appropriate materials relating to the Request, and shall be advised by the Committee of the recommendation made by the Committee concerning the Request.

Section 6.03. *Criteria.* The Committee, in arriving at its recommendation on a Continued Access Request, and the voting Banks, in voting on a Continued Access Request, shall consider (a) the present financial strength of the Bank in issue, (b) the prospects for financial recovery of the Bank in issue, (c) the probable costs of particular courses of action to the Banks and the Insurance Fund, (d) any intentions expressed by the Insurance Corporation with regard to assisting or working with the Bank in issue, (e) any existing lending commitments and any particular high-quality new lending opportunities of the Bank, (f) seasonal variations in the borrowing needs of the Bank, (g) whether either the Bank has evaluated and disclosed that it has substantial doubt about its ability to continue as a Going Concern or the Bank's independent public accountants have included a Going Concern Qualification in the most recent combined financial statements of the Bank and its constituent Associations, and (h) any other matters deemed pertinent.

Section 6.04. *Expiration Date.* A Continued Access Decision shall have such expiration date as the Committee recommends and is approved by a 100-percent Vote. If the Committee recommends against or fails to act on a Continued Access Request, and it is subsequently approved by a 100-percent Vote, the expiration date of the Continued Access Decision shall be the earlier of the date requested by the Bank or 180 days from the date the Request is granted. A Continued Access Decision may be terminated prior to that date, or renewed for an additional term, upon a new recommendation by the Committee and 100-percent Vote.

Section 6.05. *Conditions.* A Continued Access Decision shall be subject to such conditions as the Committee recommends and are approved by a 100-percent Vote. If specifically approved by a 100-percent Vote, administration of the details of the conditions and ongoing refinement of the conditions to take account of changing circumstances can be left to the Committee or such subcommittee as it may establish for that purpose. Among the conditions that may be imposed on a Continued Access Decision are (a) a requirement of remedial action by the Bank, failing which the Continued Access Decision will terminate, (b) a requirement of other appropriate conduct on the part of the Bank (such as compliance with the Additional Restrictions), failing which the Continued Access Decision will terminate, and (c) specific restrictions on continued borrowing by the Bank, such as a provision allowing a Bank in Category II to borrow only for specified types of business in addition to rolling over the principal of maturing debt, or allowing such a Bank only to roll over interest on maturing debt in addition to rolling over the principal of maturing debt, or a provision allowing a Bank in Category III to roll over a portion of its maturing debt. The Committee shall be responsible for monitoring and determining compliance with conditions, and shall promptly advise the Parties of any failure by a Bank to comply with conditions. The Committee's determination with respect to compliance with conditions shall be final, until and unless overturned or modified in arbitration pursuant to Section 7.08.

Section 6.06. *FCA Action.* The Parties agree that a Continued Access Decision shall go into effect without the need for approval by the FCA, but that the FCA may override the Continued Access Decision, for such time period as the FCA may specify (or, if the FCA does not so specify, until a new Continued Access Decision is made pursuant to a recommendation of the Committee and a 100-percent Vote, in which case it is again subject to override by the FCA), by so ordering at any time.

Section 6.07. *Notice to FCA of Intent to File Continued Access Request.* A Bank that receives notice that it is in Category III shall advise the FCA, within 10 days of receiving such notice, whether it intends to file a Continued Access Request.

ARTICLE VII—OTHER

Section 7.01. *Conditions Precedent.* This Restated MAA shall go into effect on January 1, 2017, *provided, however*, that on or before January 31, 2017 each

Party has executed a certificate in substantially the form of Attachment 3 hereto that all of the following conditions precedent have been satisfied: (a) the delivery to the Banks of an opinion by an outside law firm reasonably acceptable to all of the Parties and in substantially the form of Attachment 4 hereto, (b) the delivery to the Funding Corporation of an opinion by an outside law firm reasonably acceptable to all of the Parties and in substantially the form of Attachment 5 hereto, (c) adoption by each of the Banks and the Funding Corporation of a resolution in substantially the form of Attachment 6 hereto, (d) action by the Insurance Corporation, through its board, expressing its support for this Restated MAA, and (e) action by FCA, through its board, approving this Restated MAA pursuant to section 4.2(c) and (d) of the Act, and (without necessarily expressing any view as to the proper interpretation of section 4.9(b)(2) of the Act) approving this Restated MAA pursuant to section 4.9(b)(2) of the Act insofar as such approval may be required, which action shall (i) indicate that the entry into and compliance with this Restated MAA by the Funding Corporation fully satisfy such obligations as the Funding Corporation may have with respect to establishing "conditions of participation" for market access under section 4.9(b)(2), and (ii) contain no reservations or other conditions or qualifications except for those which may be specifically agreed to by the Funding Corporation's board of directors and the other Parties.

Upon execution of its certificate, each Party shall forward a copy to the Funding Corporation, attn. General Counsel, which shall advise all other Parties when a complete set of certificates is received.

If this Restated MAA becomes effective in accordance with this Section 7.01, the Second Restated MAA shall be amended and restated by this Restated MAA as of that date without further action of the Parties. If any term, provision, covenant or restriction of this Restated MAA is held by a court of competent jurisdiction or other authority to be invalid, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions of this Restated MAA shall remain in full force and effect and shall in no way be affected, impaired or invalidated. If any term, provision, covenant or restriction of this Restated MAA that purports to amend a term, provision, covenant or restriction of the Original Agreement, the First Restated MAA or the Second Restated MAA is

held by a court of competent jurisdiction or other authority to be invalid, void or unenforceable, such term, provision, covenant or restriction of the Original Agreement, the First Restated MAA or the Second Restated MAA shall be considered to have continued and to be continuing in full force and effect at all times since this Restated MAA has purported to be in effect. The Parties agree that notwithstanding the occurrence of any of the foregoing events they will treat, to the maximum extent permitted by law, all actions theretofore taken pursuant to this Restated MAA as valid and binding actions of the Parties.

Section 7.02. *Representations and Warranties.* Each Party represents and warrants to the other Parties that (a) it has duly executed and delivered this Restated MAA, (b) its performance of this Restated MAA in accordance with its terms will not conflict with or result in the breach of or violation of any of the terms or conditions of, or constitute (or with notice or lapse of time or both constitute) a default under any order, judgment or decree applicable to it, or any instrument, contract or other agreement to which it is a party or by which it is bound, (c) it is duly constituted and validly existing under the laws of the United States, (d) it has the corporate and other authority, and has obtained all necessary approvals, to enter into this Restated MAA and perform all of its obligations hereunder, and (e) its performance of this Restated MAA in accordance with its terms will not conflict with or result in the breach of or violation of any of the terms or conditions of, or constitute (or with notice or lapse of time or both constitute) a default under its charter (with respect to the Banks), or its bylaws.

Section 7.03. *Additional Covenants.*

(a) Each Bank agrees to notify the other Parties and the Scorekeeper if, at any time, it anticipates that within the following 3 months it will come to be in Category I, Category II or Category III, or will move from one Category to another.

(b) Whenever a Bank is subject to Final Restrictions, a Final Prohibition, Category II Interim Restrictions, Category III Interim Restrictions, or a Continued Access Decision, the Committee shall promptly so notify the Funding Corporation, and the Funding Corporation shall take all necessary steps to ensure that the Bank participates in issues of Debt Securities only to the extent permitted thereunder. The Funding Corporation may rely on the determination of the Committee as to whether a Bank has complied with a

condition to a Continued Access Decision.

(c) Each Bank agrees that it will not at any time that it is in Category I, Category II or Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, and will not without 12-months' prior notice to all other Banks and the Funding Corporation at any other time, either (i) withdraw, or (ii) modify, in a fashion that would impede the issuance of Debt Securities, the funding resolution it has adopted pursuant to section 4.4(b) of the Act. Should a violation of this covenant be asserted, and should the Bank deny same, the funding resolution shall be deemed still to be in full effect, without modification, until arbitration of the matter is completed, and each Bank, by entering into this Restated MAA, consents to emergency injunctive relief to enforce this provision. Nothing in this Restated MAA shall be construed to restrict any Party's ability to take the position that a Bank's withdrawal or modification of its funding resolution is not authorized by law.

(d) Each Bank agrees that it will not at any time that it is in Category I, Category II or Category III, as indicated in the most recent notice from the Scorekeeper under Section 1.09, and will not without 12-months' prior notice to all other Banks and the System Disclosure Agent at any other time, fail to report information to the System Disclosure Agent pursuant to the Disclosure Program for the issuance of Debt Securities and for the System Disclosure Agent to have a reasonable basis for making disclosures pursuant to the Disclosure Program. Should the System Disclosure Agent assert a violation of this covenant, and should the Bank deny same, the Bank shall furnish such information as the System Disclosure Agent shall request until arbitration of the matter is completed, and each Bank, by entering into this Restated MAA, consents to emergency injunctive relief to enforce this provision. Nothing in this Restated MAA shall be construed to restrict the ability of the System Disclosure Agent to comply with its obligations under the securities laws or other applicable law or regulations with regard to disclosure to investors.

(e) Without implying that suit may be brought on any other matter, each Bank and the Funding Corporation specifically agree not to bring suit to challenge this Restated MAA or to challenge any Final Prohibition, Final Restrictions, Category II Interim Restrictions, Category III Interim Restrictions, Continued Access Decision, denial of a Continued Access

Request or recommendation of the Committee with respect to a Continued Access Request arrived at in accordance with this Restated MAA. This provision shall not be construed to preclude judicial actions under the U.S. Arbitration Act, 9 U.S.C. sections 1–15, to enforce or vacate arbitration decisions rendered pursuant to Section 7.08, or for an order that arbitration proceed pursuant to Section 7.08.

(f) The Funding Corporation agrees that it will not reinstitute the Market Access and Risk Alert Program, or adopt a similar such program for so long as both (i) this Restated MAA is in effect and (ii) section 4.9(b)(2) of the Act is not amended in a manner which would require, nor is there any other change in applicable law or regulations which would require, the Funding Corporation to establish "conditions of participation" different from those contained in this Restated MAA. Should the condition described in (ii) no longer apply and the Funding Corporation adopt a market access program, this Restated MAA shall be deemed terminated. All Banks reserve the right to argue, if the conditions described in clauses (i) or (ii) of the preceding sentence should no longer apply and the Funding Corporation should adopt such a program, that any such program adopted by the Funding Corporation is contrary to law, either because section 4.9(b)(2) of the Act does not authorize such a program, or for any other reason, and the entry by any Bank into this Restated MAA shall not be construed as waiving such right.

(g) It is expressly agreed that the Original Agreement, the FCA approval of the Original Agreement, the First Restated MAA, the Second Restated MAA and the FCA approval of this Restated MAA do not provide any grounds for challenging the FCA or Insurance Corporation actions with respect to the creation of or the conduct of receiverships or conservatorships. Without limiting the preceding statement, each Bank specifically and expressly agrees and acknowledges that it cannot, and agrees that it shall not, attempt to challenge the FCA's appointment of a receiver or conservator for itself or any other System institution or the FCA's or the Insurance Corporation's actions in the conduct of any receivership or conservatorship (i) on the basis of this Restated MAA or the FCA's approval of this Restated MAA; or (ii) on the grounds that Category II Interim Restrictions, Final Restrictions, Category III Interim Restrictions, or Final Prohibitions were or were not imposed, whether by reason of the FCA's or the Insurance Corporation's

action or inaction or otherwise. The Banks jointly and severally agree that they shall indemnify and hold harmless the FCA and the Insurance Corporation against all costs, expenses, and damages, including without limitation, attorneys' fees and litigation costs, resulting from any such challenge by any Party.

Section 7.04. *Termination.* This Restated MAA shall terminate upon the earliest of (i) December 31, 2025, (ii) an earlier date if so agreed in writing by 100-percent Vote of the Banks, or (iii) in the event that all Banks shall be in either Category II or Category III. Commencing a year before December 31, 2025, the Parties shall meet to consider its extension. Except as provided in Section 7.03(f), it is understood that the termination of this Restated MAA shall not affect (i) any rights and obligations of the Funding Corporation under section 4.9(b)(2) of the Act, and (ii) any Bank's rights pursuant to any Final Restrictions, a Final Prohibition, Category II Interim Restrictions, Category III Interim Restrictions, or a Continued Access Decision then-in-effect.

Section 7.05. *Periodic Review.* Commencing every third anniversary of the effective date of this Restated MAA, beginning January 1, 2020, and at such more frequent intervals as the Parties may agree, the Banks and the Funding Corporation, through their boards of directors, shall conduct a formal review of this Restated MAA and consider whether any amendments to it are appropriate. In connection with such review, the Committee shall report to the boards on the operation of the Restated MAA and recommend any amendments it considers appropriate.

Section 7.06. *Confidentiality.* The Parties may disclose this Restated MAA and any amendments to it and any actions taken pursuant to this Restated MAA to restrict or prohibit borrowing by a Bank. All other information relating to this Restated MAA shall be kept confidential and shall be used solely for purposes of this Restated MAA, except that, to the extent permitted by applicable law and regulations, such information may be disclosed by (a) the System Disclosure Agent under the Disclosure Program, (b) a Bank, upon coordination of such disclosure with the System Disclosure Agent, as the Bank deems appropriate for purposes of the Bank's disclosures to borrowers or shareholders; (c) a Bank as deemed appropriate for purposes of disclosure to transacting parties (subject, to the extent the Bank reasonably can obtain such agreement, to such a transacting party's agreeing to keep the information

confidential) of material information relating to that Bank, or (d) any Party in order to comply with legal or regulatory obligations. Notwithstanding the preceding sentence, the Parties shall make every effort, to the extent consistent with legal requirements, securities disclosure obligations and other business necessities, to preserve the confidentiality of information provided to the Committee by a Bank and designated as "Proprietary and Confidential." Any expert or consultant retained in connection with this Restated MAA shall execute a written undertaking to preserve the confidentiality of any information received in connection with this Restated MAA. Notwithstanding the foregoing, nothing in this Restated MAA shall prevent Parties from disclosing information to the FCA or the Insurance Corporation.

Section 7.07. *Amendments.* This Restated MAA may be amended only by the written agreement of all the Parties.

Section 7.08. *Dispute Resolution.* All disputes between or among Parties relating to this Restated MAA shall be submitted to final and binding arbitration pursuant to the U.S. Arbitration Act, 9 U.S.C. sections 1–15, *provided, however*, that any recommendation by the Committee regarding a Continued Access Request (including, if the recommendation is to grant the Request, recommendations as to the expiration date of the Continued Access Decision and as to any conditions to be imposed on the Decision), and any vote by a Bank on a Continued Access Request, shall be final and not subject to arbitration. Arbitrations shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association before a single arbitrator. An arbitrator shall be selected within 14 days of the initiation of arbitration by any Party, and the arbitrator shall render a decision within 30 days of his or her selection, or as otherwise agreed to by the parties thereto.

Section 7.09. *Governing Law.* This Restated MAA shall be governed by and construed in accordance with the Federal laws of the United States of America, and, to the extent of the absence of Federal law, in accordance with the laws of the State of New York excluding any conflict of law provisions that would cause the law of any jurisdiction other than New York to be applied; *provided, however*, that in the event of any conflict between the U.S. Arbitration Act and applicable Federal or New York law, the U.S. Arbitration Act shall control.

Section 7.10. *Notices.* Any notices required or permitted under this Restated MAA shall be in writing and shall be deemed given if delivered in person or by a nationally recognized overnight courier, in each case addressed as follows, unless such address is changed by written notice hereunder:

To AgFirst Farm Credit Bank: AgFirst Farm Credit Bank, 1901 Main Street, Columbia, SC 29201, Attention: President and Chief Executive Officer.
To AgriBank, FCB: AgriBank, FCB, 30 East 7th Street, Suite 1600, St. Paul, MN 55101, Attention: President and Chief Executive Officer.
To CoBank, ACB: CoBank, ACB, 6340 S. Fiddlers Green Circle, Greenwood Village, CO 80111, Attention: President and Chief Executive Officer
To the Farm Credit Bank of Texas: Farm Credit Bank of Texas, 4801 Plaza on the Lake Drive, Austin, TX 78746, Attention: President and Chief Executive Officer
To Federal Farm Credit Banks Funding Corporation: Federal Farm Credit Banks Funding Corporation, 101 Hudson Street, Suite 3505, Jersey City, NJ 07302, Attention: President and Chief Executive Officer
To the Farm Credit System Insurance Corporation: Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102, Attention: Chair
To the Farm Credit Administration: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090, Attention: Chair
To the CIPA Oversight Body: At such address and e-mail address as shall be supplied to the Parties from time to time by the Chairman of the CIPA Oversight Body.
To the Committee: At such address and e-mail address as shall be supplied by the Committee, which the Committee shall promptly transmit to each Party.

Any notice sent by the courier shall be deemed given 1 Business Day after depositing with the overnight courier. Any notice given in person, or by e-mail shall be deemed given instantaneously.

Section 7.11. *Headings; Conjunctive/Disjunctive; Singular/Plural.* The headings of any article or section of this Restated MAA are for convenience only and shall not be used to interpret any provision of the Restated MAA. Uses of the conjunctive include the disjunctive, and vice versa, unless the context clearly requires otherwise. Uses of the singular include the plural, and vice versa, unless the context clearly requires otherwise.

Section 7.12. *Successors and Assigns.* Except as provided in the definitions of

“Bank” and “Banks” in Article IX, this Restated MAA shall inure to the benefit of and be binding upon the successors and assigns of the Parties, including entities resulting from the merger or consolidation of one or more Banks.

Section 7.13. *Counterparts.* This Restated MAA, and any document provided for hereunder, may be executed in one or more counterparts. Transmission by facsimile or other form of electronic transmission of an executed counterpart of this Restated MAA shall be deemed to constitute due and sufficient delivery of such counterpart.

Section 7.14. *Waiver.* Any provision of this Restated MAA may be waived, but only if such waiver is in writing and is signed by all Parties to this Restated MAA.

Section 7.15. *Entire Agreement.* Except as provisions of CIPA are cited in this Restated MAA (which provisions are expressly incorporated herein by reference), this Restated MAA sets forth the entire agreement of the Parties and supersedes all prior understandings or agreements, oral or written, among the Parties with respect to the subject matter hereof.

Section 7.16. *Relation to CIPA.* This Restated MAA and CIPA are separate agreements, and invalidation of one does not affect the other. Should CIPA be invalidated or terminated, the Parties will take the necessary steps to maintain those aspects of CIPA that are referred to in Sections 1.01, 1.02 and 1.03 of this Restated MAA, and to replace the CIPA Oversight Body for purposes of continued administration of this Restated MAA.

Section 7.17. *Third Parties.* Except as provided in sections 2.10, 3.03, 7.03(g), 7.21 and 7.22, this Restated MAA is for the benefit of the Parties and their respective successors and assigns, and no rights are intended to be, or are, created hereunder for the benefit of any third party.

Section 7.18. *Time Is Of The Essence.* Time is of the essence in interpreting and performing this Restated MAA.

Section 7.19. *Statutory Collateral Requirement.* Nothing in this Restated MAA shall be construed to permit a Bank to participate in issues of Debt Securities or other obligations if it does not satisfy the collateral requirements of section 4.3(c) of the Act. For purposes of this Section, “Bank” shall include any System bank in conservatorship or receivership.

Section 7.20. *Termination of System Status.* Nothing in this Restated MAA shall be construed to preclude a Bank from terminating its status as a System institution pursuant to section 7.10 of

the Act, or from at that time withdrawing, as from that time forward, the funding resolution it has adopted pursuant to section 4.4(b) of the Act. A Bank that terminates its System status shall cease to have any rights or obligations under this Restated MAA, except that it shall continue to be subject to Article VIII with respect to claims accruing through the date of such termination of System status.

Section 7.21. *Restrictions Concerning Subsequent Litigation.* It is expressly agreed by the Banks that (a) characterization or categorization of Banks, (b) information furnished to the Committee or other Banks, and (c) discussions or decisions of the Banks or Committee under this Restated MAA shall not be used in any subsequent litigation challenging the FCA’s or the Insurance Corporation’s action or inaction.

Section 7.22. *Effect of this Agreement.* Neither this Restated MAA nor the FCA approval hereof shall in any way restrict or qualify the authority of the FCA or the Insurance Corporation to exercise any of the powers, rights, or duties granted by law to the FCA or the Insurance Corporation.

Section 7.23. *Relationship to the Joint and Several Liability Reallocation Agreement.* This Restated MAA and the Joint and Several Liability Reallocation Agreement are separate agreements, and invalidation of one does not affect the other.

ARTICLE VIII—INDEMNIFICATION

Section 8.01. *Definitions.* As used in this Article VIII:

(a) “Indemnified Party” means any Bank, the Funding Corporation, the Committee, the Scorekeeper, or any of the past, present or future directors, officers, stockholders, employees or agents of the foregoing.

(b) “Damages” means any and all losses, costs, liabilities, damages and expenses, including, without limitation, court costs and reasonable fees and expenses of attorneys expended in investigation, settlement and defense (at the trial and appellate levels and otherwise), which are incurred by an Indemnified Party as a result of or in connection with a claim alleging liability to any non-Party for actions taken pursuant to or in connection with this Restated MAA. Except to the extent otherwise provided in this Article VIII, Damages shall be deemed to have been incurred by reason of a final settlement or the dismissal with prejudice of any such claim, or the issuance of a final non-appealable order by a court of competent jurisdiction which ultimately

disposes of such a claim, whether favorably or unfavorably.

Section 8.02. *Indemnity.* To the extent consistent with governing law, the Banks, jointly and severally, shall indemnify and hold harmless each Indemnified Party against and in respect of Damages, *provided, however*, that an Indemnified Party shall not be entitled to indemnification under this Article VIII in connection with conduct of such Indemnified Party constituting gross negligence, willful misconduct, intentional tort or criminal act, or in connection with civil money penalties imposed by the FCA. In addition, the Banks, jointly and severally, shall indemnify an Indemnified Party for all costs and expenses (including, without limitation, fees and expenses of attorneys) incurred reasonably and in good faith by an Indemnified Party in connection with the successful enforcement of rights under any provision of this Article VIII.

Section 8.03. *Advancement of Expenses.* The Banks, jointly and severally, shall advance to an Indemnified Party, as and when incurred by the Indemnified Party, all reasonable expenses, court costs and attorneys’ fees incurred by such Indemnified Party in defending any proceeding involving a claim against such Indemnified Party based upon or alleging any matter that constitutes, or if sustained would constitute, a matter in respect of which indemnification is provided for in Section 8.02, so long as the Indemnified Party provides the Banks with a written undertaking to repay all amounts so advanced if it is ultimately determined by a court in a final non-appealable order or by agreement of the Banks and the Indemnified Party that the Indemnified Party is not entitled to be indemnified under Section 8.02.

Section 8.04. *Assertion of Claim.*

(a) Promptly after the receipt by an Indemnified Party of notice of the assertion of any claim or the commencement of any action against him, her or it in respect of which indemnity may be sought against the Banks hereunder (an “Assertion”), such Indemnified Party shall apprise the Banks, through a notice to each of them, of such Assertion. The failure to so notify the Banks shall not relieve the Banks of liability they may have to such Indemnified Party hereunder, except to the extent that failure to give such notice results in material prejudice to the Banks.

(b) Any Bank receiving a notice under paragraph (a) shall forward it to the Committee (which, if not in existence, shall be formed at the instance of such

Bank to consider the matter). The Banks, through the Committee, shall be entitled to participate in, and to the extent the Banks, through the Committee, elect in writing on 30-days' notice, to assume, the defense of an Assertion, at their own expense, with counsel chosen by them and satisfactory to the Indemnified Party. Notwithstanding that the Banks, through the Committee, shall have elected by such written notice to assume the defense of any Assertion, such Indemnified Party shall have the right to participate in the investigation and defense thereof, with separate counsel chosen by such Indemnified Party, but in such event the fees and expenses of such separate counsel shall be paid by such Indemnified Party and shall not be subject to indemnification by the Banks unless (i) the Banks, through the Committee, shall have agreed to pay such fees and expenses, (ii) the Banks shall have failed to assume the defense of such Assertion and to employ counsel satisfactory to such Indemnified Party, or (iii) in the reasonable judgment of such Indemnified Party, based upon advice of his, her or its counsel, a conflict of interest may exist between the Banks and such Indemnified Party with respect to such Assertion, in which case, if such Indemnified Party notifies the Banks, through the Committee, that such Indemnified Party elects to employ separate counsel at the Banks' expense, the Banks shall not have the right to assume the defense of such Assertion on behalf of such Indemnified Party. Notwithstanding anything to the contrary in this Article VIII, neither the Banks, through the Committee, nor the Indemnified Party shall settle or compromise any action or consent to the entering of any judgment (x) without the prior written consent of the other, which consent shall not be unreasonably withheld, and (y) without obtaining, as an unconditional term of such settlement, compromise or consent, the delivery by the claimant or plaintiff to such Indemnified Party of a duly executed written release of such Indemnified Party from all liability in respect of such Assertion, which release shall be satisfactory in form and substance to counsel to such Indemnified Party. The Funding Corporation shall not be entitled to vote on actions by the Committee under this paragraph (b) or Section 8.08.

Section 8.05. *Remedies; Survival.* The indemnification, rights and remedies provided to an Indemnified Party under this Article VIII shall be (i) in addition to and not in substitution for any other rights and remedies to which any of the Indemnified Parties may be entitled,

under any other agreement with any other Person, or otherwise at law or in equity, and (ii) provided prior to and without regard to any other indemnification available to any Indemnified Party. This Article VIII shall survive the termination of this Restated MAA.

Section 8.06. *No Rights in Third Parties.* This Restated MAA shall not confer upon any Person other than the Indemnified Party any rights or remedies of any nature or kind whatsoever under or by reason of the indemnification provided for in this Article VIII.

Section 8.07. *Subrogation; Insurance.* Upon the payment by the Banks to an Indemnified Party of any amounts for which an Indemnified Party shall be entitled to indemnification under this Article VIII, if the Indemnified Party shall also have the right to recover such amount under any commercial insurance, the Banks shall be subrogated to such rights to the extent of the indemnification actually paid. Where coverage under such commercial insurance may exist, the Indemnified Party shall promptly file and diligently pursue a claim under said insurance. Any amounts paid pursuant to such claim shall be refunded to the Banks to the extent the Banks have provided indemnification payments under this Article VIII, *provided, however*, that recovery under such insurance shall not be deemed a condition precedent to the indemnification obligations of the Banks under this Article VIII.

Section 8.08. *Sharing in Costs.* The Banks shall share in the costs of any indemnification payment hereunder as the Committee shall determine.

ARTICLE IX—DEFINITIONS

The following definitions are used in this Restated MAA:

"Act" means the Farm Credit Act of 1971, 12 U.S.C. section 2001, *et seq.*, as amended from time to time, or any successors thereto.

The "Additional Restrictions" are that a Bank (a) shall manage its asset/liability mix so as not to increase, and, to the extent possible, so as to reduce or eliminate, any Interest-Rate Sensitivity Deduction in its Net Composite Score, and (b) shall not increase the dollar amount of any liabilities, or take any action giving rise to a lien or pledge on its assets, senior to its liability on Debt Securities other than (i) tax liabilities and secured liabilities arising in the ordinary course of business through activities other than borrowing, such as mechanic's liens or judgment liens, and (ii) secured liabilities, or an action giving rise to such a lien or pledge,

incurred in the ordinary course of business as the result of issuing secured debt or entering into repurchase agreements, *provided, however*, that such debt issuances and agreements may be undertaken to the extent that the proceeds therefrom are used to repay the principal of outstanding Debt Securities and the value of the collateral securing the debt issuances or the agreements (computed in the same manner as provided under section 4.3(c) of the Act) does not exceed the amount of principal so repaid.

"Associations" means agricultural credit associations, federal land bank associations, Federal land credit associations and production credit associations.

"Average Net Composite Score" is defined in Section 1.03.

"Bank" means a bank (including its consolidated subsidiaries) of the Farm Credit System, other than (except where noted) any bank in conservatorship or receivership (and its consolidated subsidiaries).

"Banks" means the banks (including their consolidated subsidiaries) of the Farm Credit System, other than (except where noted) any banks in conservatorship or receivership (and their consolidated subsidiaries).

"Business Day" means any day other than a Saturday, Sunday or Federal holiday.

"Business Plan" means the business plan required under 12 CFR 618.8440, as amended from time to time, or any successors thereto.

"Category" means Category I, Category II, or Category III, as the circumstances require.

"Category I" is defined in Section 1.05.

"Category II" is defined in Section 1.06.

"Category II Interim Restrictions" means the requirements set forth in Section 4.02.

"Category III" is defined in Section 1.07.

"Category III Interim Restrictions" means the requirements set forth in Section 5.02.

"CIPA" means that certain Amended and Restated Contractual Interbank Performance Agreement among the Banks of the Farm Credit System and the Federal Farm Credit Banks Funding Corporation, the Scorekeeper, dated as of June 30, 2011, as amended from time to time, or any successor thereto.

"CIPA Oversight Body" is defined in Section 1.02.

"Collateral" is defined as in section 4.3(c) of the Act and the regulations thereunder, as amended from time to time, or any successors thereto.

The "Committee" is defined in Section 2.01.

"Continued Access Decision(s)" means a decision, subject to the procedures, terms and conditions described in Article VI, that Final Restrictions or a Final Prohibition not go into effect, or be lifted.

"Continued Access Request" means a request for a Continued Access Decision.

"Days" means calendar days, unless the term Business Days is used.

"Debt Securities" means System-wide and consolidated obligations issued through the Funding Corporation, within the meaning of sections 4.2(c), 4.2(d) and 4.9 of the Act.

"Disclosure Program" means the program established, pursuant to resolutions of the Banks and the Funding Corporation as approved on December 6, 2007 and amended in 2008, 2011 and 2013, for disclosure at the System-wide level of financial and other information in connection with the issuance of Debt Securities, as amended from time to time, or any successor thereto.

"FCA" means the Farm Credit Administration.

"Final Prohibition" means the requirements set forth in Section 5.01.

"Final Restrictions" means the requirements set forth in Section 4.01.

"First Restated MAA" means that certain Amended and Restated Market Access Agreement, dated July 1, 2003, among the Banks and the Funding Corporation.

"Funding Corporation" means the Federal Farm Credit Banks Funding Corporation.

"Going Concern" means an entity that is able to continue as a going concern as set forth in Financial Accounting Standards Board Accounting Standards Update 2014-15.

"Insurance Corporation" means the Farm Credit System Insurance Corporation.

"Insurance Fund" means the Farm Credit Insurance Fund maintained by the Insurance Corporation pursuant to section 5.60 of the Act.

"Interest-Rate Sensitivity Deduction" is defined as in Article II of CIPA, and the Model referred to therein, as amended from time to time, or any successor thereto.

"Joint and Several Liability Reallocation Agreement" means that certain Joint and Several Liability Reallocation Agreement among the Banks and the Funding Corporation.

"Liquidity Deficiency Deduction" is defined as in Article II of CIPA, and the Model referred to therein, as amended from time to time, or any successor thereto.

"Model" means the term Model as it is defined in the CIPA.

"Net Composite Score" is defined in Section 1.03.

"100-Percent Vote" means an affirmative vote, through each voting Bank's board of directors or its designee, of all Banks that are entitled to vote on a matter.

"Original Agreement" means that certain Market Access Agreement, dated September 1, 1994 and effective as of November 23, 1994, among the Banks and the Funding Corporation.

"Parties" mean the parties to this Restated MAA. A bank in conservatorship or receivership is not a party to this Restated MAA.

"Person" means any human being, partnership, association, joint venture, corporation, legal representative or trust, or any other entity.

"Ratio(s)" means either the Tier 1 Leverage Ratio, or Total Capital Ratio, as the circumstances require.

"Second Restated MAA" means that certain Second Amended and Restated Market Access Agreement, dated December 14, 2011, among the Banks and the Funding Corporation.

"Scorekeeper" is defined in Section 1.01.

"System" means the Farm Credit System.

"System Disclosure Agent" means the Funding Corporation or such other disclosure agent as all Banks shall unanimously agree upon, to the extent permitted by law or regulation. For purposes of this definition, "Banks" shall include any System bank in conservatorship or receivership.

"Tier 1 Leverage Ratio" is defined in 12 CFR 628.10(c)(4).

"Total Capital Ratio" is defined in 12 CFR 628.10(c)(3).

In witness whereof, the Parties have caused this Restated Agreement to be executed by their duly authorized officers as of the date first above written.

Witness

AgFirst Farm Credit Bank

By: _____

Title: _____

Witness:

AgriBank, FCB

By: _____

Title: _____

Witness

CoBank, FCB

By: _____

Title: _____

Witness

Farm Credit Bank of Texas

By: _____

Title: _____

Witness

Federal Farm Credit Banks Funding Corporation, the Scorekeeper

By: _____

Title: _____

[end of Draft Third Amended and Restated MAA]

Dated: January 12, 2017.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2017-01054 Filed 1-17-17; 8:45 am]

BILLING CODE 6705-01-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 13, 2017.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309. Comments can also be sent electronically to Applications.Comments@atl.frb.org:

1. *People Independent Bancshares, Inc.*, Boaz, Alabama; to acquire 100

percent of the outstanding shares of Horizon Bank, Fyffe, Alabama.

Board of Governors of the Federal Reserve System, January 12, 2017.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2017-01045 Filed 1-17-17; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 1, 2017.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Dennis Schardt, Kearney, Nebraska; Brian Schardt, Grand Island, Nebraska; and Christina Nokelby, Marquette, Nebraska*; to acquire voting shares of Bank Management, Inc., and thereby acquire shares of First Bank of Nebraska, both of Wahoo, Nebraska. In addition, Christina Nokelby Trust No. 2, Kimberly Schardt Porter Trust No. 2, Rebecca Rathjen Trust No. 2, Brian Schardt Trust No. 2, Brian Schardt, Kimberly Schardt Porter, Rebecca Rathjen, Grand Island, Nebraska, and Christina Nokelby, Marquette, Nebraska, individually, and as trustees of the trusts listed, and Dennis Schardt, Kearney, Nebraska, for approval as members of the Schardt Family Group acting in concert, and thereby acquire shares of Bank Management, Inc.

Board of Governors of the Federal Reserve System, January 12, 2017.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2017-01046 Filed 1-17-17; 8:45 am]

BILLING CODE 6210-01-P

GOVERNMENT ACCOUNTABILITY OFFICE

Request for Medicare Payment Advisory Commission Nominations

AGENCY: U.S. Government Accountability Office (GAO).

ACTION: Request for letters of nomination and resumes.

SUMMARY: The Balanced Budget Act of 1997 established the Medicare Payment Advisory Commission (MedPAC) and gave the Comptroller General responsibility for appointing its members. GAO is now accepting nominations for MedPAC appointments that will be effective May 1, 2017. Letters of nomination and resumes should be submitted no later than March 10, 2017 to ensure adequate opportunity for review and consideration of nominees prior to appointment of new members. Acknowledgement of submissions will be provided within a week of submission. Please contact Greg Giusto at (202) 512-8268 if you do not receive an acknowledgment.

ADDRESSES:

Email: MedPACappointments@gao.gov.

Mail: U.S. GAO, Attn: MedPAC Appointments, 441 G Street NW., Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: GAO Office of Public Affairs, (202) 512-4800. 42 U.S.C. 1395b-6.

Gene L. Dodaro,

Comptroller General of the United States.

[FR Doc. 2017-00593 Filed 1-17-17; 8:45 am]

BILLING CODE 1610-02-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC-2017-0003]

Notice of Availability of the Draft Programmatic Environmental Assessment (Draft PEA) for Mosquito Control Activities Funded by HHS/CDC To Combat Zika Virus Transmission in the United States

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of Availability; request for comment.

SUMMARY: The Centers for Disease Control and Prevention (CDC), within the Department of Health and Human

Services (HHS), is issuing this notice to request public comment on a draft Programmatic Environmental Assessment (Draft PEA) for mosquito control activities funded by HHS/CDC to Combat Zika Virus transmission in the United States. HHS/CDC prepared the draft PEA in accordance with the National Environmental Policy Act of 1969 (NEPA) as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) implementing regulations (40 CFR parts 1500-1508) and the HHS General Administration Manual (GAM) Part 30 *Environmental Procedures*, dated February 25, 2000.

DATES: Written comments must be received on or before March 20, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC-2017-xxxx by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Clint A. Liveoak, Deputy Director, Division of Issues Management, Analysis, and Coordination, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS-D13, Atlanta, GA 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

The draft PEA is available at HHS/CDC's Zika Web site, <https://www.cdc.gov/zika> and at the docket (www.regulations.gov). A copy of the draft PEA can also be requested from Clint A. Liveoak, Deputy Director, Division of Issues Management, Analysis, and Coordination, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., MS-D13, Atlanta, GA 30329.

SUPPLEMENTARY INFORMATION: The Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services (HHS), has prepared a draft Programmatic Environmental Assessment (Draft PEA) to assess the potential impacts associated with supporting mosquito control activities funded by HHS/CDC to combat Zika Virus transmission in the United States. The Draft PEA analyzes the effect of the *Enhanced Support for Integrated Mosquito Management* (Proposed Alternative) and the *No Action Alternative*. The draft PEA evaluates the potential impacts to the environment

from the proposed activities and outlines the steps that would be taken to mitigate any adverse impacts and ensure that the public is informed prior to any actions in a specific location.

HHS/CDC will review all comments received to the docket and issue a final Programmatic Environmental Assessment that will be announced in the **Federal Register**.

Dated: January 12, 2017.

Lauren Hoffmann,

Acting Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2017-01027 Filed 1-17-17; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS-10169]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by February 17, 2017.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured

consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395-5806 or Email: OIRA_submission@omb.eop.gov.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of the following:

1. Access CMS' Web site address at <http://www.cms.hhs.gov/PaperworkReductionActof1995>.
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to Paperwork@cms.hhs.gov.
3. Call the Reports Clearance Office at (410) 786-1326.

FOR FURTHER INFORMATION CONTACT:

Reports Clearance Office at (410) 786-1326.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a previously approved collection;

Title of Information Collection: Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Competitive Bidding Program; Change of Ownership Forms; *Use:* The MMA requires the Secretary to recompetes contracts not less often than once every 3 years. The Round 1 Rebid contract period for all product categories except mail-order diabetic supplies expired on December 31, 2013. (Round 1 Rebid contracts for mail-order diabetic testing supplies ended on December 31, 2012.) The competition

for the Round 1 Recompetes began in August of 2012. The Round 1 Recompetes contracts and prices became effective on January 1, 2014 and will expire on December 31, 2016. Round 2 and National Mail-Order contracts and prices will expire on June 30, 2016. The most recent approval for this information collection request (ICR) was issued by OMB on June 10, 2013. That ICR included the estimated burden to collect the information in bidding Forms A and B for the Round 1 Recompetes. We are now seeking approval to collect the information in Forms A and B for competitions that will occur before 2017. For these upcoming competitions CMS will publish a slightly modified version of the RFB instructions and accompanying Forms A and B so that suppliers will be better able to identify and understand the requirements of the program. We decided to modify the RFB instructions and forms based on our experience from the last round of competition. The end result is expected to produce more complete and accurate information to evaluate suppliers. No new collection requirements have been added to the modified RFB instructions or Form A or B. Finally, we are retaining without change the Change of Ownership (CHOW) Purchaser Form and the CHOW Contract Supplier Notification Form, the Subcontracting Disclosure Form, and Forms C, and D and their associated burden under this ICR. We intend to continue use of these Forms on an ongoing basis. *Form Number:* CMS-10169 (OMB Control Number: 0938-1016); *Frequency:* Yearly; *Affected Public:* Private Sector; Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 70,213; *Total Annual Responses:* 53,811; *Total Annual Hours:* 162,134. (For policy questions regarding this collection contact James Cowher at 410-786-1948)

Dated: January 12, 2017.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2017-00982 Filed 1-17-17; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2017-D-0154]

Considerations in Demonstrating Interchangeability With a Reference Product; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled “Considerations in Demonstrating Interchangeability With a Reference Product.” This guidance is intended to assist sponsors in demonstrating that a proposed therapeutic protein product (*proposed interchangeable product* or *proposed product*) is interchangeable with a reference product for the purposes of submitting a marketing application or supplement under the Public Health Service Act (PHS Act). This guidance is one in a series of guidances that FDA has developed to implement the Biologics Price Competition and Innovation Act of 2009 (BPCI Act).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by March 20, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that

identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA-2017-D-0154 for “Considerations in Demonstrating Interchangeability With a Reference Product; Draft Guidance for Industry; Availability.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in

accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Sandra Benton, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6340, Silver Spring, MD 20993-0002, 301-796-1042; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Considerations in Demonstrating Interchangeability With a Reference Product.” This guidance is intended to assist sponsors in demonstrating that a proposed therapeutic protein product (*proposed interchangeable product* or *proposed product*) is interchangeable with a reference product for the purposes of submitting a marketing application or supplement under section 351(k) of the PHS Act (42 U.S.C. 262(k)). The BPCI Act amends the PHS Act and other statutes to create an

abbreviated licensure pathway in section 351(k) for biological products shown to be biosimilar to or interchangeable with an FDA-licensed biological reference product (see sections 7001 through 7003 of the Patient Protection and Affordable Care Act Of 2010 (Affordable Care Act) (Pub. L. 111-148)).

Section 351(k) of the PHS Act sets forth the requirements for an application for a proposed biosimilar product and an application or a supplement for a proposed interchangeable product. Specifically, section 351(k)(4) provides that upon review of an application submitted under section 351(k), or any supplement to such an application, FDA will determine the biological product to be interchangeable with the reference product if FDA determines that the information submitted in the application (or supplement) is sufficient to show that the biological product is biosimilar to the reference product and can be expected to produce the same clinical result as the reference product in any given patient; and for a biological product that is administered more than once to an individual, the risk in terms of safety or diminished efficacy of alternating or switching between use of the biological product and the reference product is not greater than the risk of using the reference product without such alternation or switch. Section 351(i) of the PHS Act states that the term *interchangeable* or *interchangeability*, in reference to a biological product that is shown to meet the standards described in subsection 351(k)(4), means that the biological product may be substituted for the reference product without the intervention of the health care provider who prescribed the reference product.

This guidance gives an overview of important scientific considerations in demonstrating interchangeability, including:

- The data and information needed to support a demonstration of interchangeability;
- Considerations for the design and analysis of a switching study or studies to support a demonstration of interchangeability;
- Recommendations regarding the use of U.S.-licensed reference products in a switching study or studies; and
- Considerations for developing presentations, container closure systems, and delivery device constituent parts for proposed interchangeable products.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115).

The draft guidance, when finalized, will represent the current thinking of FDA on topics sponsors should consider when seeking to demonstrate that a proposed therapeutic protein product is interchangeable with a reference product. It does not establish any rights for any person and is not binding on FDA or the public.

II. Topics for Comment

In addition to comment on the draft guidance, we also invite general comments on interchangeability, including comments on regulation of an interchangeable product over its lifecycle, as well as comments on the following topics:

1. Since the mid-1990s, FDA has approved manufacturing changes for biological products based on data from comparability assessments comparing the pre-change and post-change product using comparative analytical, and, when necessary, animal and/or clinical (e.g., pharmacokinetic, immunogenicity) studies. A demonstration of comparability between pre- and post-change product supports a determination that the safety and efficacy profile remains the same for the product. With respect to interchangeable products, are there considerations in addition to comparability assessments that FDA should consider in regulating post-approval manufacturing changes of interchangeable products? Your comments should include the scientific rationale and justification for your recommendations, as well as recommendations for processes and systems (including key logistics) to implement your recommendations.

2. As explained in the guidance "Considerations in Demonstrating Interchangeability With a Reference Product," FDA expects that sponsors seeking an interchangeability determination will submit data and information to support a showing that the proposed interchangeable product can be expected to produce the same clinical result as the reference product in all of the reference product's licensed conditions of use. How, if at all, should the Agency consider conditions of use that are licensed for the reference product after an interchangeable product has been licensed? Your comments should include the scientific rationale and justification for your recommendations, as well as recommendations for processes and systems (including key logistics) to implement your recommendations.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The collections of information under 21 CFR part 312 have been approved under OMB control number 0910-0014; the collections of information under 21 CFR part 601 have been approved under OMB control number 0910-0338; and the collections of information under section 351(k) of the PHS Act have been approved under OMB control number 0910-0719.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, or <https://www.regulations.gov>.

Dated: January 12, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017-01042 Filed 1-17-17; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2016-P-2469]

Determination That SYMMETREL (Amantadine Hydrochloride), Syrup, 50 Milligrams/5 Milliliters, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that SYMMETREL (amantadine hydrochloride), Syrup, 50 milligrams/5 milliliters (50 mg/5 mL), was not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to SYMMETREL, and it will allow FDA to continue to approve ANDAs that reference SYMMETREL if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT:

Stefanie S. Kraus, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6215, Silver Spring, MD 20993-0002, 301-796-9585.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the “listed drug,” which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the “Approved Drug Products With Therapeutic Equivalence Evaluations,” which is known generally as the “Orange Book.” Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug’s NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, is the subject of NDAs 016023 and 017118, held by Endo Pharmaceuticals, and initially approved on February 14, 1968, and July 20, 1976, respectively. SYMMETREL is indicated for the prophylaxis and treatment of signs and symptoms of infection caused by various strains of influenza A virus. SYMMETREL is also indicated for the treatment of parkinsonism and drug-induced extrapyramidal reactions.

In a letter dated March 19, 2009, Endo Pharmaceuticals notified FDA that SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, was being discontinued and requested withdrawal of NDA016023 for that product. FDA moved the drug product to the “Discontinued Drug Product List” section of the Orange Book and announced in the **Federal Register** of July 21, 2010 (75 FR 42455), that FDA was withdrawing approval of NDA 016023, effective August 20, 2010.

Hyman, Phelps & McNamara submitted a citizen petition dated August 3, 2016 (Docket No. FDA-2016-P-2469), under 21 CFR 10.30, requesting that the Agency determine whether SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that this drug product was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have reviewed the available evidence and determined that this drug product was not withdrawn from sale for reasons of safety or effectiveness.¹

Accordingly, the Agency will continue to list SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, in the “Discontinued Drug Product List” section of the Orange Book. The “Discontinued Drug Product List” delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. FDA will not begin procedures to withdraw approval of approved ANDAs that refer

¹ Due to high levels of resistance to currently circulating Influenza A viruses, the Centers for Disease Control and Prevention currently recommends against using amantadine to treat Influenza A. Given the potential for viral reassortment, however, amantadine may be effective against future Influenza A viruses. Consistent with this, the current label for SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, was revised to caution prescribers to consider susceptibility and clinical benefit when deciding whether to use amantadine to treat Influenza A.

to SYMMETREL. Additional ANDAs that refer to SYMMETREL (amantadine hydrochloride), Syrup, 50 mg/5 mL, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: January 12, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017-01064 Filed 1-17-17; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2010-D-0026]

Assessment of Abuse Potential of Drugs; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry entitled “Assessment of Abuse Potential of Drugs.” This guidance is intended to assist sponsors of investigational new drugs and applicants for approval of a new drug in evaluating whether their new drug product has abuse potential. Specifically, this guidance provides recommendations for assessing the abuse potential of central nervous system (CNS)-active new drugs. Drug products with abuse potential generally contain drug substances that are active within the CNS and produce psychoactive effects such as euphoria and hallucinations. Thus, if a drug substance is CNS-active, the new drug product containing that drug substance will likely need to undergo a thorough assessment of its abuse potential and may be subject to control under the Controlled Substances Act (CSA). This guidance finalizes the draft guidance of the same name issued on January 27, 2010.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2010-D-0026 for "Assessment of Abuse Potential of Drugs; Guidance for Industry; Availability." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS

CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Dominic Chiapperino, Controlled Substance Staff, Center for Drug Evaluation and Research, Bldg. 51, Rm. 5148, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301-796-1183.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled "Assessment of Abuse Potential of Drugs." Under the Federal Food, Drug, and Cosmetic Act, an abuse potential assessment is part of the general evaluation of the safety and efficacy of a new drug to be used under medical

supervision. Additionally, if a new drug has abuse potential, the Secretary of Health and Human Services (HHS) is required under the CSA (21 U.S.C. 801 *et seq.*) to make a recommendation for scheduling to the Drug Enforcement Administration (DEA). The regulatory responsibilities for this process are described in Title 21, United States Code (U.S.C.) 811. FDA, in consultation with the National Institute on Drug Abuse (NIDA) conducts the medical and scientific analysis on behalf of HHS. Specifically, the Controlled Substance Staff of FDA performs this scientific evaluation of the abuse potential of a drug for FDA, in consultation with NIDA, as described in a Memorandum of Understanding (MOU) of March 8, 1985 (50 FR 9518) (available at; <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm116365.htm>). When an applicant submits a New Drug Application (NDA) for a drug with abuse potential to FDA for review, the applicant is required to propose a CSA schedule for the new drug (21 CFR 314.50(d)(5)(vii)). The applicant's proposal is considered by the Agency during its evaluation of the drug's abuse potential. FDA prepares a scientific analysis with a recommendation for scheduling the drug under the CSA, as warranted, based on consideration of all relevant and available data. This recommendation is forwarded by the HHS Assistant Secretary for Health to DEA for their consideration in the decision on final scheduling of the drug.

Under new legislation enacted in 2015, the Improving Regulatory Transparency for New Medical Therapies Act (Pub. L. 114-89), upon receipt of both: (1) Notification from FDA that a marketing application has been approved by FDA and (2) the scheduling recommendation of HHS with respect to the subject drug in the marketing application, DEA shall within 90 days schedule the drug by rulemaking, thus establishing the effective date of approval for the drug product. See 21 U.S.C. 355(x); see also Public Law 114-89 (November 25, 2015). Control under Schedules II, III, IV, or V results in schedule-specific regulatory requirements relating to the drug's labeling, prescribing, dispensing, advertising, manufacturing, distribution, importation/exportation, promotion, marketing, and legitimate use in medical treatment. See generally 21 U.S.C. 821-831 and 21 CFR 1300-1321. Scheduling of a substance in the CSA is for the purpose of reducing abuse and diversion.

This guidance provides important recommendations to sponsors, applicants, and potential applicants in the approaches to collecting data that should comprise the abuse potential assessment submitted in the marketing application to FDA if one is required pursuant to § 314.50(d)(5)(vii).

In the **Federal Register** of January 27, 2010 (75 FR 4400), FDA issued the draft guidance for industry “Assessment of Abuse Potential of Drugs.” Based on the 2010 draft guidance, and consideration of comments received from the public, this guidance provides the Agency’s current thinking with respect to the scientific methods recommended to assess abuse potential. The guidance also adds more detailed discussion about key questions and decision points to consider during drug development that will likely determine the appropriate studies for sponsors and applicants to conduct to address the abuse potential of their new drug, inform appropriate labeling of the product upon its approval, and allow a thorough scientific and medical evaluation to support scheduling decisions in accordance with the CSA. In addition, this guidance takes into consideration other guidance issued and legislation enacted since 2010.

This guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on assessment of abuse potential of drugs. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information in part 314, including § 314.50(d)(5)(vii), has been approved under OMB control number 0910–0001. The collection of information in 21 CFR part 312 for investigational drugs has been approved under OMB control number 0910–0014. The collection of information in the guidance “Formal Meetings Between the FDA and Sponsors or Applicants of PDUFA Products” has been approved under OMB control number 0910–0429. The collection of information in 21 CFR 201.56 and 201.57, prescription drug labeling, has been approved under OMB control number 0910–0572. The collection of information in 21 CFR part

58, Good Laboratory Practice for Nonclinical Studies, has been approved under OMB control number 0910–0119.

III. Electronic Access

Persons with access to the Internet may obtain the guidance at either <http://www.fda.gov/Drugs/Guidance/ComplianceRegulatoryInformation/Guidances/default.htm> or <https://www.regulations.gov>.

Dated: January 12, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–01024 Filed 1–17–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–D–0113]

The Prohibition of Distributing Free Samples of Tobacco Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled “The Prohibition of Distributing Free Samples of Tobacco Products; Draft Guidance for Industry.” The draft guidance, when finalized, would provide information intended to assist manufacturers, distributors, and retailers in complying with the regulations prohibiting the distribution of free samples of tobacco products.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 17, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are

solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2017–D–0113 for “The Prohibition of Distributing Free Samples of Tobacco Products.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Division of Dockets

Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Center for Tobacco Products, Food and Drug Administration, Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Paul Hart or Samantha Loh Collado, Center for Tobacco Products, Food and Drug Administration, Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 1–877–287–1373, AskCTP@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “The Prohibition of Distributing Free Samples of Tobacco Products; Draft Guidance for Industry.” Title 21 of the Code of Federal Regulations (CFR) section 1140.16(d)(1) prohibits, with a limited exception, tobacco product manufacturers, distributors, and retailers from distributing or causing to be distributed any free samples of cigarettes, smokeless tobacco, or other tobacco products. The draft guidance describes, among other things, how the prohibition of distributing free samples of tobacco products applies to non-monetary exchanges, coupons and

discounts, membership and rewards programs, contests and games of chance, and the business-to-business exchange of free samples. FDA requests that interested parties submit comments concerning its draft interpretation of the prohibition of distributing free samples.

II. Significance of Draft Guidance

FDA is issuing this draft guidance consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on “The Prohibition of Distributing Free Samples of Tobacco Products.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Electronic Access

Persons with access to the Internet may obtain an electronic version of the draft guidance at either <https://www.regulations.gov> or <http://www.fda.gov/TobaccoProducts/Labeling/RulesRegulationsGuidance/default.htm>.

Dated: January 11, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–00969 Filed 1–17–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; NURSE Corps Loan Repayment Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB).

DATES: Comments on this ICR should be received no later than March 20, 2017.

ADDRESSES: Submit your comments to paperwork@hrsa.gov or mail the HRSA Information Collection Clearance Officer, Room 14N–39, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email paperwork@hrsa.gov or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: NURSE Corps Loan Repayment Program OMB No. 0915–0140—Revision

Abstract: The NURSE Corps Loan Repayment Program (NURSE Corps LRP), formerly known as the Nursing Education Loan Repayment Program, assists in the recruitment and retention of professional Registered Nurses (RNs), including advanced practice RNs (e.g., nurse practitioners, certified registered nurse anesthetists, certified nurse-midwives, clinical nurse specialists), dedicated to working at eligible health care facilities with a critical shortage of nurses (i.e., a Critical Shortage Facility) or working as nurse faculty in eligible, accredited schools of nursing, by decreasing the financial barriers associated with pursuing a nursing education. The NURSE Corps LRP provides loan repayment assistance to these nurses to repay a portion of their qualifying educational loans in exchange for full-time service at a public or private nonprofit Critical Shortage Facility or in an eligible, accredited school of nursing.

Need and Proposed Use of the Information: The need and purpose of this information collection is to obtain information for NURSE Corps LRP applicants and participants. The information is used to consider an applicant for a NURSE Corps LRP contract award and to monitor a participant’s compliance with the service requirements. Individuals must submit an application to participate in the program. The application asks for personal, professional, educational, and financial information required to determine the applicant’s eligibility to participate in the NURSE Corps LRP. The semi-annual employment verification form asks for personal and employment information to determine if a participant is in compliance with the service requirements. The Authorization to Release Employment Information form is now a self-certification within the NURSE Corps LRP application process with applicants clicking a box. This decreases the overall time burden by eliminating a form and not increasing

the “average” time required to complete the NURSE Corps LRP application.

Likely Respondents: Professional RNs or advanced practice RNs who are interested in participating in the NURSE Corps LRP, and official representatives at their service sites.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information

requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review

the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the tables below.

Total Estimated Annualized Burden Hours:

The estimates of reporting burden for applicants are as follows:

Instrument	Number of respondents	Responses/ respondents	Total responses	Hours per response	Total burden hours
NURSE Corps LRP Application *	5,500	1	5,500	2.0	11,000
Authorization to Release Information Form	5,500	1	5,500	.10	550
Total	5,500	.....	11,000	.....	11,550

* Please note that the burden hours associated with this instrument account for both new and continuation applications. Additional (uploaded) supporting documentation is included as part of this instrument and reflected in the burden hours.

The estimates of reporting burden for participants are as follows:

Instrument	Number of respondents	Responses/ respondents	Total responses	Hours per response	Total burden hours
Participant Semi-Annual Employment Verification Form	2,300	2	4,600	.5	2,300
Total	2,300	.....	4,600	.....	2,300
Total for Applicants and Participants	7,800	.....	15,600	.....	13,850

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2017-00998 Filed 1-17-17; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Reimbursement Rates for Calendar Year 2017

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

Notice is given that the Principal Deputy Director of the Indian Health Service (IHS), under the authority of sections 321(a) and 322(b) of the Public Health Service Act (42 U.S.C. 248 and

249(b)), Public Law 83-568 (42 U.S.C. 2001(a)), and the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*), has approved the following rates for inpatient and outpatient medical care provided by IHS facilities for Calendar Year 2017 for Medicare and Medicaid beneficiaries, beneficiaries of other Federal programs, and for recoveries under the Federal Medical Care Recovery Act (42 U.S.C. 2651-2653). The Medicare Part A inpatient rates are excluded from the table below as they are paid based on the prospective payment system. Since the inpatient per diem rates set forth below do not include all physician services and practitioner services, additional payment shall be available to the extent that those services are provided.

Inpatient Hospital Per Diem Rate (Excludes Physician/Practitioner Services)

Calendar Year 2017

Lower 48 States: \$2,933

Alaska: \$3,235

Outpatient Per Visit Rate (Excluding Medicare)

Calendar Year 2017

Lower 48 States: \$391

Alaska: \$616

Outpatient Per Visit Rate (Medicare)

Calendar Year 2017

Lower 48 States: \$349

Alaska: \$577

Medicare Part B Inpatient Ancillary Per Diem Rate

Calendar Year 2017

Lower 48 States: \$679

Alaska: \$1,046

Outpatient Surgery Rate (Medicare)

Established Medicare rates for freestanding Ambulatory Surgery Centers.

Effective Date for Calendar Year 2017 Rates

Consistent with previous annual rate revisions, the Calendar Year 2017 rates will be effective for services provided on/or after January 1, 2017, to the extent consistent with payment authorities including the applicable Medicaid State plan.

Dated: January 11, 2017.

Elizabeth A. Fowler,

Deputy Director for Management Operations, Indian Health Service.

[FR Doc. 2017-01075 Filed 1-17-17; 8:45 am]

BILLING CODE 4160-65-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Dental & Craniofacial Research; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4), 552b(c)(6), and 552b(c)(9)(B), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel.

Date: February 13, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn, 7301 Waverly Street, Bethesda, MD.

Contact Person: Nisan Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Branch, NIDCR, NIH, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892, (301) 451-2405, nisan_bhattacharyya@nih.gov.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, NIDCR Clinical Trials & Studies SEP.

Date: March 2, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Morrison Clark Hotel, 1015 L Street NW., Washington, DC 20001.

Contact Person: Crina Frincu, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Blvd., Suite 662, Bethesda, MD 20892, cfrincu@mail.nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: January 11, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00894 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Diabetes and Digestive and Kidney Diseases Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Fellowships in Digestive Diseases and Nutrition.

Date: February 16-17, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-7799, yangj@extra.niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, DDK-C Conflicts.

Date: February 16-17, 2017.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-7799, yangj@extra.niddk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 10, 2017.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00896 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings. The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Limited Competition for the Continuation of Epidemiology of Diabetes Interventions and Complications (EDIC) Study.

Date: February 8, 2017.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma Begum, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7349, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-8894, begumn@niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NEW NIDDK PARs on Pragmatic Research and Natural Experiments.

Date: February 13, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892-2542, (301) 594-8898, barnardm@extra.niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, RC2—Hematology.

Date: February 21, 2017.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Barbara A. Woynarowska, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 402-7172, woynarowskab@niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, PAR-16-126: High Impact, Interdisciplinary Science in NIDDK Research Areas (RC2)—Diabetes, Endocrinology and Metabolic Diseases.

Date: March 1, 2017.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Dianne Camp, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7013, 6707 Democracy Boulevard, Bethesda, MD 20892-2542, 301-5947682, campd@extra.niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Inflammatory Bowel Disease Genetics Consortium.

Date: March 7, 2017.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Dianne Camp, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7013, 6707 Democracy Boulevard, Bethesda, MD 20892-2542, 301-5947682, campd@extra.niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NIDDK High Impact and Interdisciplinary Science (RC2) Review.

Date: March 8, 2017.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-7799, yangj@extra.niddk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 10, 2017.

David Clary,
Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00895 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NIDDK KUH Fellowship Review.

Date: February 3, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda Downtown—Marriott, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7023, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-4719, guox@extra.niddk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NIDDK Member Conflict SEP.

Date: February 3, 2017.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda Downtown—Marriott, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7023, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, (301) 594-4719, guox@extra.niddk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 10, 2017.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00897 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Initial Review Group, Mental Health Services Research Committee, SERV.

Date: February 28, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar 2121 P Street NW., Washington, DC 20037.

Contact Person: Aileen Schulte, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Blvd., Room 6136, MSC 9606, Bethesda, MD 20852, 301-443-1225, aschulte@mail.nih.gov

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: January 11, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00898 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Confirmatory Efficacy Clinical Trials of Non-Pharmacological Interventions for Mental Disorders.

Date: February 3, 2017.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Marcy Ellen Burstein, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Blvd., Room 6143, MSC 9606, Bethesda, MD 20892-9606, (301) 443-9699, bursteinme@mail.nih.gov.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Interventions/Biomarkers Special Emphasis Panel.

Date: February 3, 2017.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Marcy Ellen Burstein, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Blvd., Room 6143, MSC 9606, Bethesda, MD 20892-9606, (301) 443-9699, bursteinme@mail.nih.gov.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, NIMH Biobehavioral Research Awards for Innovative New Scientists (NIMH BRAINS).

Date: February 8, 2017.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Megan Kinnane, Ph.D., Scientific Review Officer Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Blvd., Room 6148, MSC 9609, Rockville, MD 20852-9609, (301) 402-6807, libbeym@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: January 11, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00899 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director; Notice of Charter Renewal

In accordance with Title 41 of the U.S. Code of Federal Regulations, Section 102-3.65(a), notice is hereby given that the Charter for the National Toxicology Program Special Emphasis Panel was renewed for an additional two-year period on January 7, 2017.

It is determined that the National Toxicology Program Special Emphasis Panel is in the public interest in connection with the performance of duties imposed on the National Institutes of Health by law, and that these duties can best be performed through the advice and counsel of this group.

Inquiries may be directed to Jennifer Spaeth, Director, Office of Federal Advisory Committee Policy, Office of the Director, National Institutes of Health, 6701 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20892 (Mail code 4875), Telephone (301) 496-2123, or spaethj@od.nih.gov.

Dated: January 11, 2017.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-00900 Filed 1-17-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276-1243.

Project: Assessment of the Communities Talk: Town Hall Meetings To Prevent Underage Drinking—(OMB No. 0930-0288)—Revision

The Substance Abuse and Mental Health Services Administration/Center for Substance Abuse Prevention (SAMHSA/CSAP) is requesting a revision from the Office of Management and Budget (OMB) of the information collection regarding the Assessment of the Communities Talk: Town Hall Meetings to Prevent Underage Drinking. The current data collection has approval under OMB No. 0930-0288, Assessment of the Town Hall Meetings on Underage Drinking Prevention, which expires on January 31, 2017. Revisions were made to the two existing data collection instruments: the Organizer Survey and the Participant Form (English and Spanish versions). SAMHSA is requesting to add a new data collection instrument titled the Organizer Survey—6 month Follow-up, in which hosts of the Communities Talk events will opt in to provide information on any actions that were taken as result of the Communities Talk event.

Changes

Under the current approval, the Organizer Survey consists of 30 items. Under this revision, the Organizer Survey includes 20 items about the Communities Talk event. The following table provides a summary of the proposed changes to the instrument.

Current question/item	Changes
Wording change for THM	Changed throughout to 'Communities Talk'.
q2—Location of event	Added Zip Code as a response option (new q2).
q4—Length of event	Question updated and entry field [(fill in)] (new q3),
q8—Other topics discussed (fill in)	Slight wording change of question; added the words 'non-alcohol-related' (What non-alcohol-related topics . . .); added as a secondary question to new q12.
q9—Promotion of the event	Dropped 'in the community' from the question and updated the response options (new q8).

Current question/item	Changes
q10—Number of event attendees	Provided clarification for physical and virtual attendees (new q9).
q13—Topics discussed at the event	Slight wording change of question; added the words 'alcohol-related' (. . . following alcohol-related topics . . .); response options updated (new q13).
q14—Use of materials from <i>www.stopalcoholabuse.gov</i>	Updated Web site address (new q17).
q16—Planned activities as a result of the event	Updated question and response options (new q15).
q17—Satisfaction with event	Question deleted.
q18/q19—Participation in event-related webinar and identification of that event.	Question deleted.
q20/q21—Viewing of online training and identification of that training	Question deleted.
q22—Utility of training to organization's prevention work	Updated lead-in to statements; updated wording to be properly aligned with the training and technical assistance performance measures for science and service activities (changed from . . . my organization's [to] . . . your organization's . . .) (new q18).
q23—Improved capacity due to the training received	Updated wording to be properly aligned with the training and technical assistance performance measures for science and service activities (added the word 'that' to . . . training that I received . . .) (new q18).
q24/q25—Technical assistance (TA) received and how submitted request for TA.	Question deleted.
q26—Utility of TA to organization's prevention work	Updated lead-in to statements; wording to be properly aligned with the training and technical assistance performance measures for science and service activities (changed from . . . my organization's . . . [to] . . . your organization's . . .) (new q18).
q27—Improved capacity due to the TA received	Updated wording to be properly aligned with the training and technical assistance performance measures for science and service activities (added the word 'that' to . . . TA that I received . . .) (new q18).
q28—Share additional information about event	Removed the word 'us' (. . . share with any other . . .) (new q19).
q29/q30—Data collected about event and sharing of data with SAMHSA, including information on where to send the data.	Updated questions and mailing information (new q20 and secondary question to new q20).

Three new questions were added pertaining to what influenced the decision to host an event (new q5), perception of how important UAD and its consequences is to the community (new q14), and agreement with mobilization actions statements (new q16).

The revisions were necessary to better align the data gathered to the short-term and long-term outcomes of the Communities Talk for event hosts, specifically—

Short-Term

- Increase utility of training
- Increase utility of technical assistance

Long-Term

- Increase national conversations about UAD
- Increase youth involvement in UAD
- Increase community mobilization for UAD prevention
- Increase organization capacity for prevention

- Increase use of evidence-based approaches to UAD prevention

Changes were also made to the Participant Form. Under the current approval, the Participant Form consists of 14 items. Under this revision, the Participant Form includes 17 items about the Communities Talk event. The following table provides a summary of the proposed changes to the instrument, in English and Spanish.

Current question/item	Changes
Wording change for THM	Changed throughout to 'Communities Talk'.
q2—Location of event	Added Zip Code as a response option (new q2).
q3—Most important UAD issues facing community	Question wording change and response options updated (new q3).
q5—Learn anything about UAD and its associated problems before attending the event.	Slight wording change of question, added the word 'new' (. . . learn anything new . . .) (new q5).
q7—Sharing of materials or lessons learned from the event	Response options updated (new q8).
q9—How will become more involved in decreasing UAD in community	Question wording change and response options updated (new q11).
q10—Gender	Updated to say 'sex' (new q13).
q13—Race	Updated order of response options (new q16).

Three new questions were added surrounding how often respondents are involved in UAD prevention in the community (new q9), likelihood will become more involved in UAD prevention in the community (new q10), and agreement with mobilization actions statements (new q12).

The revisions were necessary to better align the data gathered to the short-term and long-term outcomes of the Communities Talk, specifically—

Short-Term

- Increase knowledge of UAD prevention
- Increase intentions to share information on UAD prevention

Long-Term

- Increase national conversations about UAD
 - Increase youth involvement in UAD
 - Increase community mobilization for UAD prevention
- CBOs that opt in to be contacted 6 months after completing the Organizer

Survey for SAMHSA to follow up on any actions that were taken as a result of the Communities Talk event in their community will be provided with the Organizer Survey—6 month Follow-up. This survey will allow SAMHSA to measure progress towards the short- and long-term outcomes of the Communities Talk, specifically—

Short-Term

- Increase utility of training
- Increase utility of technical assistance

Long-Term

- Increase national conversations about UAD
- Increase youth involvement in UAD prevention
- Increase community mobilization for UAD prevention
- Increase capacity for prevention organizers
- Increase use of evidence-based approaches to UAD prevention

The Organizer Survey—6 month Follow-up consists of 13 items and captures information on—

- Where the Communities Talk event was held;
- Awareness of UAD activities that have taken place as a result of the event;
- Community mobilization and collaboration efforts;
- Perception of the importance of UAD and its consequences to the community; and
- Increase in youth involvement in UAD prevention activities in the community.

SAMHSA supports nationwide Communities Talk events every other year. Collecting data on each round of Communities Talk events, and using this information to inform policy and measure impact, supports SAMHSA's strategic initiative number 1: Prevention of substance use and mental illness. A specific goal under this initiative is to prevent or reduce the consequences of UAD and adult problem drinking; a

specific objective is to establish the prevention of UAD as a priority issue for states, territories, tribal entities, colleges and universities, and communities.

SAMHSA will use the information collected to document the implementation efforts of this nationwide initiative, determine if the federally sponsored Communities Talk events lead to additional activities within the community that are aimed at preventing and reducing UAD, identify what these activities may possibly include, and help plan for future rounds of Communities Talk events. SAMHSA intends to post online a summary document of each round of Communities Talk events and present findings at national conferences attended by CBOs that have hosted these events and might host future events. Similarly, SAMHSA plans to share findings with the Interagency Coordinating Committee on the Prevention of Underage Drinking. Agencies within this committee encourage their grantees to participate as the event hosts.

Additionally, the information collected will support performance measurement for SAMHSA programs under the Government Performance Results Act (GPRA).

Data Collection Component

SAMHSA/CSAP will use a web-based method to collect data through the

Organizer Survey and Organizer Survey—6 month Follow-up, and a paper-and-pencil approach to collect data through the Participant Form. The web-based application will comply with the requirements of Section 508 of the Rehabilitation Act to permit accessibility to people with disabilities.

Every 2 years, the Organizer Survey will be completed by an estimated 500 Communities Talk event organizers and will require only one response per respondent. It will take an average of 10 minutes (0.167 hours) to review the instructions and complete the survey. Similarly, the Organizer Survey—6 month Follow-up will be completed by an estimated 500 Communities Talk event organizers and will require only one response per respondent. It will take an average of 15 minutes (0.25 hours) to review the instructions and complete the survey. This burden estimate is based on comments from three 2016 Communities Talk event hosts who reviewed the survey and provided comments on how long it would take them to complete it.

The Participant Form will be completed by an average of 30 participants per sampled community-based organization (n=400) and will require only one response per respondent. It will take an average of 5 minutes (0.083 hours) to review the instructions and complete the form.

ESTIMATED ANNUALIZED BURDEN TABLE

Form name	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden
Organizer survey	500	1	500	0.167	83.50
Organizer Survey—6 month Follow-up	500	1	500	0.25	125.00
Participant Form	4,500	1	4,500	0.083	373.50
Total	5,500	.....	5,500	.....	582.00

Written comments and recommendations concerning the proposed information collection should be sent by February 17, 2017 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: OIRA_Submission@omb.eop.gov. Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202-395-7285. Commenters may also mail them to:

Office of Management and Budget,
Office of Information and Regulatory
Affairs, New Executive Office Building,
Room 10102, Washington, DC 20503.

Summer King,

Statistician.

[FR Doc. 2017-00980 Filed 1-17-17; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY**U.S. Citizenship and Immigration Services**

[OMB Control Number 1615-0037]

**Agency Information Collection
Activities: Refugee/Asylee Relative
Petition, Form I-730; Extension,
Without Change, of a Currently
Approved Collection**

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and

Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments. DATES: Comments are encouraged and will be accepted for 60 days until March 20, 2017.

ADDRESSES: All submissions received must include the OMB Control Number 1615-0037 in the body of the letter, the agency name and Docket ID USCIS-2007-0030. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal Web site at <http://www.regulations.gov> under e-Docket ID number USCIS-2007-0030;

(2) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529-2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW., Washington, DC 20529-2140, telephone number 202-272-8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at <http://www.uscis.gov>, or call the USCIS National Customer Service Center at 800-375-5283 (TTY 800-767-1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: <http://www.regulations.gov> and enter USCIS-2007-0030 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking

Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Refugee/Asylee Relative Petition.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I-730; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Form I-730 is used by a refugee or asylee to file on behalf of his or her spouse and/or children for follow-to-join benefits provided that the relationship to the refugee/asylee existed prior to their admission to the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information

collection I-730 is 6,039 and the estimated hour burden per response is .667 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 4,028 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is 739,778.

Dated: January 12, 2017.

Samantha Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2017-01051 Filed 1-17-17; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-6012-N-01]

Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice allocates \$1,805,976,000 in Community Development Block Grant disaster recovery (CDBG-DR) funds appropriated by the Further Continuing and Security Assistance Appropriations Act, 2017 for the purpose of assisting long-term recovery in Florida, Louisiana, North Carolina, South Carolina, Texas, and West Virginia. This allocation of CDBG-DR supplements funds appropriated by the Continuing Appropriation Act, 2017. It provided \$500 million in CDBG-DR funding that has been allocated to Louisiana, Texas, and West Virginia in response to qualifying disasters. In HUD's **Federal Register** notice published on November 21, 2016, at 81 FR 83254 (the Prior Notice), HUD described that allocation and applicable waivers and alternative requirements, relevant statutory and regulatory requirements, the grant award process, criteria for action plan approval, and eligible disaster recovery activities. Grantees receiving an allocation of funds under this notice are subject to the requirements of the Prior Notice, including provisions of the Prior Notice amended herein.

DATES: Effective Date: January 23, 2017.

FOR FURTHER INFORMATION CONTACT:

Stanley Gimont, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street SW., Room 7286, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Facsimile inquiries may be sent to Mr. Gimont at 202-401-2044. (Except for the "800" number, these telephone numbers are not toll-free.) Email inquiries may be sent to: disaster_recovery@hud.gov.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Allocations
- II. Use of Funds
- III. Grant Amendment Process
- IV. Applicable Rules, Statutes, Waivers, and Alternative Requirements
- V. Duration of Funding
- VI. Catalog of Federal Domestic Assistance
- VII. Finding of No Significant Impact
- Appendix A: Allocation Methodology

I. Allocations

Section 101 of the Further Continuing and Security Assistance Appropriations Act, 2017 (division A of Pub. L. 114–

254, approved December 10, 2016) amended the Continuing Appropriations Act, 2017 (division C of Pub. L. 114–223) by adding a new section 192 that makes available \$1,808,976,000 in Community Development Block Grant (CDBG) funds for necessary expenses for activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared in 2016 and occurring prior to December 10, 2016. Qualifying major disasters are declared by the President pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*) (Stafford Act). The following allocations of funds appropriated by section 192 are in addition to the \$500 million appropriated by section 145(a) and allocated in the Prior Notice. Section 192 specifies that these additional funds are subject to the same authority and conditions as those in section 145(a),

except the major disaster must have occurred prior to December 10, 2016.

Section 145(a) provides that grants shall be awarded directly to a State or unit of general local government at the discretion of the Secretary. The Secretary has elected to award funds only to States in this notice. Unless noted otherwise, the term "grantee" refers to the State receiving an award from HUD under this notice. To comply with the statutory requirement that funds be used for disaster-related expenses in the most impacted and distressed areas, HUD allocates funds using the best available data that cover all of the eligible affected areas.

Section 192(b) permits HUD to use up to \$3,000,000 of the appropriated amount for necessary costs, including information technology costs, of administering and overseeing the obligation and expenditure of amounts made available by sections 145(a) and 192. The Department is deducting the full \$3,000,000, resulting in a total of \$1,805,976,000 available for allocation.

Based on further review of the impacts from the eligible disasters, and estimates of unmet need, HUD is making the following allocations:

TABLE 1—ALLOCATIONS UNDER PUBLIC LAW 114–245

Disaster No.	Grantee	Allocation	Minimum amount that must be expended for recovery in the HUD-identified "most impacted and distressed" areas
4263, 4277	State of Louisiana	\$1,219,172,000	(\$975,337,600) East Baton Rouge, Livingston, Ascension, Tangipahoa, Ouachita, Lafayette, Vermilion, Acadia, Washington, and St. Tammany Parishes.
4266, 4269, 4272	State of Texas	177,064,000	(\$141,651,200) Harris, Newton, Montgomery, Fort Bend, and Brazoria Counties.
4273	State of West Virginia	87,280,000	(\$69,824,000) Kanawha and Greenbrier Counties.
4285	State of North Carolina	198,553,000	(\$158,842,400) Robeson, Cumberland, Edgecombe, and Wayne Counties.
4286	State of South Carolina	65,305,000	(\$52,244,000) Marion County.
4280, 4283	State of Florida	58,602,000	(\$46,881,600) St. Johns County.
Total .....	.....	1,805,976,000	

Use of funds for all grantees is limited to unmet recovery needs from the major disasters identified in Table 1. Please note that in addition to the FEMA disaster numbers listed in the Prior Notice for the State of Texas, the State may also expend its allocation of funds from the Prior Notice on FEMA disaster number DR–4272.

Table 1 also shows the HUD-identified "most impacted and distressed" areas impacted by the disasters. At least 80 percent of the total funds provided to each State under this notice must address unmet needs within the HUD-identified "most impacted and distressed" areas, as identified in the last column in Table 1. For grantees that received an allocation under the Prior

Notice, 80 percent of both allocations may be used to address unmet needs within the HUD-identified "most impacted and distressed" areas that are identified in Table 1 of this notice. Grantees may determine where the remaining 20 percent may be spent by identifying areas it determines to be "most impacted and distressed." A detailed explanation of HUD's allocation methodology is provided at Appendix A.

II. Use of Funds

Funds allocated under this notice and funds allocated pursuant to the Prior Notice are subject to the requirements of the Prior Notice, including the provisions of the Prior Notice as

amended herein. As a reminder, section 145(a) requires that prior to the obligation of CDBG–DR funds, a grantee shall submit a plan to HUD for approval detailing the proposed use of all funds, including criteria for eligibility, and how the use of these funds will address long-term recovery and restoration of infrastructure and housing and economic revitalization in the most impacted and distressed areas. This action plan for disaster recovery must describe uses and activities that: (1) Are authorized under title I of the Housing and Community Development Act of 1974 (HCD Act) or allowed by a waiver or alternative requirement (see section IV., below); and (2) respond to disaster-

related impact to infrastructure, housing, and economic revitalization in the most impacted and distressed areas. To inform the plan, grantees must conduct an assessment of community impacts and unmet needs to guide the development and prioritization of planned recovery activities, pursuant to paragraph A.2.a. in section VI of the Prior Notice, as amended in this notice.

Pursuant to the Prior Notice, each grantee is required to expend 100 percent of its allocation of CDBG-DR funds on eligible activities within 6 years of HUD's execution of the grant agreement.

III. Overview of Grant Process

To begin expenditure of CDBG-DR funds, grantees must complete the expedited steps outlined in Section V. Overview of Grant Process in the Prior Notice. As stated below at paragraph IV.1.a, the deadlines established by the Prior Notice are now determined by the effective date of this notice.

IV. Applicable Rules, Statutes, Waivers, and Alternative Requirements

This section of the notice describes rules, statutes, waivers, and alternative requirements that apply to grantees receiving an allocation under this notice. All funds allocated by the Prior Notice and this notice are subject to the requirements of the Prior Notice, including provisions of the Prior Notice as amended herein. Further, the Secretary has determined that good cause exists for each waiver and alternative requirement established in the Prior Notice and that the waivers and alternative requirements are not inconsistent with the overall purpose of the HCD Act. The Secretary's determination extends to each waiver or alternative requirement amended by this notice.

Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Except where noted, waivers and alternative requirements described below apply to all grantees under this notice. Waivers and alternative requirements are effective five days after they are published in the **Federal Register**.

1. Incorporation of waivers, alternative requirements, and statutory changes previously described. The waivers and alternative requirements provided in the Prior Notice apply to the awards under this notice, except as modified herein. These waivers and alternative requirements provide additional flexibility in program design and implementation to support full and

swift recovery following the disasters, while also ensuring that statutory requirements are met. The requirements of the Prior Notice and this notice apply only to the CDBG-DR funds appropriated in sections 145(a) and 192.

The following clarifications or modifications apply to grantees in receipt of an allocation under this notice and to funds allocated under the Prior Notice:

a. All deadlines for the submission of the Secretary's certification, risk analysis, or the action plan referenced in the Prior Notice are now determined by the effective date of this notice. This means that the deadlines established by the Prior Notice for the submission of the Secretary's certification, risk analysis and action plan, as well as other deadlines, are extended to deadlines established by this notice. This allows grantees receiving an allocation of funds under both the Prior Notice and this notice to submit a single action plan and other documents governing both allocations.

b. Paragraph VI.A.2.a.6 of the Prior Notice at 81 FR 83258 is amended by revising the action plan requirement to identify a maximum amount of assistance available to beneficiaries under each program. In addition to the requirement described in the Prior Notice, for any residential rehabilitation or reconstruction program, grantees must establish a process by which it assesses the cost effectiveness of each rehabilitation or reconstruction project undertaken to assist a household. The requirement is amended by adding the following:

A description of the maximum amount of assistance available to a beneficiary under each of the grantee's disaster recovery programs. Additionally, for any residential rehabilitation or reconstruction program funded under this notice, each grantee must have policies and procedures to assess the cost effectiveness of each proposed project undertaken to assist a household, including criteria for determining when the cost of the rehabilitation or reconstruction of the unit will not be cost-effective relative to other means of assisting the property-owner, including through buyout or acquisition of the property, or the construction of area-wide protective infrastructure, rather than individual building mitigation solutions designed to protect individual structures. For example, as the grantee is designing its program, it might choose as comparison criteria the rehabilitation costs derived from the RS Means Residential Cost Data and costs to buyout or acquire the property as a means of determining whether or not to fund a rehabilitation project.

A grantee may find it necessary to provide exceptions on a case-by-case basis to the maximum amount of assistance or cost effectiveness criteria and must describe the

process it will use to make such exceptions in its policies and procedures. Each grantee must adopt policies and procedures that communicate how it will analyze the circumstances under which an exception is needed and how it will demonstrate that the amount of assistance is necessary and reasonable. All CDBG-DR expenditures remain subject to the cost principles in 2 CFR part 200, including the requirement that costs be necessary and reasonable for the performance of the grantee's CDBG-DR grant.

c. Paragraph VI.A.2.a.7 of the Prior Notice at 81 FR 83258 is amended by rewriting and clarifying the action plan requirements for the descriptions of long-term recovery and hazard mitigation planning and addressing specific predevelopment principles as outlined in the Federal Resource Guide for Infrastructure Planning and Design, as follows:

A description of how the grantee plans to:

(a) Promote sound, sustainable long-term recovery planning informed by a post-disaster evaluation of hazard risk, especially land-use decisions that reflect responsible flood plain management and take into account continued sea level rise, if applicable. This information should be based on the history of FEMA flood mitigation efforts, and take into account projected increase in sea level (if applicable) and frequency and intensity of precipitation events, which are not considered in current FEMA maps and National Flood Insurance Program premiums;

(b) Adhere to the advanced elevation requirements established in paragraph B. of section VI of the Prior Notice;

(c) Coordinate with local and regional planning efforts to ensure consistency, including how the grantee will promote community-level and/or regional (e.g., multiple local jurisdictions) post-disaster recovery and mitigation planning;

(d) For infrastructure allocations, the grantee must also describe:

i. How mitigation measures will be integrated into rebuilding activities and the extent to which infrastructure activities funded through this grant will achieve objectives outlined in regionally or locally established plans and policies that are designed to reduce future risk to the jurisdiction;

ii. How infrastructure activities will be informed by a consideration of the costs and benefits of the project;

iii. How the State will seek to ensure that infrastructure activities will avoid disproportionate impact on vulnerable communities and create opportunities to address economic inequities facing local communities;

iv. How the State align investments with other planned state or local capital improvements and infrastructure development efforts, and will work to foster the potential for additional infrastructure funding from multiple sources, including existing state and local capital improvement projects in planning, and the potential for private investment; and

v. The extent to which the State will employ adaptable and reliable technologies to guard against premature obsolescence of infrastructure.

Additional guidance on predevelopment principles are described in the Federal Resource Guide for Infrastructure Planning and Design: (<http://portal.hud.gov/hudportal/documents/huddoc?id=BAInfraResGuideMay2015.pdf>)

The action plan must also provide for the use of CDBG–DR funds to develop a disaster recovery and response plan that addresses long-term recovery and pre- and post-disaster hazard mitigation, if one does not currently exist.

V. Duration of Funding

Section 192 directs that these funds be available until expended. However, consistent with OMB Circular A–11, if the Secretary or the President determines that the purposes for which the appropriation has been made have been carried out and no disbursements have been made against the appropriation for two consecutive fiscal years, any remaining unobligated balance will be made unavailable for obligation or expenditure.

VI. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this notice are as follows: 14.218; 14.228.

VII. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

Dated: January 9, 2017.

Nani A. Coloretti,
Deputy Secretary.

Appendix A—Allocation of CDBG–DR Funds to Most Impacted and Distressed Areas Due to 2016 Federally Declared Disasters Thru December 10, 2016

Background

Section 145(a) of Division C of the Continuing Appropriations Act, 2017 (P. L. 114–223, Division C), enacted on September 29, 2016, appropriated \$500,000,000 through the Community Development Block Grant disaster recovery (CDBG–DR) program for necessary expenses for authorized activities related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared in 2016 but prior to September 29, 2016. Section 145(a) of P. L. 114–223, Division C stated:

SEC. 145. (a) In addition to the amount otherwise provided by section 101 for the “Community Planning and Development, Community Development Fund,” there is appropriated \$500,000,000 for an additional amount for fiscal year 2016, to remain available until expended, for necessary expenses for activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared in 2016, and which the disaster occurred prior to the date of enactment of this Act, pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*): Provided, That funds shall be awarded directly to the State or unit of general local government at the discretion of the Secretary: . . .

Subsequently, section 101 of the Further Continuing and Security Assistance Appropriations Act, 2017 (division A of Pub. L. 114–254, approved December 10, 2016) (Appropriations Act) amended the Continuing Appropriations Act, 2017 (division C of Public Law 114–223) by adding a new section 192. Section 192(a) appropriates \$1,808,976,000 in CDBG–DR funding for the same purposes, authorities and conditions as section 145(a) for major disasters declared in 2016 but prior to December 10, 2016. Section 192(b) authorizes HUD to deduct \$3,000,000 from this amount for the cost of administering both appropriations, resulting in a total of \$1,805,976,000 available for allocation.

Combined, the two appropriations make \$2,305,976,000 available for allocation, effectively matching HUD’s November 2016 estimate for serious unmet repair or replacement needs.

Most Impacted and Distressed Areas

As with prior CDBG–DR appropriations, HUD is not obligated to allocate section 192 funds for all major disasters declared in 2016 but prior to December 10, 2016. Relying on

the language of section 145(a), HUD is directed to use the funds “in the most impacted and distressed areas.” HUD has implemented this directive by limiting CDBG–DR formula allocations to jurisdictions with major disasters that meet three standards:

(1) Individual Assistance/IHP designation. HUD has limited allocations to those disasters where FEMA had determined the damage was sufficient to declare the disaster as eligible to receive Individual and Households Program (IHP) funding. President Obama signed P.L. 114–254 into law on December 10, 2016, and 45 disasters had received major declarations in calendar year 2016 by that date. Only 17 of 45 disasters that were declared in 2016 have an IHP designation.

(2) Concentrated damage. HUD has limited the allocations to counties with high levels of damage. For this allocation, HUD is using the amount of serious unmet housing need as its measure of concentrated damage and limits the data used for the allocation only to counties exceeding a “natural break” in the data for their total amount of serious unmet housing needs. For purposes of this allocation, the serious unmet housing needs break at the county level occurs at \$13 million. Serious unmet housing needs are calculated as the additional cost to repair the most damaged homes after subtracting out insurance, FEMA, and SBA assistance.

(3) Natural break. Among disasters with data meeting the first two thresholds, HUD identifies a natural break in calculated serious unmet recovery needs and funds only the jurisdictions that have substantially higher unmet needs than other jurisdictions. The jurisdictions clearing this threshold as a result of major disasters declared since January 1, 2016 now includes Florida, North Carolina, and South Carolina as a result of Hurricane Hermine or Hurricane Matthew, as well as Louisiana, Texas, and West Virginia which were qualified for funds appropriated by section 145(a) as a result of major disasters declared prior to September 29, 2016.

These allocations are thus based on the unmet costs to repair seriously damaged properties and infrastructure in the counties with more than \$13 million of serious unmet housing needs. These do not capture expected resiliency costs, although grantees may choose to use the CDBG funds for resiliency expenses. The estimated damage is based on the following factors:

(1) Seriously damaged owner occupied units without insurance repair estimate in Most Impacted Counties after FEMA, Insurance, and SBA;

(2) Seriously damaged rental units occupied by renters with income less than \$20,000 repair estimate in Most Impacted Counties after FEMA, Insurance, and SBA;

(3) Small businesses denied by SBA repair estimate; and

(4) The state match requirement to address the FEMA estimates for repair of permanent infrastructure in the FEMA Public Assistance program (categories C to G).

Methods for Estimating Unmet Needs for Housing

The data HUD staff have identified as being available to calculate unmet needs for

qualifying disasters come from the FEMA Individual Assistance program data on housing-unit damage as of December 9, 2016.

The core data on housing damage for both the unmet housing needs calculation and the concentrated damage are based on home inspection data for FEMA's Individual Assistance program. HUD calculates "unmet housing needs" as the number of housing units with unmet needs times the estimated cost to repair those units less repair funds already provided by FEMA, where:

Each of the FEMA inspected owner units are categorized by HUD into one of five categories:

- Minor-Low: Less than \$3,000 of FEMA inspected real property damage.
- Minor-High: \$3,000 to \$7,999 of FEMA inspected real property damage.
- Major-Low: \$8,000 to \$14,999 of FEMA inspected real property damage.
- Major-High: \$15,000 to \$28,800 of FEMA inspected real property damage and/or 4 to 6 feet of flooding on the first floor.
- Severe: Greater than \$28,800 of FEMA inspected real property damage or determined destroyed and/or 6 or more feet of flooding on the first floor.

To meet the statutory requirement of "most impacted" in this legislative language, homes are determined to have a high level of damage if they have damage of "major-low" or higher. That is, they have a real property FEMA inspected damage of \$8,000 or flooding over 1 foot. Furthermore, a homeowner is determined to have unmet needs if they reported damage and no insurance to cover that damage.

FEMA does not inspect rental units for real property damage so personal property damage is used as a proxy for unit damage. Each of the FEMA inspected renter units are categorized by HUD into one of five categories:

- Minor-Low: Less than \$1,000 of FEMA inspected personal property damage.
- Minor-High: \$1,000 to \$1,999 of FEMA inspected personal property damage.
- Major-Low: \$2,000 to \$3,499 of FEMA inspected personal property damage.
- Major-High: \$3,500 to \$7,499 of FEMA inspected personal property damage or 4 to 6 feet of flooding on the first floor.
- Severe: Greater than \$7,500 of FEMA inspected personal property damage or determined destroyed and/or 6 or more feet of flooding on the first floor.

For rental properties, to meet the statutory requirement of "most impacted" in this legislative language, homes are determined to have a high level of damage if they have damage of "major-low" or higher. That is, they have a FEMA personal property damage assessment of \$2,000 or greater or flooding over 1 foot. Furthermore, landlords are presumed to have adequate insurance coverage unless the unit is occupied by a renter with income of \$20,000 or less. Units are occupied by a tenant with income less than \$20,000 are used to calculate likely unmet needs for affordable rental housing.

The average cost to fully repair a home for a specific disaster to code within each of the damage categories noted above is calculated using the average real property damage repair costs determined by the Small Business

Administration for its disaster loan program for the subset of homes inspected by both SBA and FEMA for 2011 to 2013 disasters. Because SBA is inspecting for full repair costs, it is presumed to reflect the full cost to repair the home, which is generally more than the FEMA estimates on the cost to make the home habitable.

For each household determined to have unmet housing needs (as described above), their estimated average unmet housing need less assumed assistance from FEMA, SBA, and insurance was calculated at \$27,455 for major damage (low); \$45,688 for major damage (high); and \$59,493 for severe damage.

Methods for Estimating Unmet Infrastructure Needs

To best proxy unmet infrastructure needs, HUD uses data from FEMA's Public Assistance program on the expected State match requirement (usually 25 percent of the estimated public assistance needs, it is 10 percent for DR-4277 in Louisiana). This allocation uses only a subset of the Public Assistance damage estimates reflecting the categories of activities most likely to require CDBG funding above the Public Assistance and State match requirement. Those activities are categories: C, Roads and Bridges; D, Water Control Facilities; E, Public Buildings; F, Public Utilities; and G, Recreational—Other. Categories A (Debris Removal) and B (Protective Measures) are largely expended immediately after a disaster and reflect interim recovery measures rather than the long-term recovery measures for which CDBG funds are generally used.

Methods for Estimating Unmet Economic Revitalization Needs

Based on SBA disaster loans to businesses, HUD calculates the median real estate and content loss by the following damage categories for each state:

- Category 1: Real estate + content loss = below 12,000
- Category 2: Real estate + content loss = 12,000–30,000
- Category 3: Real estate + content loss = 30,000–65,000
- Category 4: Real estate + content loss = 65,000–150,000
- Category 5: Real estate + content loss = above 150,000

For properties with real estate and content loss of \$30,000 or more, HUD calculates the estimated amount of unmet needs for small businesses by multiplying the median damage estimates for the categories above by the number of small businesses denied an SBA loan, including those denied a loan prior to inspection due to inadequate credit or income (or a decision had not been made), under the assumption that damage among those denied at pre-inspection have the same distribution of damage as those denied after inspection.

Allocation Calculation

Once eligible entities are identified using the above criteria, the allocation to individual grantees represents their proportional share of the estimated unmet needs. For the formula allocation, HUD

calculates total serious unmet recovery needs as the aggregate of:

- Serious unmet housing needs in most impacted counties.
- Serious unmet business needs.
- The estimated local match requirement for the repair of infrastructure estimated for FEMA's Public Assistance program.

Natural break for most impacted disasters. HUD limits funded disasters to those with that have substantially higher unmet needs than other jurisdictions. Florida, Louisiana, North Carolina, South Carolina, Texas, and West Virginia each have aggregate unmet needs in excess of \$50,000,000, an amount that is higher than other jurisdictions affected by major disasters declared between January 1 and December 10, 2016.

[FR Doc. 2017–01007 Filed 1–17–17; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[FWS–R8–FHC–2016–N196;
FXFR1334088TWG0W4–123–FF08EACT00]

Renewal of the Trinity River Adaptive Management Working Group

AGENCY: Office of the Secretary, Interior.
ACTION: Notice.

SUMMARY: The Secretary of the Interior (Secretary), after consultation with the General Services Administration, has renewed the Trinity River Adaptive Management Working Group (Working Group) for 2 years. The Working Group provides recommendations on all aspects of the implementation of the Trinity River Restoration Program and affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River restoration efforts.

ADDRESSES: For more information on the Trinity River Adaptive Management Working Group and the Trinity River Restoration Program, see <https://www.fws.gov/arcata/fisheries/tamwg.html> and <http://www.trrp.net/>.

FOR FURTHER INFORMATION CONTACT: Joseph Polos, U.S. Fish and Wildlife Service, 1655 Heindon Road; Arcata, CA 95521; 707–822–7201.

SUPPLEMENTARY INFORMATION: The Working Group conducts its operations in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. Appendix). It reports to the Trinity River Management Council (TMC) and functions solely as an advisory body. The TMC reports to the Secretary through the Mid-Pacific Regional Director of the Bureau of Reclamation and the Pacific Southwest Regional Director for the U.S. Fish and Wildlife Service. The Working Group

provides recommendations and advice to the TMC on: (1) The effectiveness of management actions in achieving restoration goals and alternative hypotheses (methods and strategies) for study, (2) the priority for restoration projects, (3) funding priorities, and (4) other components of the Trinity River Restoration Program.

We have filed a copy of the Working Group's charter with the Committee Management Secretariat, General Services Administration; the Committee on Environment and Public Works, United States Senate; the Committee on Natural Resources, United States House of Representatives; and the Library of Congress.

Certification

I hereby certify that the Trinity River Adaptive Management Working Group is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by Public Laws 84-386 and 96-335 (Trinity River Stream Rectification Act), 98-541 and 104-143 (Trinity River Basin Fish and Wildlife Management Act of 1984), and 102-575 (Central Valley Project Improvement Act). The Working Group will assist the Department of the Interior by providing advice and recommendations on all aspects of implementation of the Trinity River Restoration Program.

Dated: December 13, 2016.

Sally Jewell,

Secretary of the Interior.

[FR Doc. 2017-00983 Filed 1-17-17; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-HQ-IA-2017-N007;
FXIA1671090000-167-FF09A30000]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Import of Sport-Hunted African Elephant Trophies

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (the U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on January 31, 2017. We may not conduct or sponsor and a person is not required to respond to a collection of

information unless it displays a currently valid OMB control number. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before February 17, 2017.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395-5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to Madonna L. Baucum, Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803 (mail); or *madonna_baucum@fws.gov* (email). Please include "1018-0164" in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Madonna L. Baucum, Information Collection Clearance Officer, U.S. Fish and Wildlife Service at *madonna_baucum@fws.gov* (email), or (703) 358-2503 (telephone). You may review the ICR online at <http://www.reginfo.gov>. Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

I. Abstract

Applications for permits for import of African elephant sport-hunted trophies from Appendix-I populations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) are approved under OMB Control Number 1018-0093, which expires May 31, 2017. Under newly revised regulations at 50 CFR 17.40(e), import permits must now also be obtained for import of African elephant sport-hunted trophies from CITES Appendix-II populations. Based on this change, we expect to receive an additional 300 applications for permits per year. The burden associated with these additional applications is the basis of this information collection. If OMB grants regular approval, we will include the burden associated with the expected 300 additional applications in OMB Control Number 1018-0093 when we renew the approval in May 2017.

II. Data

OMB Control Number: 1018-0164.

Title: Import of Sport-Hunted African Elephant Trophies, 50 CFR 17.

Service Form Number: 3-200-19, Importing African elephant trophies from Appendix-II populations.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Individuals.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Number of Respondents: 300.

Number of Annual Responses: 300.

Completion Time per Response: 20 minutes.

Total Annual Burden Hours: 100 hours.

Estimated Annual Non-hour Burden Cost: \$30,000, primarily associated with application fees. The application fee is \$100 per application.

III. Comments

On June 9, 2016, we published in the **Federal Register** (81 FR 37207) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on August 8, 2016. We received the following substantive comments in response to this request.

Comment 1: The International Fund for Animal Welfare and the Natural Resources Defense Council submitted a joint response to the notice. They expressed their strong support for the permit requirement for import of sport-hunted trophies from all African elephant populations (both Appendix-I and Appendix-II populations) and the associated collection of information. They said that prospective trophy importers should be required to provide information on the specific elephant and population, which should be added to section E2 and/or E3 of FWS Form 3-200-19. Such information should include but not be limited to (1) sex and approximate age of the elephant and (2) approximate status of the individual within the herd's hierarchy. In addition, they stated that section E5 of FWS Form 3-200-19 should be rephrased to require trophy hunters to provide information regarding "how the funds from license/trophy fees will be spent [and] what portion of the hunting fee will support conservation," because they believe that the current language on the FWS form suggests that hunters may provide this information at their own discretion. They also assert that in section E5, the Service should include specific subquestions and "require supporting documentation that places an increased burden on hunters to prove that their trophy meets the enhancement standard."

Response to Comment 1: We believe that Form 3-200-19 requests the

information we need from applicants. Hunters often apply for import permits before leaving on safari and therefore are not in a position to provide information on the specific elephant and population. In addition, hunters are not necessarily in a position to know what portion of their hunting fees will support conservation. This is information that we acquire from the countries of origin, not from permit applicants.

Comment 2: With regard to the cost burden, the International Fund for Animal Welfare and the Natural Resources Defense Council claim that the permit application fee is too small and that it should be increased to fully compensate FWS for costs associated with performing individualized (as opposed to country-wide) enhancement findings. They note that the 2015 market rate for an African elephant hunting package was between \$25,000 and \$60,000, and add that the \$100 permit application fee “imposes trivial additional costs on the importer.”

Response to Comment 2: We are currently reevaluating our permit fees and may, in the future, publish a proposed rule to revise our fee structure.

Comment 3: The Humane Society of the United States and Humane Society International jointly submitted comments in support of the request for extension of approval for information collection through FWS Form 3–200–19 from all importers of African elephant sport-hunted trophies. They stated their belief that it is critically important that this information is collected from applicants for import permits under the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*), because the information “is essential for FWS to comply with its statutory duties to protect African elephants from threats that jeopardize the species’ continued existence.” They also believe that FWS Form 3–200–19 requests the “bare minimum information needed” from an applicant.

These joint commenters also stated that the current “paltry” applicant fee of \$100 for an African elephant sport-hunted trophy import permit is too low and should be increased. They assert that the \$100 application fee for import of trophies “cannot possibly reimburse the agency for all of its costs associated with ensuring that applicants are eligible for permits,” and they “urge OMB to formally request that FWS amend this fee structure.”

Response to Comment 3: See our response to Comment 2.

Comment 4: Conservation Force submitted comments in opposition to the information collection, stating that “it is unnecessary and over burdensome

for both the U.S. Fish and Wildlife Service . . . and permit applicants/ tourist safari hunters, and it will not provide any useful information.” They contend that it is “a burden without a benefit” and that the burden cannot be reduced unless the permit requirement is removed. Conservation Force also asserts that the burden estimate is inaccurate, because the Service has not considered its current backlog of applications in assessing its ability to process another 300 permits, the additional costs and demands for seizures and law enforcement actions, and the permit renewal fee.

Response to Comment 4: Our newly revised regulations require that we issue an ESA import permit for import of all African elephant sport-hunted trophies. We are seeking authorization to collect the information necessary for us to issue these permits. The burden estimates are developed in accordance with the Paperwork Reduction Act. In estimating the burden to the Service, we consider the time required to process an application, the cost of processing an application, including the salaries of the people doing the work, and the estimated number of applications. In estimating the burden to the applicant, we consider the time it takes to complete an application, including gathering the necessary information, an estimate of the salary of the person completing the form, and the permit fee. Based on our experience, we believe our burden estimates are accurate.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: January 11, 2017.

Tina A. Campbell,

Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.

[FR Doc. 2017–00960 Filed 1–17–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–R–2016–N221];

[FXRS1261060000–178–FF06R00000]

Notice of Intent To Prepare a Comprehensive Conservation Plan for the National Bison Range, Moiese, Montana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to gather information necessary to prepare a draft Comprehensive Conservation Plan (CCP) for the National Bison Range (NBR), a unit of the National Wildlife Refuge System. We are furnishing this notice in compliance with Service Refuge Planning policy to advise other agencies and the public of our intentions, and to obtain suggestions and information on the scope of issues to be considered in the planning process. Participation in the planning process will be encouraged and facilitated by various means, including news releases and public meetings. Notification of all such meetings will be announced in the local press and on the NBR Web site.

DATES: To ensure consideration, written comments must be received or postmarked on or before February 17, 2017.

ADDRESSES: If you wish to comment on the scope of the CCP/EIS, you may submit your comments by the following method: You may mail or hand-deliver comments to Toni Griffin, Refuge Planner, NBR CCP, 134 Union Boulevard, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Toni Griffin, Refuge Planner, NBR CCP, 134 Union Boulevard, Lakewood, CO 80228, or by telephone (303) 236–4378.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for the National Bison Range, with headquarters in Moiese, MT. The notice complies with our CCP policy to (1) advise other Federal and State agencies,

Tribes, and the public of our intention to conduct planning on this refuge complex and (2) to obtain suggestions and information on the scope of additional issues to consider during development of the CCP. Through the CCP, the Service intends to evaluate both how NBR is managed and who manages it.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966, (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), requires us to develop a CCP for each national wildlife refuge. The purpose of a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

We will conduct environmental review pursuant to the provisions of the National Environmental Policy Act of 1969 (42 U.S.C 4321 *et seq.*), by preparing an environmental impact statement (EIS). The Service intends to invite the Confederated Salish and Kootenai Tribes (CSKT) to participate as a cooperating agency as provided by 40 CFR 1508.5.

The Service will prepare a CCP and EIS which will describe management of the NBR over the next 15 years. To facilitate sound planning and environmental assessment, the Service intends to gather information necessary for the preparation of the CCP/EIS and obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the CCP/EIS. The Service will separately consider CCPs for Pablo, Ninepipe, and Lost Trail National Wildlife Refuges, and the Northwest Montana Lake County Wetland Management District and the waterfowl production areas therein, which are also part of the National Bison Range Complex. The Service will publish a notice of intent to prepare these CCPs at a later date.

The National Bison Range

In 1855, the United States entered into the Hell Gate Treaty with the Salish and Kootenai Tribes of Western Montana to establish the Flathead Indian Reservation. Just over 50 years later, on May 23, 1908, Congress enacted legislation that used its power of eminent domain to establish the refuge. The overall mission of the NBR is to maintain a representative herd of bison, under reasonably natural conditions, to ensure the preservation of the species for continued public enjoyment. The NBR is 18,800 acres and supports between 350 and 500 bison. The National Bison Range lies entirely within the boundary of the Flathead Indian Reservation of the Confederated Salish and Kootenai Tribes. Members of the CSKT have a cultural, historical, or geographic connection to the land and resources of the Range. There are significant cultural sites located on the Range and the land was formerly owned in trust for the CSKT. The bison at the range today are descendants of bison owned and preserved by CSKT members over a century ago.

Additional Information

The draft CCP/EIS for NBR will include detailed information about the planning process, refuge, issues, and desired resource conditions. Based on determination of desired conditions, regardless of which management option is selected, the final CCP/EIS will outline resource management activities and visitor recreational activities. To facilitate sound judgment of environmental impacts, the Service is gathering information necessary for the preparation of a CCP/EIS. Based on public input over the years, the Service believes that the range of management alternatives should include, at a minimum:

- *Alternative A (Current Management):* This alternative represents continuing current management and serves as a baseline for comparing the other alternatives. Under this alternative, we would continue our current habitat and visitor services management activities on existing refuge lands. The Service would continue to be responsible for the overall administration of the NBR and the day-to-day on-site activities. The Service would be responsible for implementation of the NBR CCP.

- *Alternative B (Preferred Management Option):* In this alternative, the Service intends to evaluate the preferred management option of a Congressional transfer of lands comprising of the NBR unit of the National Wildlife Refuge System to the CSKT of the Flathead Reservation, to be held in trust by the Secretary of the Interior for the benefit of the CSKT. In addition to the management of the herd of bison, the CSKT will conserve the natural resources and provide for public visitation and educational opportunities on such lands. Resources would be managed to perpetuate and protect the natural environment and to preserve cultural and historic resources and values. The alternative returns to the tribe control of their traditional lands and cultural resources.

- *Alternative C:* The Service would execute and carry out a draft negotiated Annual Funding Agreement (AFA) per the Tribal Self Governance Act, wherein the CSKT would be responsible for implementing the provisions of the AFA.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 20, 2016.

Noreen Walsh,

Regional Director, U.S. Fish and Wildlife Service, Denver, Colorado.

[FR Doc. 2017–00808 Filed 1–17–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[17X.LLAZ956000.L14400000.
BJ0000.LXSSA225000.241A]

**Notice of Filing of Plats of Survey;
Arizona**

AGENCY: Bureau of Land Management,
Interior.

ACTION: Notice of Filing of Plats of
Survey; Arizona.

SUMMARY: The plats of survey of the
described lands were officially filed in
the Arizona State Office, Bureau of Land
Management, Phoenix, Arizona, on
dates indicated.

SUPPLEMENTARY INFORMATION:**The Gila and Salt River Meridian,
Arizona:**

The plat representing the dependent
resurvey of a portion of the Gila and Salt
River Meridian, the north boundary of
the Gila River Indian Community, a
portion of the northeast boundary of the
Gila River Indian Community, and a
portion of the subdivisional lines,
Township 1 North, Range 1 East,
accepted November 22, 2016, and
officially filed November 23, 2016, for
Group 1153, Arizona.

This plat was prepared at the request
of the Bureau of Indian Affairs.

The plat representing the survey of a
portion of the Ninth Standard Parallel
North (south boundary), Township 37
North, Range 7 East, the survey of the
east boundary, the survey of a portion
of the subdivisional lines, and the
subdivision of certain sections,
Township 36 North, Range 7 East,
accepted April 29, 2016, and officially
filed May 3, 2016, for Group 1147,
Arizona.

This plat was prepared at the request
of the Bureau of Indian Affairs.

The plat representing the survey of a
portion of the subdivisional lines, and
the subdivision of certain sections,
Township 36 North, Range 8 East,
accepted April 29, 2016, and officially
filed May 3, 2016, for Group 1147,
Arizona.

This plat was prepared at the request
of the Bureau of Indian Affairs.

The plat representing the dependent
resurvey of a portion of the
subdivisional lines, and the dependent
resurvey of Homestead Entry Survey No.
97, Township 14 North, Range 10 East,
accepted August 31, 2016, and officially
filed September 2, 2016, for Group 1123,
Arizona.

This plat was prepared at the request
of the United States Forest Service.

The plat representing the dependent
resurvey of a portion of the south

boundary, the dependent resurvey of a
portion of the subdivisional lines, and
the subdivision of section 29, Township
18 North, Range 26 East, accepted April
29, 2016, and officially filed May 3,
2016, for Group 1146, Arizona.

This plat was prepared at the request
of the National Park Service.

The plat representing the dependent
resurvey of a portion of the Arizona-
Utah State Line (north boundary), the
survey of the subdivisional lines, and
the subdivision of certain sections,
Township 41 North, Range 26 East,
accepted September 20, 2016, and
officially filed September 21, 2016, for
Group 1150, Arizona.

This plat was prepared at the request
of the Bureau of Indian Affairs.

The supplemental plat showing the
correction to the location of Mineral
Survey No. 542, and the subsequent
amended lotting, section 33, Township
24 North, Range 18 West, accepted
September 9, 2015, and officially filed
September 10, 2015, for Supplemental
Group 9109, Arizona.

This plat was prepared at the request
of the Bureau of Land Management.

A person or party who wishes to
protest against any of these surveys
must file a written protest with the
Arizona State Director, Bureau of Land
Management, stating that they wish to
protest.

A statement of reasons for a protest
may be filed with the notice of protest
to the State Director, or the statement of
reasons must be filed with the State
Director within thirty (30) days after the
protest is filed.

FOR FURTHER INFORMATION CONTACT:

These plats will be available for
inspection in the Arizona State Office,
Bureau of Land Management, One North
Central Avenue, Suite 800, Phoenix,
Arizona 85004-4427. Persons who use a
telecommunications device for the deaf
(TDD) may call the Federal Information
Relay Service (FIRS) at 1-800-877-8339
to contact the above individual during
normal business hours. The FIRS is
available 24 hours a day, 7 days a week,
to leave a message or question with the
above individual. You will receive a
reply during normal business hours.

Gerald T. Davis,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2017-01008 Filed 1-17-17; 8:45 am]

BILLING CODE 4310-32-P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[LLORW00000.L51010000.
ER0000.LVRWH09H0570.16XL5017AP.
WAOR65753.HAG 17-0051]

**Notice of Availability of the Record of
Decision for the Proposed Vantage to
Pomona Heights 230 kV Transmission
Line Project in Grant, Kittitas, and
Yakima Counties, Washington**

AGENCY: Bureau of Land Management,
Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land
Management (BLM) announces the
availability of the Record of Decision
(ROD) authorizing the issuance of a
right-of-way grant (ROW) to Pacific
Power to construct, operate, and
maintain an electric transmission line
on land administered by the BLM for
the Vantage to Pomona Heights 230
kilovolt (kV) Transmission Line Project
(Project). The Coeur d'Alene and
Spokane District Manager signed the
ROD on January 13, 2017, which
constitutes the final decision by the
BLM.

ADDRESSES: The BLM has sent copies of
the ROD to cooperating agencies
(identified below), public libraries in
the Project area, and interested parties
who previously requested a copy.
Copies of the ROD are available upon
request and for public inspection at the
addresses listed in the **SUPPLEMENTARY
INFORMATION** section. The ROD and
supporting documents are also available
electronically on the National ePlanning
National Environmental Policy Act
(NEPA) Register at: <http://1.usa.gov/1S4ssrO>.

FOR FURTHER INFORMATION CONTACT:

Robin Estes, BLM Project Manager, at
(541) 416-6728, by email at blm_or_vantage_pomona@blm.gov, or at the
following address: BLM Spokane
District Office, 1103 North Fancher
Road, Spokane Valley, WA 99212-1275.
Persons who use a telecommunications
device for the deaf (TDD) may call the
Federal Relay Service at 1-800-877-
8339 to contact the above individual
during normal business hours. The
service is available 24 hours a day, 7
days a week, to leave a message or
question with the above individual. You
will receive a reply during normal
business hours.

SUPPLEMENTARY INFORMATION: Pacific
Power filed Federal applications for
ROWs with the BLM, the U.S.
Department of the Army Joint Base
Lewis-McChord Yakima Training Center

(JBLM YTC), and the U.S. Bureau of Reclamation (Reclamation) for the construction, operation, and maintenance of a 230 kV transmission line. The transmission line would run from Pacific Power's Pomona Heights Substation located east of Selah, Washington, in Yakima County to the Bonneville Power Administration (BPA) Vantage Substation located just east of the Wanapum Dam in Grant County, Washington. Pacific Power's stated interest in the new transmission line is to reduce the risk of service interruptions and ensure continued reliable, efficient, and coordinated service to the Yakima Valley.

The NEPA analysis for the Project fully describes Project alternatives; identifies direct, indirect, and cumulative impacts; and identifies mitigation measures that could avoid, minimize, or offset potential impacts. In accordance with 40 CFR 1501.5, the BLM was the Lead Agency for conducting the NEPA analysis. The cooperating agencies (40 CFR parts 1508.5 and 1501.6) in the NEPA process were the JBLM YTC; Reclamation; BPA; Federal Highway Administration; U.S. Fish and Wildlife Service; Washington Department of Archaeology and Historic Preservation; Washington Department of Fish and Wildlife; Washington Department of Natural Resources; Washington State Department of Transportation; and Grant, Kittitas, and Yakima Counties. To address any unavoidable impacts of the Project to Greater Sage-grouse, a project-specific Framework for Development of a Greater Sage-Grouse Compensatory Mitigation Plan (Mitigation Framework) was developed. The Mitigation Framework provides the guidance to facilitate Pacific Power's development of a Greater Sage-grouse Compensatory Mitigation Plan. The Mitigation Framework is included as an appendix in the Final Environmental Impact Statement (EIS) and in the ROD.

Pursuant to NEPA implementing regulation 40 CFR 1501.7, the Notice of Intent (NOI) to prepare an EIS for the proposed Project was published in the **Federal Register** on January 5, 2010 (75 FR 429). The publication of the NOI initiated the public scoping comment period that concluded on March 8, 2010.

On January 4, 2013, the BLM published the Notice of Availability (NOA) for the Draft EIS in the **Federal Register** (78 FR 756), starting the 90-day public comment period. As a result of the comments received at public meetings and submitted in writing during the Draft EIS comment period, a new alternative route, the New Northern

Route (NNR) Alternative, was identified. The NNR Alternative is 40.5 miles in length. The BLM determined that a Supplemental Draft EIS was required in order to assess the effects of the NNR Alternative. On January 2, 2015, the BLM published the NOA for the Supplemental Draft EIS in the **Federal Register** (80 FR 50).

The BLM was the Lead Federal Agency for the NEPA analysis process and preparation of the EIS. On October 21, 2016, the BLM published the NOA for the Final EIS in the **Federal Register** (81 FR 72821). Printed and electronic copies of the Draft EIS, Supplemental Draft EIS, and Final EIS are available at the Spokane District Office and, electronically, on the National ePlanning NEPA Register at: <http://1.usa.gov/1S4ssrO>.

The BLM purpose and need for the action is to respond to a ROW application submitted under Section 501 of the Federal Land Policy and Management Act (43 U.S.C. 1761(a)) to use public lands for an electric transmission system and related facilities. The BLM adopted the Agency Preferred Alternative, the NNR Alternative—Overhead Design Option, from the Final EIS. The ROD approves issuance of a ROW to Pacific Power over approximately 4 miles of land administered by the BLM crossed by the NNR Alternative—Overhead Design Option in Yakima and Kittitas Counties. The BLM Coeur d'Alene and Spokane District Manager signed the ROD, which constitutes the final decision of the BLM and makes the decision to issue a ROW effective immediately. Copies of the ROD are available for public inspection during normal business hours at the following BLM offices: Bureau of Land Management, Wenatchee Field Office, 915 Walla Walla Ave., Wenatchee, Washington; and Bureau of Land Management, Spokane District Office, 1103 N. Fancher Rd., Spokane Valley, Washington.

Appeal Information: This decision may be appealed to the Interior Board of Land Appeals in accordance with the regulations contained in 43 CFR part 4. Appeal and stay procedures are outlined in Form 1842–1.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Linda Clark,

Spokane District Manager and Authorizing Officer.

[FR Doc. 2017–01000 Filed 1–17–17; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2016–0045]

Atlantic Wind Lease Sale 7 (ATLW–7) for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Kitty Hawk, North Carolina—Final Sale Notice; MMAA104000

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Final Sale Notice for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Kitty Hawk, North Carolina.

SUMMARY: This document is the Final Sale Notice (FSN) for the sale of one commercial wind energy lease on the Outer Continental Shelf (OCS) offshore Kitty Hawk, North Carolina, pursuant to 30 CFR 585.216. The Bureau of Ocean Energy Management (BOEM) will offer Lease OCS–A 0508 for sale using an ascending bidding auction format. The FSN contains information pertaining to the area available for leasing, provisions and conditions, auction details, the lease form, criteria for evaluating competing bids, award procedures, appeal procedures, and lease execution. The issuance of the lease resulting from this sale would not constitute an approval of project-specific plans to develop offshore wind energy. Such plans, if submitted by the lessee, would be subject to subsequent environmental, technical, and public reviews prior to a decision to authorize any such development.

DATES: BOEM will hold a mock auction for the bidders starting at 9:00 a.m. Eastern Standard Time (EST) on March 14, 2017. The monetary auction will be held online and will begin at 9:00 a.m. EST on March 16, 2017. Additional details are provided in the section entitled “Deadlines and Milestones for Bidders.”

FOR FURTHER INFORMATION CONTACT: Will Waskes, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM–OREP, Sterling, Virginia 20166, (703) 787–1320 or Will.Waskes@boem.gov.

Authority: This FSN is published pursuant to subsection 8(p) of the OCS Lands Act (43 U.S.C. 1337(p)), as amended by section 388 of the Energy Policy Act of 2005, and the implementing regulations at 30 CFR part 585, including sections 211 and 216.

Background: BOEM proposed this lease sale on August 16, 2016, in the *Proposed Sale Notice and Request for Interest (PSN/RFI) for Commercial*

Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore North Carolina (Kitty Hawk), which was published in the **Federal Register** (81 FR 54591). A 60-day comment period followed. BOEM received 19 comment submissions in response to the PSN/RFI, which are available on regulations.gov (Docket ID: BOEM-2016-0045) at: <https://www.regulations.gov/docket?D=BOEM-2016-0045>. BOEM has posted a document containing responses to comments submitted during the PSN/RFI comment period. The document, entitled *Response to Comments*, can be found through BOEM's Web site at: <http://www.boem.gov/North-Carolina>.

In response to the Request for Interest, BOEM received one affirmation of interest from an existing legally, technically, and financially qualified entity. In addition to this affirmation of interest, eight new entities submitted qualifications in response to the PSN and have been determined to be qualified to participate in the North Carolina (Kitty Hawk) lease sale. Accordingly, BOEM has determined that competitive interest in OCS-A 0508 continues to exist, and BOEM is proceeding with a competitive leasing process as set forth in 30 CFR 585.211 through 585.225.

Environmental Reviews

On January 23, 2015, BOEM published a Notice of Availability (NOA) of an Environmental Assessment (EA) for commercial wind lease issuance and site assessment activities on the Atlantic OCS offshore North Carolina with a 30-day public comment period (80 FR 3621). In response to the NOA, BOEM received 195 comments, which are available at <http://www.regulations.gov>, Docket No. BOEM-2015-0001. Many of the comments focused on mitigation measures to protect wildlife, specifically marine mammals. Based on the comments received in response to the EA, public outreach, information meetings, and new information received, BOEM made revisions to the EA originally published in January 2015. As a result of the analysis in the revised EA, BOEM issued a Finding of No Significant Impact (FONSI) on September 18, 2015, (80 FR 56494). The revised EA and FONSI can be found at: <http://www.boem.gov/North-Carolina/>.

In addition, BOEM has concluded consultations under the Endangered Species Act (ESA) with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (NMFS), and under the Magnuson-Stevens Fishery Conservation and Management Act with NMFS, relating to the lease sale,

associated site characterization surveys, and subsequent site assessment activities. In October 2016, the States of North Carolina and Virginia concurred with BOEM's consistency determination under the Coastal Zone Management Act.

On May 23, 2013, BOEM executed a programmatic agreement (PA) with the State Historic Preservation Officer of North Carolina and the Advisory Council on Historic Preservation to guide consultation under section 106 of the National Historic Preservation Act for renewable energy activities offshore North Carolina. The PA provides for consultation to continue throughout BOEM's commercial leasing process and the decision-making process regarding the approval, approval with modification, or disapproval of a lessee's Site Assessment Plan (SAP) and/or Construction and Operations Plan (COP). In addition, the PA allows for phased identification and evaluation of historic properties. The PA can be found at: <http://www.boem.gov/South-Atlantic-Renewable-Energy-Activities/>.

On May 7, 2015, BOEM completed its section 106 review for issuing commercial leases within the North Carolina Wind Energy Areas (WEA) and published a *Finding of No Historic Properties Affected For the Issuance of Commercial Leases within the Kitty Hawk, Wilmington East and Wilmington West Wind Energy Areas For Wind Energy Development on the Outer Continental Shelf Offshore North Carolina*. The Finding can be found at: <http://www.boem.gov/NC-WEAs-Lease-Issuance/>.

Through its environmental review process, and in consideration of the comments received in response to the EA, BOEM developed measures to mitigate potential impacts from site characterization surveys and site assessment activities. Mitigation measures designed to reduce or eliminate impacts from survey activities will be enforced through the terms, conditions, and stipulations included in Addendum "C" of Lease OCS-A 0508. Mitigation measures related to the installation and operation of meteorological towers and/or buoys would be included as terms and conditions of the eventual lessee's SAP approval. This suite of mitigation measures was developed using the best available science, and BOEM will continue to work with affected stakeholders and assess ongoing and future research relating to potential survey, site assessment, and construction and operations impacts, including potential mitigation measures. Additional environmental reviews and

consultations will be conducted as necessary upon receipt of the lessee's SAP and COP.

List of Eligible Bidders: BOEM has determined that pursuant to 30 CFR 585.106 and 107, the following entities are legally, technically, and financially qualified to hold a commercial wind lease offshore North Carolina, and therefore may participate in this lease sale as bidders subject to meeting the requirements outlined in this notice.

Company name	Company No.
Avangrid Renewables, LLC	15019
Enbridge Holdings (Green Energy) L.L.C	15065
Shell WindEnergy Inc	15066
Northland Power America Inc	15068
Wind Future LLC	15067
Outer Banks Ocean Energy, LLC	15008
PNE Wind USA, Wind Inc	15056
Statoil Wind US LLC	15058
wpd offshore Alpha LLC	15060

Deadlines and Milestones for Bidders: This section describes the major deadlines and milestones in the auction process from publication of this FSN to execution of the lease pursuant to this sale. These are organized into various stages: the FSN Waiting Period; Conducting the Auction; and From the Auction to Lease Execution.

• FSN Waiting Period

• *Bidder's Financial Form (BFF):* Each bidder must submit a BFF to BOEM in order to participate in the auction. BOEM must receive each bidder's BFF no later than February 2, 2017. BOEM will consider extensions to this deadline only if BOEM determines that the failure to timely submit a BFF was caused by events beyond the bidder's control. The BFF can be downloaded at: <http://www.boem.gov/North-Carolina/>. Once the BFF has been processed, bidders may log into pay.gov and submit a bid deposit. For purposes of this auction, BOEM will not consider any BFFs submitted by bidders for previous lease sales. BOEM will only accept an originally executed paper copy of the BFF. The BFF must be executed by an authorized representative as shown on the bidder's legal qualifications. Each bidder is required to sign the self-certification in the BFF, in accordance with 18 U.S.C. 1001 (Fraud and False Statements).

• *Bid Deposit:* Each bidder must provide a bid deposit of \$450,000 no later than February 16, 2017, in order to participate in the mock auction and the monetary auction. BOEM will consider extensions to this deadline only if BOEM determines that the failure to

timely submit the bid deposit was caused by events beyond the bidder's control. Further information about bid deposits can be found in the "Bid Deposit" section of this notice.

- **Mock Auction:** BOEM will hold a Mock Auction on March 14, 2017, beginning at 9:00 a.m. EST. The Mock Auction will be held online. BOEM will contact each bidder that has timely filed a BFF and bid deposit and provide instructions for participation. Only bidders that have timely submitted BFFs and bid deposits will be permitted to participate in the Mock Auction.

- **Conducting the Auction:** BOEM, through its contractor, will hold an auction as described in this notice.

- **Auction:** On March 16, 2017, BOEM, through its contractor, will hold the auction. The first round of the auction will start at 9:00 a.m. EST. The auction will proceed electronically according to a schedule to be distributed by the BOEM Auction Manager at the time of the auction. BOEM anticipates that the auction will last one business day, but it may continue on consecutive business days, as necessary, until the auction ends in accordance with the procedures described in the "Auction Format" section of this notice. The monetary bidding will end in the first round in which BOEM receives one or zero bids at the asking price.

- **Announce Provisional Winner:** BOEM will announce the provisional winner of the lease sale after the auction ends.

- **From the Auction to Lease Execution**

- **Refund Non-Winners:** Once the provisional winner has been announced, BOEM will provide the non-winners a written explanation of why they did not win and return their bid deposits.

- **Department of Justice (DOJ) Review:** DOJ will have 30 days in which to conduct an antitrust review of the auction, pursuant to 43 U.S.C § 1337(c).

- **Delivery of the Lease:** BOEM will send three lease copies to the winner, with instructions on how to execute the lease. The first year's rent is due 45 calendar days after the winner receives the lease copies for execution.

- **Return the Lease:** Within 10 business days of receiving the lease copies, the auction winner must post financial assurance, pay any outstanding balance of its bonus bid (*i.e.*, winning monetary bid minus applicable bid deposit), and sign and return the three executed lease copies. The winner may request extensions to the 10-day deadline, and BOEM may grant such extensions if BOEM determines the delay to be caused by

events beyond the winner's control, pursuant to 30 CFR 585.224(e).

- **Execution of Lease:** Once BOEM has received the lease copies and verified that all other required materials have been received, BOEM will make a final determination regarding its issuance of the lease and will execute the lease, if appropriate.

- **Area Offered for Leasing:** The area available for sale will be auctioned as one lease, Lease OCS-A 0508, (Kitty Hawk Lease Area (LA)). The Kitty Hawk LA consists of 122,405 acres. The Kitty Hawk LA is the same as the Kitty Hawk WEA that BOEM announced on August 11, 2014, and published in the PSN. A description of the Kitty Hawk LA can be found in Addendum "A" of the lease, which along with the Area Identification announcement and PSN, are available with this notice on the BOEM Web site at: <http://www.boem.gov/North-Carolina/>.

Map of the Area Offered for Leasing

A map of the Kitty Hawk LA, and GIS spatial files X, Y (eastings, northings) UTM Zone 18, NAD83 Datum, and geographic X, Y (longitude, latitude), NAD83 Datum can be found on BOEM's Web site at: <http://www.boem.gov/North-Carolina/>.

A large scale map of the Kitty Hawk LA, showing boundaries of the area with numbered blocks, is available from BOEM upon request at the following address: Bureau of Ocean Energy Management, Office of Renewable Energy Programs, 45600 Woodland Road, VAM-OREP, Sterling, Virginia 20166, Phone: (703) 787-1300, Fax: (703) 787-1708.

Withdrawal of Blocks: BOEM reserves the right to withdraw all or portions of the Kitty Hawk LA prior to executing the lease with the winning bidder, based upon relevant information provided to BOEM.

Lease Terms and Conditions: BOEM has included terms, conditions, and stipulations for the OCS commercial wind lease to be offered through this sale. After the lease is issued, BOEM reserves the right to require compliance with additional terms and conditions associated with approval of a SAP or COP. The lease is available on BOEM's Web site at: <http://www.boem.gov/North-Carolina/>. The lease includes the following seven attachments:

- Addendum "A" (Description of Leased Area and Lease Activities);
- Addendum "B" (Lease Term and Financial Schedule);
- Addendum "C" (Lease Specific Terms, Conditions, and Stipulations);
- Addendum "D" (Project Easement);

- Addendum "E" (Rent Schedule post-COP approval);

- Appendix A to Addendum "C" (Incident Report: Protected Species Injury or Mortality); and

- Appendix B to Addendum "C" (Required Data Elements for Protected Species Observer Reports).

Addenda "A," "B," and "C" provide detailed descriptions of lease terms and conditions. Addenda "D" and "E" will be completed at the time of COP approval or approval with modifications.

The most recent version of BOEM's renewable energy commercial lease form (BOEM-0008) is available on BOEM's Web site at: <http://www.boem.gov/BOEM-OCS-Operation-Forms/>.

Potential bidders should note that BOEM and the Bureau of Safety and Environmental Enforcement (BSEE) are in the process of reassigning regulations relating to safety and environmental oversight and enforcement responsibilities for offshore renewable energy projects from BOEM to BSEE. Once this administrative reassignment is finalized, BOEM may make ministerial and non-substantive amendments to the lease to conform it to the regulatory revisions.

Plans: Pursuant to 30 CFR 585.601, the leaseholder wishing to submit a SAP must do so within 12 months of lease issuance. If the lessee intends to continue its commercial lease with an operations term, the lessee must submit a COP at least 6 months before the end of the site assessment term.

Financial Terms and Conditions: This section provides an overview of the annual payments required of the lessee that will be fully described in the lease, and the financial assurance requirements that will be associated with the lease.

Rent: Pursuant to 30 CFR 585.224(b) and 585.503, the first year's rent payment of \$3 per acre is due within 45 calendar days of the date the lessee receives the lease for execution. Thereafter, annual rent payments are due on the anniversary of the Effective Date of the lease (the "Lease Anniversary"). Once commercial operations under the lease begin, BOEM will charge rent only for the portions of the lease not authorized for commercial operations, *i.e.*, not generating electricity. However, instead of geographically dividing the leased area into acreage that is "generating" and "non-generating," the fraction of the lease accruing rent will be based on the fraction of the total nameplate capacity of the project that is not yet in operation. This fraction is calculated by

dividing the nameplate capacity not yet authorized for commercial operations at the time payment is due by the anticipated nameplate capacity after full installation of the project (as described in the COP). The annual rent due for a given year is then derived by multiplying this fraction by the amount of rent that would have been due for the lessee's entire LA at the rental rate of \$3 per acre.

For a 122,405 acre lease (the size of the Kitty Hawk LA), the rent payment will be \$367,215 per year if no portion of the LA is authorized for commercial operations. If 300 megawatts (MW) of a project's nameplate capacity is operating (or authorized for operation), and the approved COP specifies a maximum project size of 500 MW, the rent payment will be \$146,886. This payment is based on the 200 MW of nameplate capacity BOEM has not yet authorized for commercial operations. For the above example, this would be calculated as follows: $200\text{MW}/500\text{MW} \times (\$3/\text{acre} \times 122,405 \text{ acres}) = \$146,886$.

If the lessee submits an application for relinquishment of a portion of its leased area within the first 45 calendar

days following the date that the lease is received by the lessee for execution, and BOEM approves that application, no rent payment will be due on the relinquished portion of the Kitty Hawk LA. Later relinquishments of any portion of the Kitty Hawk LA will reduce the lessee's rent payments starting in the year following BOEM's approval of the relinquishment.

The lessee also must pay rent for any project easement associated with the lease, commencing on the date that BOEM approves the COP (or modification thereof) that describes the project easement. Annual rent for a project easement that is 200 feet wide and centered on the transmission cable is \$70 per statute mile. For any additional acreage required, the lease must also pay the greater of \$5 per acre per year or \$450 per year.

Operating Fee: For purposes of calculating the initial annual operating fee payment and pursuant to 30 CFR 585.506, an operating fee rate is applied to a proxy for the wholesale market value of the electricity expected to be generated from the project during its first twelve months of operations. This

initial payment will be prorated to reflect the period between the commencement of commercial operations and the Lease Anniversary. The initial annual operating fee payment is due within 45 days of the commencement of commercial operations. Thereafter, subsequent annual operating fee payments are due on or before each Lease Anniversary.

The subsequent annual operating fee payments are calculated by multiplying the operating fee rate by the imputed wholesale market value of the projected annual electric power production. For the purposes of this calculation, the imputed market value is the product of the project's annual nameplate capacity, the total number of hours in the year (8,760), the capacity factor, and the annual average price of electricity derived from a historical regional wholesale power price index. For example, the annual operating fee for a 100 MW wind facility operating at a 40% capacity (*i.e.*, capacity factor of 0.4) with a regional wholesale power price of \$40/MWh and an operating fee rate of 0.02 would be calculated as follows:

$$\text{Annual Operating Fee} = 100\text{MW} \times 8,760 \frac{\text{hrs}}{\text{year}} \times 0.4 \times \frac{\$40}{\text{MWh}} \text{Power Price} \times 0.02 = \$280,320$$

Operating Fee Rate: The operating fee rate is the share of imputed wholesale market value of the projected annual electric power production due to the Office of Natural Resources Revenue as an annual operating fee. For the Kitty Hawk LA, BOEM will set the fee rate at 0.02 (*i.e.*, 2%) for the entire life of commercial operations.

Nameplate Capacity: Nameplate capacity is the maximum rated electric output, expressed in MW, that the turbines of the wind facility under commercial operations can produce at their rated wind speed as designated by the turbine's manufacturer. The lessee will specify in its COP the nameplate capacity available at the start of each year of commercial operations on the lease. For example, if the lessee specifies 20 turbines in its COP, and each is rated by the manufacturer at 5 MW, the nameplate capacity of the wind facility is 100 MW.

Capacity Factor: The capacity factor compares the amount of energy delivered to the grid during a period of time to the amount of energy the wind facility would have produced at full capacity. The amount of power delivered in a year will always be less than the theoretical 100% capacity, largely because of the variability of

wind speeds, transmission line loss, and downtime for maintenance or other purposes.

The capacity factor is expressed as a decimal between zero and one, and represents the share of anticipated generation of the wind facility that is delivered to the interconnection grid (*i.e.*, where the lessee's facility interconnects with the electric grid) relative to the wind facility's generation at continuous full power operation at nameplate capacity. BOEM has set the capacity factor for the year in which commercial operations commence and the six full years thereafter at 0.4 (*i.e.*, 40%). At the end of the sixth year, BOEM may adjust the capacity factor to reflect the performance over the previous five years based upon the actual metered electricity generation at the delivery point to the electrical grid. BOEM may make similar adjustments to the capacity factor once every five years thereafter. The maximum change in the capacity factor from one period to the next will be limited to plus or minus 10 percent of the previous period's value.

Wholesale Power Price Index: Pursuant to 30 CFR 585.506(c)(2)(i), the wholesale power price, expressed in dollars per MW-hour, is determined at the time each annual operating fee

payment is due, based on the weighted average of the inflation-adjusted peak and off-peak spot price indices for the PJM Dominion zone for the most recent year of spot price data available. The wholesale power price is adjusted for inflation from the year associated with the published spot price indices to the year in which the operating fee is to be due, based on the lease anniversary and using annual implicit price deflators as reported by the U.S. Department of Commerce, Bureau of Economic Analysis.

Financial Assurance: Within 10 business days after receiving the lease copies and pursuant to 30 CFR 585.515–516, the provisional winner of the Kitty Hawk LA must provide an initial lease-specific bond or other approved means of meeting the lessor's initial financial assurance requirements. The provisional winner may meet financial assurance requirements by posting a surety bond or by setting up an escrow account with a trust agreement giving BOEM the right to withdraw the money held in the account on demand. BOEM encourages the provisionally winning bidder to discuss the financial assurance requirement with BOEM as soon as possible after the auction has concluded.

BOEM will base the amount of all SAP, COP, and decommissioning financial assurance requirements on cost estimates for meeting all accrued lease obligations at the respective stages of development. The required amount of supplemental and decommissioning financial assurance will be determined on a case-by-case basis.

The financial terms described above can be found in Addendum "B" of the lease, which BOEM has made available with this notice on its Web site at: <http://www.boem.gov/North-Carolina/>.

Bidder's Financial Form: Each bidder must fill out the BFF referenced in this FSN. BOEM has also made a copy of the form available with this notice on its Web site at: <http://www.boem.gov/North-Carolina/>. BOEM recommends that each bidder designate an email address in its BFF that the bidder will then use to create an account in *pay.gov* (if it has not already done so).

BOEM will not consider BFFs submitted by bidders for previous lease sales to satisfy the requirements of this auction. BOEM will also only consider BFFs submitted after the deadline if BOEM determines that the failure to timely submit the BFF was caused by events beyond the bidder's control. BOEM will only accept an original, executed paper copy of the BFF. The BFF must be executed by an authorized representative who has been identified in the qualifications package on file with BOEM as authorized to bind the company.

Bid Deposit: A bid deposit is an advance cash payment submitted to BOEM in order to participate in the auction. After creating an account in *pay.gov* (if necessary), bidders may use the Bid Deposit Form on the *pay.gov* Web site to leave a deposit. Each bidder must submit a bid deposit of \$450,000 no later than February 16, 2017. Any bidder who fails to submit the bid deposit by this deadline may be disqualified from participating in the auction.

Following the auction, bid deposits will be applied against bonus bids or other obligations owed to BOEM. If the bid deposit exceeds a bidder's total financial obligation, the balance of the bid deposit will be refunded to the bidder. BOEM will refund bid deposits to non-winners once BOEM has announced the provisional winner.

If BOEM offers a lease pursuant to a provisionally winning bid, and that bidder fails to timely return the signed lease form, establish financial assurance, and/or pay the balance of its bid, BOEM will retain the bidder's \$450,000 bid deposit. BOEM reserves the right to determine which bid would

have won in the absence of the bid previously-determined to be the winning bid, and to offer a lease pursuant to this next highest bid.

Minimum Bid: The minimum bid is the lowest bid BOEM will accept as a winning bid and it is where BOEM will start the monetary bidding. BOEM has established a minimum bid of \$2.00 per acre, or \$244,810, for this lease sale.

Auction Procedures

Ascending Bidding With Cash Bid Variable

As authorized under 30 CFR 585.220(a)(2) and 585.221(a)(1), BOEM will use an ascending bidding auction with cash as the bid variable for this sale. Using an online bidding system to host the auction, BOEM will start the bidding for Lease OCS-A 0508 at \$244,810, and increase that price incrementally until no more than one active bidder remains in the auction.

The Auction

The auction will be conducted in a series of rounds. At the start of each round, BOEM will state an asking price for the LA. If a bidder is willing to meet that asking price for the LA, it will indicate this by submitting a bid equal to the asking price, *i.e.*, a live bid.

To participate in any round of the auction, a bidder must have submitted a live bid in the previous round. As long as there are two or more live bids for the LA, the auction will proceed to the next round. Between rounds, BOEM will raise the asking price for the LA by an increment that it determines appropriate. Asking price increments are within BOEM's sole discretion, but may be based on a number of factors, including the number of bidders still active in the auction and BOEM's best estimate of how many rounds may remain before the auction is resolved.

As the auction proceeds, a bidder will retain its eligibility to continue bidding as long as that bidder submitted a live bid in the previous round. Between rounds, BOEM will release information indicating the number of live bids in the previous round of the auction (*i.e.*, the level of demand) and the asking price in the upcoming round of the auction. Bidders may be bound by any of their bids until the auction results are finalized.

Exit Bidding

In any round after the first round of the auction, a bidder may submit an exit bid that is higher than the previous round's asking price, but less than the current round's asking price. If a bidder submits an exit bid, it is not eligible to participate in any subsequent rounds of

the auction. During the auction, exit bids will be seen only by BOEM and not by other bidders.

If the LA receives only exit bids in a round, no bidders will be eligible to bid in the next round, and the auction will conclude.

Determining the Provisional Winner

The auction will end in the first round in which at most one live bid is received. If there is one live bid in the final round, that bid is the provisionally winning bid. If there are no live bids, the highest exit bid is the provisionally winning bid. If there is a tie for the highest exit bid, BOEM's tie-breaking procedures will resolve the tie. If BOEM receives no live or exit bids, then there is a tie among all bidders that had submitted live bids in the previous round and BOEM's tie-breaking procedures will determine the provisionally winning bid.

Ties are resolved by a random process. The auction system generates a random number for each bidder. In the event of a tie, these numbers are compared, and the tied bidder with the highest random number is deemed the provisional winner.

Additional Information Regarding the Auction Format

Bidder Authentication

For the online auction, BOEM will require two-factor authentication. After BOEM has processed the bid deposits, the auction contractor sends several bidder authentication packages to the bidders. One package will contain digital authentication tokens necessary for allowing access to the auction Web site. As a general practice, tokens are mailed to the Primary Point of Contact indicated on the BFF. This individual is responsible for distributing the tokens to the individuals authorized to bid for that company. *Bidders are to ensure that each token is returned within three business days following the auction.* An addressed, stamped envelope will be provided to facilitate this process. In the event that a bidder fails to submit a bid deposit or does not participate in the auction, BOEM will de-activate that bidder's tokens and login information, and the bidder will be asked to return its tokens.

The second package contains login credentials for authorized bidders. The login credentials are mailed to the address provided in the BFF for each authorized individual. Bidders can confirm these addresses by calling 703-787-1320. This package will contain user login information and instructions for accessing the Bidder Manual for the

auction system, the Auction System Technical Supplement (ASTS) and the Alternative Bidding Form, all of which are available on BOEM's Web site at: <http://www.boem.gov/North-Carolina/>. The login information, along with the tokens, will be tested during the Mock Auction.

Timing of Auction

The auction will begin at 9:00 a.m. EST on March 16, 2017. Bidders may log in as early as 8:30 a.m. on that day. We recommend that bidders log in earlier than 9:00 a.m. on that day to ensure that any login issues are resolved prior to the start of the auction. Once bidders have logged in, they should review the auction schedule, which lists the anticipated start times, end times, and recess times of each round in the auction. Each round is structured as follows:

- Round bidding begins;
- Bidders enter their bids;
- Round bidding ends and the Recess begins;
- During the Recess, previous Round results are posted;
- Bidders review the previous Round results and prepare their next Round bids; and
- Next Round bidding begins.

The first round will last about 30 minutes, though subsequent rounds may be shorter. Recesses are anticipated to last approximately 10 minutes. The description of the auction schedule included with this FSN is tentative. Bidders should consult the auction schedule on the bidding Web site during the auction for updated times. Bidding may continue until about 6:00 p.m. each day. BOEM anticipates that the auction will last one business day, but bidders are advised to prepare to continue bidding for additional business days as necessary to resolve the auction.

BOEM and the auction contractors will use the auction platform messaging service to keep bidders informed on issues of interest during the auction. For example, BOEM may change the schedule at any time, including during the auction. When BOEM changes the schedule during an auction, it uses the messaging feature to notify bidders that a revision has been made, and directs bidders to the relevant page. BOEM also uses the messaging system for other changes and updates during the auction.

Bidders may place bids at any time during the round. At the top of the bidding page, a countdown clock shows how much time remains in the round. Bidders have until the scheduled time to place bids. Bidders should do so according to the procedures described in this notice, and the ASTS. No

information about the round results is available until the round has closed and results have been posted, so there is no strategic advantage to placing bids early or late in the round.

The timing of the auction will be elaborated on and clarified in the ASTS. The ASTS describes auction procedures that are incorporated by reference in this notice, unless the procedures described in the ASTS directly contradict this notice. In the event of an inconsistency between the ASTS and the FSN, the FSN is controlling.

Prohibition on Communications Between Bidders During Auction

During the auction, bidders are prohibited from communicating with each other regarding their participation in the auction. Additionally, during the auction, bidders are prohibited from communicating to the general public, including, but not limited to, through social media, updated Web sites, or press releases, regarding any aspect of their participation or lack thereof in the auction.

Alternate Bidding Procedures

Alternate Bidding Procedures enable a bidder who is having difficulty accessing the Internet to submit its bid via fax using an Alternate Bidding Form available on BOEM's Web site at: <http://www.boem.gov/North-Carolina/>.

In order to be authorized to use an Alternate Bidding Form, a bidder must call the help desk number listed in the Auction Manual *before* the end of the round. BOEM will authenticate the caller to ensure he/she is authorized to bid on behalf of the bidder. The bidder must explain the reasons for which he/she is forced to place a bid using the Alternate Bidding Procedures. BOEM may, in its sole discretion, permit or refuse to accept a request for the placement of a bid using the Alternate Bidding Procedures.

Rejection or Non-Acceptance of Bids: BOEM reserves the right and authority to reject any and all bids that do not satisfy the requirements and rules of the auction, the FSN, or applicable regulations and statutes.

Anti-Competitive Review: Bidding behavior in this sale is subject to Federal antitrust laws. Accordingly, following the auction, but before the acceptance of bids and the issuance of leases, BOEM will "allow the Attorney General, in consultation with the Federal Trade Commission, 30 days to review the results of the lease sale." 43 U.S.C. 1337(c). If a bidder is found to have engaged in anti-competitive behavior in connection with its participation in the competitive bidding

process, BOEM may reject the provisionally winning bid. Compliance with BOEM's auction procedures and regulations is not an absolute defense to violations of antitrust laws.

Anti-competitive behavior determinations are fact-specific. However, such behavior may manifest itself in several different ways, including, but not limited to:

- An express or tacit agreement among bidders not to bid in an auction, or to bid a particular price;
- An agreement among bidders not to bid;
- An agreement among bidders not to bid against each other; or
- Other agreements among bidders that have the potential to affect the final auction price.

BOEM will decline to award a lease pursuant to 43 U.S.C. 1337(c) if the Attorney General, in consultation with the Federal Trade Commission, determines that awarding the lease would be inconsistent with the antitrust laws.

For more information on whether specific communications or agreements could constitute a violation of Federal antitrust law, please see: <http://www.justice.gov/atr/public/business-resources.html>, or consult legal counsel.

Process for Issuing the Lease: Once all post-auction reviews have been completed to BOEM's satisfaction, BOEM will issue three unsigned copies of the lease to the provisionally winning bidder. Within 10 business days after receiving the lease copies, the provisionally winning bidder must:

1. Sign and return the lease copies on the bidder's behalf;
2. File financial assurance, as required under 30 CFR 585.515–537; and
3. Pay by electronic funds transfer (EFT) the balance (if any) of the bonus bid (winning bid less the bid deposit). BOEM requires bidders to use EFT procedures (not *pay.gov*, the Web site bidders used to submit bid deposits) for payment of the balance of the bonus bid, following the detailed instructions contained in the "Instructions for Making Electronic Payments" available on BOEM's Web site at: <http://www.boem.gov/North-Carolina/>.

BOEM will not execute a lease until the three requirements above have been satisfied. BOEM has accepted the provisionally winning bidder's financial assurance pursuant to 30 CFR 585.515, and BOEM has processed the provisionally winning bidder's payment.

BOEM may extend the 10 business day deadline for signing the lease, filing the required financial assurance, and/or paying the balance of the bonus bid if

BOEM determines the delay was caused by events beyond the provisionally winning bidder's control.

If the provisionally winning bidder does not meet these requirements or otherwise fails to comply with applicable regulations or the terms of the FSN, BOEM reserves the right not to issue the lease to that bidder. In such a case, the provisionally winning bidder will forfeit its bid deposit. In such an event, BOEM reserves the right to identify the next highest bid submitted during the lease sale and offer the lease pursuant to that bid.

Within 45 calendar days of the date that the provisionally winning bidder receives copies of the lease, it must pay the first year's rent using the *pay.gov* Renewable Energy Initial Rental Payment form available at: <https://www.pay.gov/public/form/start/27797604/>. Subsequent annual rent payments must be made following the detailed instructions contained in the "Instructions for Making Electronic Payments," available on BOEM's Web site at: <http://www.boem.gov/North-Carolina/>.

Non-Procurement Debarment and Suspension Regulations: Pursuant to regulations at 43 CFR part 42, subpart C, an OCS renewable energy lessee must comply with the Department of the Interior's non-procurement debarment and suspension regulations at 2 CFR 180 and 1400. The lessee must also communicate this requirement to persons with whom the lessee does business relating to this lease, by including this term as a condition in their contracts and other transactions.

Force Majeure: The Program Manager of BOEM's Office of Renewable Energy Programs has the discretion to change any auction details specified in the FSN, including the date and time, in case of a *force majeure* event that the Program Manager deems may interfere with a fair and proper lease sale process. Such events may include, but are not limited to: natural disasters (e.g., earthquakes, hurricanes, floods, blizzards), wars, riots, acts of terrorism, fire, strikes, civil disorder or other events of a similar nature. In case of such events, BOEM will notify all qualified bidders via email or phone, or through the BOEM Web site at: <http://www.boem.gov/Renewable-Energy-Program/index.aspx>. Bidders should call 703-787-1320 if they have concerns.

Appeals: The appeals procedures are provided in BOEM's regulations at 30 CFR 585.225 and 585.118(c). Pursuant to 30 CFR 585.225:

(a) If BOEM rejects your bid, BOEM will provide a written statement of the reasons and refund any money

deposited with your bid, without interest.

(b) You will then be able to ask the BOEM Director for reconsideration, in writing, within 15 business days of bid rejection, under 30 CFR 585.118(c)(1). We will send you a written response either affirming or reversing the rejection.

The procedures for appealing final decisions with respect to lease sales are described in 30 CFR 585.118(c).

Protection of Privileged or Confidential Information: BOEM will protect privileged or confidential information that you submit, as required by the Freedom of Information Act (FOIA). Exemption 4 of FOIA applies to "trade secrets and commercial or financial information that you submit that is privileged or confidential." 5 U.S.C. 552(b)(4). If you wish to protect the confidentiality of such information, clearly mark it "Contains Privileged or Confidential Information" and consider submitting such information as a separate attachment. BOEM will not disclose such information, except as required by FOIA. Information that is not labeled as privileged or confidential will be regarded by BOEM as suitable for public release. Further, BOEM will not treat as confidential aggregate summaries of otherwise confidential information.

Dated: January 10, 2017.

Walter D. Cruickshank,

Acting Director, Bureau of Ocean Energy Management.

[FR Doc. 2017-01059 Filed 1-17-17; 8:45 am]

BILLING CODE 4310-MR-P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR85854000; XXXR4524KS;
RR.4888TR11.0040001]

Agency Information Collection Activities Under OMB Review; Proposed New Collection

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation has forwarded the following Information Collection Request to the Office of Management and Budget (OMB) for review and approval: Collection and Compilation of Water Pipeline Field Performance Data (OMB Control Number 1006-XXXX). The Information Collection Request describes the nature of the information collection and its expected cost burden.

DATES: OMB has up to 60 days to approve or disapprove this information collection request, but may respond after 30 days; therefore, public comment must be received on or before February 17, 2017.

ADDRESSES: Send written comments to the Desk Officer for the Department of the Interior at the Office of Management and Budget, Office of Information and Regulatory Affairs, via facsimile to (202) 395-5806, or email to oir_submission@omb.eop.gov. A copy of your comments should also be directed to Dr. Lee Sears, Materials and Corrosion Laboratory, 86-68540, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225; or via email to lsears@usbr.gov. Please reference OMB Control Number: 1006-XXXX in your comments.

FOR FURTHER INFORMATION CONTACT: Dr. Lee Sears at 303-445-2392. You may also view the Information Collection Request at www.reginfo.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Bureau of Reclamation (Reclamation) has obtained the services of an outside entity to survey water utilities and collect data on water pipeline performance. The information being collected is required to comply with a request from Congress for Reclamation to assemble data on pipeline reliability for specific types of pipes.

From 2013 through 2015, Reclamation worked with Water Research Foundation and Battelle Memorial Institute (Battelle) on a draft information collection request (ICR) to collect high-quality field performance data on pipeline reliability for water pipelines of different material and vintage. A **Federal Register** notice announcing the availability of this draft collection of this information was initiated on February 26, 2014 (79 FR 10842), offering the public a 60-day public comment period. A summary of comments received during the 60-day comment period, disposition of comments, and revised draft information collection were published in the **Federal Register** on October 1, 2014 (79 FR 59291) and the public comment period was reopened for another 30 days. In response to the public's request for additional time to comment, a third notice was published in the **Federal Register** on October 30, 2014 (79 FR 64622), extending the comment period another 30 days. In total, the public was provided 120 days to comment on the draft ICR. Also at the

public's request, all draft supporting documents were made available to the public for consideration. The contract between Reclamation and its partners was terminated in July 2015 before the ICR could be finalized.

Reclamation signed an agreement in November 2015 with Virginia Polytechnic Institute and State University (Virginia Tech) to develop a new ICR to collect buried water pipe performance data. The notice announcing the new draft ICR was published in the **Federal Register** on July 14, 2016 (81 FR 45533) to start the 60-day public comment period. The public comment period for this ICR ended on September 12, 2016. Information gathered from Reclamation's earlier attempt to develop an ICR to collect pipeline reliability data was incorporated into this current ICR.

II. Summary of Proposed Changes, Comments and Responses

Comments on this ICR were received from two entities. Responses to the public comments are addressed in Supporting Statement A of this ICR and are available for public review at www.reginfo.gov. Copies of the comments have also been uploaded at this same web address.

III. Data

Title: Collection and Compilation of Water Pipeline Field Performance Data.

OMB Control Number: 1006-XXXX.

Description of respondents: Water utility and Federal facility pipe data managers.

Frequency: One-time collection.

Estimated completion time: 10 minutes (making participation decision), 30 minutes (introductory webinar); and 110 minutes (uploading data). The total estimated time is 150 minutes for each respondent.

Estimated Total Number of Respondents: 500 (making participation decision).

Estimated Number of Responses per Respondent: 1.

Estimated Total of Annual Responses: 250.

Estimated Total Annual Burden Hours on Respondents: 83 hours (making participation decision); 126 hours (introductory webinar); and 459 hours (uploading data), for a combined total of 668 hours.

IV. Request for Comments

We invite your comments on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) the accuracy of our burden estimate for the proposed collection of information;

(c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Reclamation will display a valid OMB control number on the survey.

V. Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 10, 2017.

Richard W. LaFond,

*Chief, Civil Engineering Services Division,
Bureau of Reclamation.*

[FR Doc. 2017-01002 Filed 1-17-17; 8:45 am]

BILLING CODE 4332-90-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Claim for Reimbursement of Benefit Payments and Claims Expense Under the War Hazards Compensation Act

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, "Claim for Reimbursement of Benefit Payments and Claims Expense Under the War Hazards Compensation Act," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before February 17, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the [RegInfo.gov](http://www.reginfo.gov) Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201609-1240-003 or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: DOL_PRA_PUBLIC@dol.gov.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to DOL_PRA_PUBLIC@dol.gov.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Claim for Reimbursement of Benefit Payments and Claims Expense Under the War Hazards Compensation Act (WHCA), Form CA-278, information collection. The OWCP is responsible for administering the WHCA (42 U.S.C. 1701 *et seq.*). WHCA section 104(a) (42 U.S.C. 1704(a)) provides that an insurance carrier or self-insured who has paid workers' compensation benefits to or on account of any person for a war-risk hazard may seek reimbursement for benefits paid (plus expenses) out of the Federal Employees' Compensation Fund. *See also* 5 U.S.C. 8147. Insurance carriers and the self-insured file a Form CA-278 to request reimbursement. Regulations implementing the WHCA permit the OWCP to collect the information needed to consider the reimbursement request of an insurance carrier or self-insured. *See* 20 CFR 61.101 and 61.104. This

information collection has been classified as a revision, because of clarifications to a statement about accommodations available to persons with disabilities who file the form. WHCA section 104(a) authorizes this information collection. See 42 U.S.C. 1704(a).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240-0006. The DOL notes that existing information collection requirements submitted to the OMB remain in effect while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 12, 2016 (81 FR 70443).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240-0006. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL-OWCP.

Title of Collection: Claim for Reimbursement of Benefit Payments and Claims Expense Under the War Hazards Compensation Act.

OMB Control Number: 1240-0006.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 7.

Total Estimated Number of Responses: 345.

Total Estimated Annual Time Burden: 173 hours.

Total Estimated Annual Other Costs Burden: \$542.

Dated: January 11, 2017.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2017-00975 Filed 1-17-17; 8:45 am]

BILLING CODE 4510-CH-P

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: Museums for All Program Evaluation

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

ACTION: Notice, request for comments, and collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this notice, IMLS is soliciting comments concerning a proposed survey to collect information to monitor the use, expectations of and satisfaction with cultural programs and services, most especially library and museum services.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before March 17, 2017.

ADDRESSES: Send comments to: Christopher J. Reich, Chief Administrator, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW., Suite 4000, Washington, DC 20024-2135. Mr. Reich can be reached by Telephone: 202-653-4685, Fax: 202-653-4608, or by email at creich@imls.gov, or by teletype (TTY/TDD) for persons with hearing difficulty at 202-653-4614.

SUPPLEMENTARY INFORMATION:

I. Background

The Institute of Museum and Library Services is the primary source of federal support for the Nation's 123,000 libraries and 35,000 museums. The Institute's mission is to inspire libraries and museums to advance innovation, learning and civic engagement. The Institute works at the national level and in coordination with state and local organizations to sustain heritage, culture, and knowledge; enhance learning and innovation; and support professional development. IMLS is responsible for identifying national needs for and trends in museum, library, and information services; measuring and reporting on the impact and effectiveness of museum, library and information services throughout the United States, including programs conducted with funds made available by IMLS; identifying, and disseminating information on, the best practices of such programs; and developing plans to improve museum, library and information services of the United States and strengthen national, State, local, regional, and international communications and cooperative networks (20 U.S.C. Chapter 72, 20 U.S.C. 9108).

II. Current Actions

The purpose of this collection is to assess institutional and individual outcomes from participation in the *Museums for All* program. *Museums for All* is a voluntary program inviting museums to invite EBT card holders to receive reduced-price admission to their facilities.

A summative evaluation will be conducted to measure participating institutions' understanding of the program's value, structural strengths and difficulties, partnership implications, financial implications, and community support and engagement. The evaluation is intended

to provide insight for future changes and programmatic improvements. Methods will include online surveys and in-depth interviews.

The institutional online survey, expected to require an average of 10 minutes to complete, will consist of 1–3 questions focused on the *Museums for All* program's implications for participating museums, allowing for a broad understanding of the program's institutional participants, their perceptions of the program, and potential future directions. In-depth interviews with 15–18 survey participants, each projected to require 20 minutes to complete, will add depth and clarity of understanding to the online survey. An additional online survey, projected to require 10 minutes to complete, will be conducted with a sampling of adult museum participants in the program to gauge the level of awareness of the program and its influence on their museum experience.

IMLS is particularly interested in comments that help the agency:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Agency: Institute of Museum and Library Services.

Title: Museum Assessment Program Evaluation.

OMB Number: To Be Determined.

Frequency: One-time collection anticipated.

Affected Public: The target population is museums that have chosen to participate in the *Museums for All* program and their visitors.

Number of Respondents: 150 museum staff to respond to institutional survey; 18 museum staff to respond to institutional interview; and 200 museum visitors.

Estimated Average Burden per Response: The burden per respondent is estimated to be an average of 10 minutes for the museum survey, 20 minutes for

the in-depth interview, and 10 minutes for the visitor survey.

Estimated Total Annual Burden: 64.33 hours (that is 10 minutes times 350 respondents plus 20 minutes per respondent times 18 interview respondents, equaling 3,860 minutes or 64.33 hours).

Total Annualized capital/startup costs: n/a.

Total Annual costs: To be determined.

Public Comments Invited: Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT:

Stephanie Burwell, Chief Information Officer, Office of the Chief Information Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW., Suite 4000, Washington, DC 20024–2135. Mrs. Burwell can be reached by Telephone: 202–653–4684, Fax: 202–653–4625, or by email at sburwell@imls.gov or by teletype (TTY/TDD) at 202–653–4614. Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

Dated: January 11, 2017.

Kim Miller,

Grants Management Specialist, Office of Chief Information Officer.

[FR Doc. 2017–00954 Filed 1–17–17; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection: “Museums Empowered: Professional Development and Capacity Building Opportunities for Museums”—A Museums for America Special Initiative

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Submission for OMB Review, Comment Request.

SUMMARY: The Institute of Museum and Library Service (“IMLS”) as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). This program helps to ensure that

requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before February 17, 2017.

ADDRESSES: Stephanie Burwell, Chief Information Officer, Office of the Chief Information Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW., Suite 4000, Washington, DC 20024–2135. Mrs. Burwell can be reached by Telephone: 202–653–4684, Fax: 202–653–4625, or by email at sburwell@imls.gov or by teletype (TTY/TDD) at 202–653–4614. Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Institute of Museum and Library Services is the primary source of federal support for the Nation's 123,000 libraries and 35,000 museums. The Institute's mission is to inspire libraries and museums to advance innovation, learning, and civic engagement. The Institute works at the national level and in coordination with state and local organizations to sustain heritage, culture, and knowledge; enhance learning and innovation; and support professional development. IMLS is responsible for identifying national needs for and trends in museum, library, and information services; measuring and reporting on the impact and effectiveness of museum, library and information services throughout the United States, including programs conducted with funds made available by IMLS; identifying, and disseminating information on, the best practices of such programs; and developing plans to improve museum, library, and information services of the United States and strengthen national, State, local, regional, and international communications and cooperative networks (20 U.S.C. 72, 20 U.S.C. 9108).

The purpose of this survey is to administer a special initiative in the Museums for America (MFA) grant program titled “Museums Empowered: Professional Development and Capacity Building Opportunities for Museums”—A Museums for America Special Initiative.

Museums for America (MFA) grants support projects that strengthen the ability of an individual museum to serve its public. This special MFA initiative will provide professional development and capacity building opportunities for eligible museums.

As centers of innovation and discovery, as well as catalysts of community revitalization, museums are at the forefront of change in our communities. Like any other institution, museums need to remain dynamic to respond to fast-evolving technological advances and changing demographics. Museums also need to generate and share outcomes-based data and results of their community impact and develop sustainable organizational structures and strategies for continued growth and vitality. Professional Development is critical for museums to deliver on these areas of need.

To support and empower museums of all sizes and disciplines in responding to the evolving needs and changes, this MFA special initiative has four areas of focus for professional development and capacity building 1. Diversity and Inclusion 2. Digital Technology 3. Evaluation 4. Organizational Management. Potential projects will address one of these four priority areas and help strengthen the capability of an individual museum to better serve its public.

Funded projects may support a wide variety of training opportunities for museum staff at a variety of levels (senior leadership, middle management, front-line staff, interns and volunteers) and in various lines of museum work or a combination of (education and outreach, interpretation, curation, registration, conservation, exhibition design, administration, finance, marketing, public relations, community engagement, visitor services security and other).

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic,

mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submissions of responses.

Current Actions: This notice proposes clearance of the "Museums Empowered: Professional Development and Capacity Building Opportunities for Museums"—A Museums for America Special Initiative, was published in the **Federal Register** on October 13, 2016 (FR vol. 81, No. 198, pgs. 70707–70708). There were no public comments.

Agency: Institute of Museum and Library Services.

Title: "Museums Empowered: Professional Development and Capacity Building Opportunities for Museums"—A Museums for America Special Initiative.

OMB Number: TBD.

Agency Number: 3137.

Frequency: One time.

Affected Public: Museums that meet the IMLS Museums for America institutional eligibility criteria.

Number of Respondents: 100.

Estimated Time per Respondent: 40 hours.

Total Burden Hours: 4,000.

Total Annualized cost to respondents: \$109,600.00.

Total Annualized capital/startup costs: 0.

Total Annualized Cost to Federal Government: \$13,651.84.

FOR FURTHER INFORMATION CONTACT:

Comments should be sent to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, (202) 395–7316.

Dated: January 11, 2017.

Kim A. Miller,

Grants Management Specialist, Office of the Chief Financial Officer.

[FR Doc. 2017–00953 Filed 1–17–17; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL MEDIATION BOARD

Notice of Proposed Information Collection Requests

AGENCY: National Mediation Board.

SUMMARY: The Assistant Chief of Staff, Administration invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments within 30 days from the date of this publication.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that

the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Assistant Chief of Staff, Administration publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, e.g. new, revision extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Record keeping burden. OMB invites public comment.

Currently, the National Mediation Board is soliciting comments concerning the proposed extension of the Application for Alternative Dispute Resolution (ADR) Services and is interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 11, 2017.

Samantha Jones,

Assistant Chief of Staff, Administration, National Mediation Board.

A. Application for ADR Services

Type of Review: Extension.

Title: Application for ADR Services.

Frequency: On occasion.

Affected Public: Union Officials and Officials of Railroads and Airlines.

Reporting and Recordkeeping Hour Burden:

Responses: Estimate about 45 annually.

Burden Hours: 9.

Abstract: The Railway Labor Act, 45 U.S.C., 151 a. General Purposes, provides that the purposes of the Act are (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein. * * * (4) to

provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions, and (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. In fulfilling its role to administer the Act, the National Mediation Board offers the parties to disputes mediation and arbitration services. On a voluntary basis, training programs in Alternative Dispute Resolution (ADR) and facilitation services are also available. These ADR programs are designed to enhance the bargaining and grievance handling skill level of the disputants and to assist the parties in the resolution of disputes. The impact of these ADR programs is that mediation and arbitration can be avoided entirely or the scope and number of issues brought to mediation or arbitration is significantly reduced. This collection is necessary to confirm the voluntary participation of the parties in the ADR process. The information provided by the parties is used by the NMB to schedule the parties for ADR training and facilitation. Based on a recent survey of those who participated in the NMB's ADR Programs, 94.6% said they were satisfied with the ADR Programs and said they recommend the program for all negotiators. Collecting the brief information on the Application for ADR Services form allows the parties to voluntarily engage the services of the NMB in the orderly settlement of all disputes and fulfill the purposes of the Act.

Requests for copies of the proposed information collection request may be accessed from www.nmb.gov or should be addressed to Denise Murdock, NMB, 1301 K Street NW., Suite 250 E, Washington, DC 20005 or addressed to the email address murdock@nmb.gov or faxed to 202-692-5081. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Samantha Jones at 202-692-5010 or via internet address jones@nmb.gov. Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 2017-00968 Filed 1-17-17; 8:45 am]

BILLING CODE 7550-01-P

NEIGHBORHOOD REINVESTMENT CORPORATION

Audit Committee Meeting: Sunshine Act

TIME AND DATE: 2:30 p.m., Monday, January 23, 2017.

PLACE: NeighborWorks America—Gramlich Boardroom, 999 North Capitol Street NE., Washington DC 20002.

STATUS: Open (with the exception of Executive Session).

CONTACT PERSON: Jeffrey Bryson, General Counsel/Secretary, (202) 760-4101; jbryson@nw.org.

AGENDA:

I. CALL TO ORDER

II. Executive Session with Chief Audit Executive

III. Internal Audit Reports with Management's Response

IV. FY 2017 Internal Audit Plan—Proposed Change

V. Internal Audit Status Reports

VI. Audit of Retirement Plan Year Ending 2015 and 2014

VII. Adjournment

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552 (b)(4) permit closure of the following portions of this meeting:

- Executive Session with the External Auditor

Jeffrey T. Bryson,

EVP & General Counsel/Corporate Secretary.

[FR Doc. 2017-01157 Filed 1-13-17; 11:15 am]

BILLING CODE 7570-02-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52-022 and 52-023; NRC-2013-0261]

Duke Energy Progress; Combined License Application for Shearon Harris Nuclear Power Plant Units 2 and 3

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption in response to an October 13, 2016, letter from Duke Energy Progress (DEP), which requested an exemption from certain regulatory requirements that requires DEP to submit an update to the final safety analysis report (FSAR) included in their combined license (COL) application for Shearon Harris Nuclear Power Plant (Harris) Units 2 and 3 by December 31, 2016. The NRC

staff reviewed this request and determined that it is appropriate to grant the exemption, but stipulated that the update to the FSAR must be submitted prior to, or coincident with the resumption of the COL application review or by December 31, 2019, whichever comes first.

DATES: The exemption is effective on January 18, 2017.

ADDRESSES: Please refer to Docket ID NRC-2013-0261 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this action by the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2013-0261. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced (if that document is available in ADAMS) is provided the first time that the document is referenced.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Brian Hughes, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-6582; email: Brian.Hughes@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On February 18, 2008, DEP, submitted to the NRC a COL application for two units of Westinghouse Electric Company's AP1000 advanced pressurized water reactors to be constructed and operated at the existing Shearon Harris Nuclear Plant (Harris) site (ADAMS Accession No.

ML080580078). The NRC docketed the Shearon Harris Units 2 and 3 COL application (Docket Nos. 52–022 and 52–023) on April 23, 2008. On April 15, 2013, (ADAMS Accession No. ML13112A761) DEP submitted Revision 5 to the COL application including updates to the FSAR, per Subsection 50.71(e)(3)(iii) of title 10 of the *Code of Federal Regulations* (10 CFR). On May 2, 2013 (ADAMS Accession No. ML13123A344), DEP requested that the NRC suspend review of the Shearon Harris Nuclear Plant Units 2 and 3 COL application. On August 7, 2013 (ADAMS Accession No. ML13220B004), DEP requested an exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the COL application FSAR update, which NRC granted through December 31, 2014. On August 1, 2014 (ADAMS Accession No. ML14216A431), DEP requested another exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the COL application FSAR update which the NRC granted through December 31, 2015. On August 12, 2015 (ADAMS Accession No. ML15226A353), DEP requested another exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the COL application FSAR update which NRC granted through by December 31, 2016. On October 13, 2016 (ADAMS Accession No. ML16288A815), DEP requested another exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit annual updates to the FSAR during the years 2016, 2017, and 2018. In this exemption request, DEP indicated that it would provide an update to the FSAR, or take other appropriate action, no later than December 31, 2019.

II. Request/Action

Paragraph 50.71(e)(3)(iii) requires that an applicant for a COL under Subpart C of 10 CFR part 52, submit updates to their FSAR annually during the period from docketing the application to the Commission making its 10 CFR 52.103(g) finding.

Pursuant to 10 CFR 50.71(e)(3)(iii) the next annual update of the FSAR included in the Harris Units 2 and 3 COL application would be due by December 31, 2016. In a letter dated October 13, 2016 (ADAMS Accession No. ML16288A815), DEP requested that the Harris Units 2 and 3 COL application be exempt from the 10 CFR 50.71(e)(3)(iii) requirements during the years of 2016, 2017, and 2018 until December 31, 2019, or prior to a request to reactivate the Harris Units 2 and 3 COL application review.

The exemption would allow DEP to submit the next FSAR update at a later date, but still in advance of NRC's

reinstating its review of the application and in any event, by December 31, 2019. The current requirement to submit an FSAR update could not be changed, absent the exemption.

III. Discussion

Pursuant to 10 CFR 50.12 the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50, including 10 CFR 50.71(e)(3)(iii) when: (1) The exemption(s) are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) special circumstances are present. As relevant to the requested exemption, special circumstances exist if: [a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)) and if: [t]he exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation (10 CFR 50.12(a)(2)(v)).

The purpose of 10 CFR 50.71(e)(3)(iii) is to ensure that the NRC has the most up to date information regarding the COL application, in order to perform an efficient and effective review. The rule targeted those applications that are being actively reviewed by the NRC. Because DEP requested the NRC suspend its review of the Harris Units 2 and 3 COL application, compelling DEP to submit its FSAR on an annual basis is not necessary as the FSAR will not be changed or updated until the review is restarted. Requiring the updates would result in undue hardship on DEP, and the purpose of 10 CFR 50.71(e)(3)(iii) would still be achieved if the update is submitted prior to restarting the review and in any event by December 31, 2019.

The requested exemption to defer submittal of the next update to the FSAR included in the Harris Units 2 and 3 COL application would provide only temporary relief from the regulations in 10 CFR 50.71(e)(3)(iii). As evidenced by the proper submittal of annual updates on June 23, 2009 (ADAMS Accession No. ML091810540), April 12, 2010 (ADAMS Accession No. ML101120592), April 14, 2011 (ADAMS Accession No. ML111170902), April 12, 2012 (ADAMS Accession No. ML12122A656), and April 15, 2013 (ADAMS Accession No. ML13112A761), DEP has made good faith efforts to comply with 10 CFR 50.71(e)(3)(iii)

prior to requesting suspension of the review. In its subsequent requests dated August 1, 2014, August 12, 2015, and October 13, 2016, DEP asked the NRC to grant exemption from 10 CFR 50.71(e)(3)(iii) until December 31, 2019, or prior to any request to reactivate Harris Units 2 and 3 COL application review. For the reasons stated above, the application of 10 CFR 50.71(e)(3)(iii) in this particular circumstance can be deemed unnecessary and the granting of the exemption would allow only temporary relief from a rule that the applicant had made good faith efforts to comply with, therefore special circumstances are present.

Authorized by Law

The exemption is a schedule exemption from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow DEP to submit the next Harris Units 2 and 3 COL application FSAR update on or before December 31, 2019, in lieu of the required scheduled submittals on December 31, 2016, December 31, 2017, and December 31, 2018. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50. The NRC staff has determined that granting DEP the requested exemption from the requirements of 10 CFR 50.71(e)(3)(iii) will provide only temporary relief from this regulation and will not result in a violation of the Atomic Energy Act of 1954, as amended, or the NRC's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for a timely and comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by the NRC staff and issuance of the NRC staff's safety evaluation report. The requested exemption is solely administrative in nature, in that it pertains to the schedule for submittal to the NRC of revisions to an application under 10 CFR part 52, for which a license has not been granted. In addition, since the review of the application has been suspended, any update to the application submitted by DEP will not be reviewed by the NRC at this time. Plant construction cannot proceed until the NRC's review of the application is completed, a mandatory hearing is completed, and a license is issued. Additionally, based on the nature of the requested exemption as described above, no new accident precursors are created by the exemption; thus neither

the probability, nor the consequences of postulated accidents are increased. Therefore, there is no undue risk to public health and safety.

Consistent With Common Defense and Security

The requested exemption would allow DEP to submit the next FSAR update prior to requesting the NRC to resume the review and, in any event, on or before December 31, 2019. This schedule change has no relation to security issues. Therefore, the common defense and security is not impacted.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii) are present whenever: (1) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)). The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to ensure that the NRC has the most up-to date information in order to perform its review of a COL application efficiently and effectively. Because the requirement to annually update the FSAR was intended for active reviews and the Harris Units 2 and 3 COL application review is now suspended, the application of this regulation in this particular circumstance is unnecessary in order to achieve its underlying purpose. If the NRC were to grant this exemption, and DEP was then required to update its FSAR by December 31, 2019, or prior to any request to restart of their review, the purpose of the rule would still be achieved.

Special circumstances in accordance with 10 CFR 50.12(a)(2)(v) are present whenever the exemption would provide only temporary relief from the regulation and the applicant has made good faith efforts to comply with this regulation. Because of the assumed and imposed new deadline of December 31, 2016, DEP's exemption request seeks only temporary relief from the requirement that it file an update to the FSAR included in the Harris Units 2 and 3 COL application. Additionally DEP submitted the required annual updates to its FSAR throughout the application process until asking for suspension of its review.

Therefore, since the relief from the requirements of 10 CFR 50.71(e)(3)(iii) would be temporary and the applicant has made good faith efforts to comply with the rule, and the underlying purpose of the rule is not served by application of the rule in this circumstance, the special circumstances

required by 10 CFR 50.12(a)(2)(ii) and 50.12(a)(2)(v) for the granting of an exemption from 10 CFR 50.71(e)(3)(iii) exist.

Eligibility for Categorical Exclusion From Environmental Review

With respect to the exemption's impact on the quality of the human environment, the NRC has determined that this specific exemption request is eligible for categorical exclusion as identified in 10 CFR 51.22(c)(25) provided that:

(i) There is no significant hazards consideration;

The criteria for determining whether there is no significant hazards consideration are found in 10 CFR 50.92. The proposed action involves only a schedule change regarding the submission of an update to the application for which the licensing review has been suspended. Therefore, there is no significant hazards consideration because granting the proposed exemption would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or

(3) Involve a significant reduction in a margin of safety.

(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

The proposed action involves only a schedule change which is administrative in nature, and does not involve any changes to be made in the types or significant increase in the amounts of effluents that may be released offsite.

(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

Since the proposed action involves only a schedule change which is administrative in nature, it does not contribute to any significant increase in occupational or public radiation exposure.

(iv) There is no significant construction impact;

The proposed action involves only a schedule change which is administrative in nature; the application review is suspended until further notice, and there is no consideration of any construction at this time, and hence the proposed action does not involve any construction impact.

(v) There is no significant increase in the potential for or consequences from radiological accidents;

The proposed action involves only a schedule change which is administrative in nature, and does not impact the probability or consequences of accidents.

(vi) The requirements from which an exemption is sought involve:

(B) Reporting requirements;

The exemption request involves submitting an updated FSAR by DEP; and

(G) Scheduling requirements;

The proposed exemption relates to the schedule for submitting FSAR updates to the NRC.

IV. Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also special circumstances are present. Therefore, the Commission hereby grants DEP a one-time exemption from the requirements of 10 CFR 50.71(e)(3)(iii) pertaining to the Harris Units 2 and 3 COL application to allow submittal of the next FSAR update prior to any request to the NRC to resume the review, and in any event no later than December 31, 2019.

Pursuant to 10 CFR 51.22, the Commission has determined that the exemption request meets the applicable categorical exclusion criteria set forth in 10 CFR 51.22(c)(25), and the granting of this exemption will not have a significant effect on the quality of the human environment.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 9th day of January 2017.

For the Nuclear Regulatory Commission.

Francis M. Akstulewicz,

*Director, Division of New Reactor Licensing,
Office of New Reactors.*

[FR Doc. 2017-01035 Filed 1-17-17; 8:45 am]

BILLING CODE 7590-01-P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of

the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

1. *Title and purpose of information collection:* Application and Claim for Unemployment Benefits and Employment Service; OMB 3220-0022.

Section 2 of the Railroad Unemployment Insurance Act (RUIA), provides unemployment benefits for qualified railroad employees. These benefits are generally payable for each day of unemployment in excess of four

during a registration period (normally a period of 14 days).

Section 12 of the RUIA provides that the RRB establish, maintain and operate free employment facilities directed toward the reemployment of railroad employees. The procedures for applying for the unemployment benefits and employment service and for registering and claiming the benefits are prescribed in 20 CFR 325. 20 CFR 321 provides for applying and filing claims for unemployment benefits electronically.

The RRB utilizes the following forms to collect the information necessary to pay unemployment benefits. Form UI-1 (or its Internet equivalent, Form UI-1 (Internet)), *Application for Unemployment Benefits and Employment Service*, is completed by a claimant for unemployment benefits once in a benefit year, at the time of first

registration. Completion of Form UI-1 or UI-1 (Internet) also registers an unemployment claimant for the RRB's employment service.

The RRB also utilizes Form UI-3 (or its Internet equivalent Form UI-3 (Internet)), *Claim for Unemployment Benefits*, for use in claiming unemployment benefits for days of unemployment in a particular registration period, normally a period of 14 days.

Completion of Forms UI-1, UI-1 (Internet), UI-3, and UI-3 (Internet) is required to obtain or retain benefits. The number of responses required of each claimant varies, depending on their period of unemployment. The RRB proposes no changes to the forms in this information collection.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

Form No.	Annual responses	Time (minutes)	Burden (hours)
UI-1	8,003	10	1,334
UI-1 (Internet)	5,542	10	924
UI-3	37,584	6	3,758
UI-3 (Internet)	45,011	6	4,501
Total	96,140	.....	10,517

2. *Title and purpose of information collection:* Public Service Pension Questionnaires; OMB 3220-0136.

Public Law 95-216 amended the Social Security Act of 1977 by providing, in part, that spouse or survivor benefits may be reduced when the beneficiary is in receipt of a pension based on employment with a Federal, State, or local governmental unit. Initially, the reduction was equal to the full amount of the government pension. Public Law 98-21 changed the reduction to two-thirds of the amount of the government pension.

Public Law 108-203 amended the Social Security Act by changing the

requirement for exemption to a public service offset, so that Federal Insurance Contributions Act (FICA) taxes are deducted from the public service wages for the last 60 months of public service employment, rather than just the last day of public service employment.

Sections 4(a)(1) and 4(f)(1) of the Railroad Retirement Act (RRA) provides that a spouse or survivor annuity should be equal in amount to what the annuitant would receive if entitled to a like benefit from the Social Security Administration. Therefore, the public service pension (PSP) provisions apply to RRA annuities. RRB regulations pertaining to the collection of evidence

relating to public service pensions or worker's compensation paid to spouse or survivor applicants or annuitants are prescribed in 20 CFR 219.64c.

The RRB utilizes Form G-208, Public Service Pension Questionnaire, and Form G-212, Public Service Monitoring Questionnaire, to obtain information used to determine whether an annuity reduction is in order. Completion of the forms is voluntary. However, failure to complete the forms could result in the nonpayment of benefits. One response is requested of each respondent. The RRB proposes no changes to the forms in the collection.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

Form No.	Annual responses	Time (minutes)	Burden (hours)
G-208	70	16	19.0
G-212	1,100	15	275.0
Total	1,170	.....	294.0

3. *Title and purpose of information collection:* Report of Medicaid State Office on Beneficiary's Buy-In Status; OMB 3220-0185.

Under Section 7(d) of the Railroad Retirement Act, the RRB administers the Medicare program for persons covered by the railroad retirement system. Under Section 1843 of the Social Security Act,

states may enter into "buy-in agreements" with the Secretary of Health and Human Services for the purpose of enrolling certain groups of low-income individuals under the

Medicare medical insurance (Part B) program and paying the premiums for their insurance coverage. Generally, these individuals are categorically needy under Medicaid and meet the eligibility requirements for Medicare Part B. States can also include in their buy-in agreements, individuals who are

eligible for medical assistance only. The RRB utilizes Form RL-380-F, *Report of Medicaid State Office on Beneficiary's Buy-In Status*, to obtain information needed to determine if certain railroad beneficiaries are entitled to receive Supplementary Medical Insurance program coverage under a state buy-in

agreement in the states in which they reside. Completion of Form RL-380-F is voluntary. One response is received from each respondent. The RRB proposes no changes to Form RL-380-F.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

Form No.	Annual responses	Time (minutes)	Burden (hours)
RL-380-F	600	10	100

Additional Information or Comments:

To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Dana Hickman at (312) 751-4981 or Dana.Hickman@RRB.GOV. Comments regarding the information collection should be addressed to Brian Foster, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-1275 or emailed to Brian.Foster@rrb.gov. Written comments should be received within 60 days of this notice.

Brian D. Foster,
Clearance Officer.

[FR Doc. 2017-00962 Filed 1-17-17; 8:45 am]

BILLING CODE 7905-01-P

Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings;
Resolution of litigation claims; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed; please contact Brent J. Fields from the Office of the Secretary at (202) 551-5400.

Dated: January 12, 2017.

Brent J. Fields,
Secretary.

[FR Doc. 2017-01142 Filed 1-13-17; 11:15 am]

BILLING CODE 8011-01-P

changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-members of the Exchange pursuant to EDGX Rules 15.1(a) and (c) to modify its fees for physical ports, logical ports, and for the use of a communication and routing service known as Bats Connect.

The text of the proposed rule change is available at the Exchange's Web site at www.bats.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold a closed meeting on Thursday, January 19, 2017 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(7), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matter at the closed meeting.

Chair White, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting will be:

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79774; File No. SR-BatsEDGX-2017-02]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Fees for Connectivity and Its Communication and Routing Service Known as Bats Connect

January 11, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 5, 2017, Bats EDGX Exchange, Inc. ("Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fees for physical ports, logical ports, and for the use of a communication and routing service known as Bats Connect. Each of these proposed changes are described below.

Physical Ports

A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers:

(i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,000 per physical port that connects to the System⁶ via 1 gigabyte circuit; and \$4,000 per physical port that connects to the System via 10 gigabyte circuit. The Exchange proposes to increase the fee per physical port that connects to the System via a 10 gigabyte circuit from \$4,000 per month to \$6,000 per month in order to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems and enable it to continue to maintain and improve its market technology and services. The Exchange does not propose to amend the fee for a 1 gigabyte circuit, which will remain \$2,000 per month.

Logical Ports

The Exchange currently charges for logical ports (including Multicast PITCH

Spin Server and GRP ports) \$500 per port per month. A logical port represents a port established by the Exchange within the Exchange's system for trading and billing purposes. Each logical port established is specific to a Member or non-Member and grants that Member or non-Member the ability to operate a specific application, such as FIX order entry or PITCH data receipt. Logical port fees are limited to logical ports in the Exchange's primary data center and no logical port fees are assessed for redundant secondary data center ports. The Exchange assesses the monthly per logical port fees to all Members' and non-Members' logical ports. The Exchange now proposes to increase charges for logical ports (including Multicast PITCH Spin Server and GRP ports) from \$500 per port per month to \$550 per month. Like as for the proposed fee increase for physical ports described above, the proposed increase in logical port fees is intended to cover increased infrastructure costs associated with establishing ports to connect to the Exchange's Systems and to enable the Exchange to continue to maintain and improve its market technology and services.

Bats Connect

The Exchange proposes to increase select fees related to the use of Bats Connect. Bats Connect is offered by the Exchange on a voluntary basis in a capacity similar to a vendor.⁷ In sum, Bats Connect is a communication service that provides subscribers an additional means to receive market data from and route orders to any destination connected to the Exchange's network. Bats Connect does not provide any advantage to subscribers for connecting to the Exchange's affiliates⁸ as compared to other methods of connectivity. The servers of the subscriber need not be located in the same facilities as the Exchange in order

to subscribe to Bats Connect. Subscribers may also seek to utilize Bats Connect in the event of a market disruption where other alternative connection methods become unavailable.

The Exchange charges a monthly connectivity fee to subscribers utilizing Bats Connect to route orders to other exchanges and broker-dealers that are connected to the Exchange's network via unicast access. The amount of the connectivity fee varies based solely on the bandwidth selected by the subscriber. Specifically, as set forth under the Unicast Access—Order Entry section of the fee schedule, the Exchange charges \$350 for 1 Mb, \$700 for 5 Mb, \$950 for 10 Mb, \$1,500 for 25 Mb, \$2,500 for 50 Mb, and \$3,500 for 100 Mb. The Exchange proposes to increase those fees as follows: \$500 for 1 Mb, \$1,000 for 5 Mb, and \$1,250 for 10 Mb. The proposed increases are designed to cover increased costs related to hardware, installation, and testing, as well as increased expenses involved in maintaining and managing the service. The Exchange does not propose to increase the fees for the 25 Mb, 50 Mb and 100 Mb connections as those fees will remain \$1,500, \$2,500, and \$3,500, respectively.

Bats Connect also allows subscribers to receive market data feeds from the exchanges connected to the Exchange's network. In such case, the subscriber pays the Exchange a connectivity fee, which are set forth under the Market Data Connectivity section of the fee schedule and vary based solely on the amount of bandwidth required to transmit the selected data product to the subscriber.⁹ The proposed connectivity fees currently range from no charge to \$11,500 based on the market data product the subscriber selects. The Exchange proposes to increase select connectivity fees for market data as follows:

Data feed	Current fee	Proposed fee
UQDF/UTDF/OMDF	\$650	\$1,200
CQS/CTS	1,000	1,400
OPRA	3,500	4,500
Nasdaq TotalView	1,300	1,500
Nasdaq BX TotalView	650	1,000
Nasdaq PSX TotalView	350	750
NYSE Integrated	11,500	14,500
NYSE ArcaBook	1,000	1,250
NYSE MKT OpenBook Ultra	150	500
NYSE Alerts	250	500
NYSE Imbalances	100	500

⁶ The term "System" is defined as "the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when

applicable, routing away." See Exchange Rule 1.5(cc).

⁷ See Exchange Rule 13.9.

⁸ The Exchange's affiliated exchanges are Bats EDGA Exchange, Inc. ("EDGA"), Bats BYX

Exchange, Inc. ("BYX"), and Bats BZX Exchange, Inc. ("BZX").

⁹ Subscribers pay any fees charged by the exchange providing the market data feed directly to that exchange.

Data feed	Current fee	Proposed fee
NYSE Arca Trades	250	500
BBDS/TDDS	100	500

The proposed increases are designed to allow the Exchange to cover the increased costs related to the amount of bandwidth required to provide connectivity to receive market data as well as the costs of maintaining that infrastructure.

The Exchange also charges a discounted fee of \$4,160 per month for subscribers who purchase connectivity to a bundle of select market data products, known as the U.S. Equities Select + SIP Bundle. The following market data products are included in the bundle: UQDF/UTDF/OMDF, CQS/CTS, Nasdaq TotalView, Nasdaq BX TotalView, Nasdaq PSX TotalView, NYSE ArcaBook, NYSE MKT OpenBook Ultra, and BBDS/TDDS.¹⁰ Absent the discount, a subscriber purchasing connectivity through Bats Connect for each of these market data products would currently pay a total monthly fee of \$5,200. Instead, a subscriber who purchases connectivity to each of the above market data products is charged a monthly fee of \$4,160, which represents a 20% discount. The Exchange proposes to add NYSE OpenBook Ultra to the bundle. Also, in light of the proposed changes outlined above, the Exchange proposes to increase the discounted rate of the bundle to \$5,910 per month, which would now represent a 40% discount from the rate of \$9,850 a subscriber purchasing connectivity through Bats Connect for each of these market data products would be charged under the proposed rule change.

Lastly, the Exchange proposes to charge a discounted fee of \$6,390 per month for subscribers who purchase connectivity to the OPRA, UQDF/UTDF/OMDF, and CQS/CTS data feeds, to be known as the OPRA + SIP Bundle. Absent the discount, a subscriber purchasing connectivity through Bats Connect for each of these market data products would pay a total monthly fee of \$7,100. Instead, a subscriber who purchases connectivity to each of the above market data products is charged a monthly fee of \$6,390, which represents a 10% discount.

¹⁰ The Exchange also proposes to correct a typographical error in referencing BBDS/TDDS in its description of the U.S. Equity Select + SIP bundle.

Implementation Date

The Exchange proposes to implement this amendment to its fee schedule on January 3, 2017.¹¹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹² in general, and furthers the objectives of Section 6(b)(4),¹³ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that

¹¹ The Exchange initially filed the proposed rule change on December 27, 2016. (SR-BatsEDGX-2016-74). On January 5, 2017, the Exchange withdrew SR-BatsEDGX-2016-74 and submitted this filing.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4).

this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of reasonable dues, fees, and other charges as the Exchange believes that the increased fees obtained will enable it to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems. The additional revenue from the increased fees will also enable the Exchange to continue to maintain and improve its market technology and services.

Physical Ports

The Exchange believes that the proposed fees for a 10 gigabyte circuit of \$6,000 per month is reasonable in that they are less than analogous fees charged by the Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("Arca"), which range from \$10,000–\$15,000 per month for 10 gigabyte circuits.¹⁴ The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members and non-Members. Members and non-Members will continue to choose whether they want more than one physical port and choose the method of connectivity based on their specific needs. All Exchange Members that voluntarily select various service options will be charged the same amount for the same services. As is true of all physical connectivity, all Members and non-Members have the option to select any connectivity option, and there is no differentiation with regard to the fees charged for the service.

Logical Ports

The Exchange believes that the increase of fees for logical ports represents an equitable allocation of reasonable dues, fees and other charges. The Exchange believes that its proposed changes to logical port fees are reasonable in light of the benefits to Exchange participants of direct market access and receipt of data. The Exchange believes its proposed fees are reasonable because Nasdaq and NYSE

¹⁴ See Nasdaq Rule 7034(b) and the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (dated December 2, 2016).

Arca charge comparable rates for logical ports to access such markets.¹⁵

Bats Connect

The Exchange also believes that its proposed fees for Bats Connect provide for the equitable allocation of reasonable dues, fees and other charges among members and other persons using its facilities. First, the Exchange charges a connectivity fee to subscribers utilizing Bats Connect to route orders to other exchanges and market centers that are connected to the Exchange's network, which varies based solely on the amount of bandwidth selected by the subscriber. The proposed increased connectivity fees remain reasonable and competitive as compared to similar fees charged by other exchanges. For purposes of order routing, the Exchange proposes to now charge \$500 for 1 Mb, \$1,000 for 5 Mb, and \$1,250 for 10 Mb. The New York Stock Exchange, Inc. ("NYSE") currently charges \$300 for 1 Mb, \$700 for 5 Mb, and \$900 for 10 Mb.¹⁶ In addition, the proposed rates continue to be less than what a subscriber would pay to connect directly to another exchange.¹⁷ The Exchange notes that, overall, the connectivity fee for routing of orders to other market centers proposed by the Exchange is similar to that charged by the NYSE.

Second, with regard to utilizing Bats Connect to receive market data products from other exchanges, the Exchange only charges subscribers a connectivity fee, the amount of which is based solely on the amount of bandwidth required to transmit that specific data product to the subscribers. The Exchange believes it is necessary to increase the rates for select market data feeds as described herein to address changes in bandwidth necessary to receive such feeds. The increased fees will also enable the Exchange to continue to cover the increased infrastructure costs while also enabling it to continue to maintain and improve the service.

The amounts of the connectivity fees continue to be reasonable as compared to similar fees charged by other

exchanges. For example, for market data connectivity, Nasdaq charges \$1,412 per month for CQS/CTS data feed, and the Exchange proposes to charge \$1,400 per month connectivity for CQS/CTS data feed.¹⁸

The Exchange believes it is reasonable to offer such discounted pricing to subscribers who purchase connectivity to a bundle of market data products as it would enable them to reduce their overall connectivity costs for the receipt of market data. The Exchange is not required by any rule or regulation to make Bats Connect available; nor are subscribers required by any rule or regulation to utilize Bats Connect. Accordingly, subscribers can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Moreover, the Exchange believes the proposed fees are reasonable and equitable because they continue to be based on the Exchange's costs to cover the amount of bandwidth required to provide connectivity to the select bundle of data feeds. The proposed fees will continue to allow the Exchange to recoup this cost, while providing subscribers with an alternative means to connect to the select bundle of data feeds at a discounted rate.

Lastly, the Exchange believes the proposed fees are reasonable and equitable because they are based on the Exchange's costs to cover hardware, installation, testing and connection, as well as expenses involved in maintaining and managing the service. The proposed fees allow the Exchange to recoup these costs, while providing subscribers with an alternative means to connect to other exchange and market centers. The Exchange believes that the proposed fees are reasonable and equitable in that they reflect the costs and the benefit of providing alternative connectivity.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by

the Exchange's competitors.

Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

Lastly, the Exchange does not believe the proposed fees for Bats Connect will result in any burden on competition. The proposed rule change is designed to provide subscribers with an alternative means to access other market centers on the Exchange's network if they choose or in the event of a market disruption where other alternative connection methods become unavailable. Bats Connect is not the exclusive method to connect to these market centers and subscribers may utilize alternative methods to connect to the product if they believe the Exchange's proposed pricing is unreasonable or otherwise. Therefore, the Exchange does not believe the proposed rule change will have any effect on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and paragraph (f) of Rule 19b-4 thereunder.²⁰ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹⁵ See Nasdaq Rule 7015(b) (charging a fee of \$575 per month for FIX Trading Ports) and the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (dated December 2, 2016) (charging a fee of \$550 per month for ports for order/quote entry).

¹⁶ See Section 3.6.1 of NYSE's SFTI Americas Product and Service List available at <http://www.nyxdata.com/docs/connectivity>.

¹⁷ See e.g., Nasdaq Rule 7034(b) and the Co-Location section of the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (dated December 2, 2016).

¹⁸ See Nasdaq Rule 7034 (setting forth Nasdaq's connectivity fees for receipt of third party market data products).

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BatsEDGX-2017-02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-BatsEDGX-2017-02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsEDGX-2017-02 and should be submitted on or before February 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-00965 Filed 1-17-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79773; File No. SR-BatsEDGX-2017-01]

Self-Regulatory Organizations; Bats EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Fees for Connectivity and Its Communication and Routing Service Known as Bats Connect

January 11, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 5, 2017, Bats EDGA Exchange, Inc. ("Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-members of the Exchange pursuant to EDGA Rules 15.1(a) and (c) to modify its fees for physical ports, logical ports, and for the use of a communication and routing service known as Bats Connect.

The text of the proposed rule change is available at the Exchange's Web site at www.bats.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fees for physical ports, logical ports, and for the use of a communication and routing service known as Bats Connect. Each of these proposed changes are described below.

Physical Ports

A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently maintains a presence in two third-party data centers: (i) the primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,000 per physical port that connects to the System⁶ via 1 gigabyte circuit; and \$4,000 per physical port that connects to the System via 10 gigabyte circuit. The Exchange proposes to increase the fee per physical port that connects to the System via a 10 gigabyte circuit from \$4,000 per month to \$6,000 per month in order to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems and enable it to continue to maintain and improve its market technology and services. The Exchange does not propose to amend the fee for a 1 gigabyte circuit, which will remain \$2,000 per month.

Logical Ports

The Exchange currently charges for logical ports (including Multicast PITCH Spin Server and GRP ports) \$500 per port per month. A logical port

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

⁶ The term "System" is defined as "the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away." See Exchange Rule 1.5(cc).

²¹ 17 CFR 200.30-3(a)(12).

represents a port established by the Exchange within the Exchange's system for trading and billing purposes. Each logical port established is specific to a Member or non-Member and grants that Member or non-Member the ability to operate a specific application, such as FIX order entry or PITCH data receipt. Logical port fees are limited to logical ports in the Exchange's primary data center and no logical port fees are assessed for redundant secondary data center ports. The Exchange assesses the monthly per logical port fees to all Members' and non-Members' logical ports. The Exchange now proposes to increase charges for logical ports (including Multicast PITCH Spin Server and GRP ports) from \$500 per port per month to \$550 per month. Like as for the proposed fee increase for physical ports described above, the proposed increase in logical port fees is intended to cover increased infrastructure costs associated with establishing ports to connect to the Exchange's Systems and to enable the Exchange to continue to maintain and improve its market technology and services.

Bats Connect

The Exchange proposes to increase select fees related to the use of Bats

Connect. Bats Connect is offered by the Exchange on a voluntary basis in a capacity similar to a vendor.⁷ In sum, Bats Connect is a communication service that provides subscribers an additional means to receive market data from and route orders to any destination connected to the Exchange's network. Bats Connect does not provide any advantage to subscribers for connecting to the Exchange's affiliates⁸ as compared to other methods of connectivity. The servers of the subscriber need not be located in the same facilities as the Exchange in order to subscribe to Bats Connect. Subscribers may also seek to utilize Bats Connect in the event of a market disruption where other alternative connection methods become unavailable.

The Exchange charges a monthly connectivity fee to subscribers utilizing Bats Connect to route orders to other exchanges and broker-dealers that are connected to the Exchange's network via unicast access. The amount of the connectivity fee varies based solely on the bandwidth selected by the subscriber. Specifically, as set forth under the Unicast Access—Order Entry section of the fee schedule, the Exchange charges \$350 for 1 Mb, \$700

for 5 Mb, \$950 for 10 Mb, \$1,500 for 25 Mb, \$2,500 for 50 Mb, and \$3,500 for 100 Mb. The Exchange proposes to increase those fees as follows: \$500 for 1 Mb, \$1,000 for 5 Mb, and \$1,250 for 10 Mb. The proposed increases are designed to cover increased costs related to hardware, installation, and testing, as well as increased expenses involved in maintaining and managing the service. The Exchange does not propose to increase the fees for the 25 Mb, 50 Mb and 100 Mb connections as those fees will remain \$1,500, \$2,500, and \$3,500, respectively.

Bats Connect also allows subscribers to receive market data feeds from the exchanges connected to the Exchange's network. In such case, the subscriber pays the Exchange a connectivity fee, which are set forth under the Market Data Connectivity section of the fee schedule and vary based solely on the amount of bandwidth required to transmit the selected data product to the subscriber.⁹ The proposed connectivity fees currently range from no charge to \$11,500 based on the market data product the subscriber selects. The Exchange proposes to increase select connectivity fees for market data as follows:

Data feed	Current fee	Proposed fee
UQDF/UTDF/OMDF	\$650	\$1,200
CQS/CTS	1,000	1,400
OPRA	3,500	4,500
Nasdaq TotalView	1,300	1,500
Nasdaq BX TotalView	650	1,000
Nasdaq PSX TotalView	350	750
NYSE Integrated	11,500	14,500
NYSE ArcaBook	1,000	1,250
NYSE MKT OpenBook Ultra	150	500
NYSE Alerts	250	500
NYSE Imbalances	100	500
NYSE Arca Trades	250	500
BBDS/TDDS	100	500

The proposed increases are designed to allow the Exchange to cover the increased costs related to the amount of bandwidth required to provide connectivity to receive market data as well as the costs of maintaining that infrastructure.

The Exchange also charges a discounted fee of \$4,160 per month for subscribers who purchase connectivity to a bundle of select market data products, known as the U.S. Equities Select + SIP Bundle. The following

market data products are included in the bundle: UQDF/UTDF/OMDF, CQS/CTS, Nasdaq TotalView, Nasdaq BX TotalView, Nasdaq PSX TotalView, NYSE ArcaBook, NYSE MKT OpenBook Ultra, and BBDS/TDDS.¹⁰ Absent the discount, a subscriber purchasing connectivity through Bats Connect for each of these market data products would currently pay a total monthly fee of \$5,200. Instead, a subscriber who purchases connectivity to each of the above market data products is charged

a monthly fee of \$4,160, which represents a 20% discount. The Exchange proposes to add NYSE OpenBook Ultra to the bundle. Also, in light of the proposed changes outlined above, the Exchange proposes to increase the discounted rate of the bundle to \$5,910 per month, which would now represent a 40% discount from the rate of \$9,850 a subscriber purchasing connectivity through Bats Connect for each of these market data

its description of the U.S. Equity Select + SIP bundle.

⁷ See Exchange Rule 13.9.

⁸ The Exchange's affiliated exchanges are Bats EDGX Exchange, Inc. ("EDGX"), Bats BYX Exchange, Inc. ("BYX"), and Bats BZX Exchange, Inc. ("BZX").

⁹ Subscribers pays any fees charged by the exchange providing the market data feed directly to that exchange.

¹⁰ The Exchange also proposes to correct a typographical error in referencing BBDS/TDDS in

products would be charged under the proposed rule change.

Lastly, the Exchange proposes to charge a discounted fee of \$6,390 per month for subscribers who purchase connectivity to the OPRA, UQDF/UTDF/OMDF, and CQS/CTS data feeds, to be known as the OPRA + SIP Bundle. Absent the discount, a subscriber purchasing connectivity through Bats Connect for each of these market data products would pay a total monthly fee of \$7,100. Instead, a subscriber who purchases connectivity to each of the above market data products is charged a monthly fee of \$6,390, which represents a 10% discount.

Implementation Date

The Exchange proposes to implement this amendment to its fee schedule on January 3, 2017.¹¹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹² in general, and furthers the objectives of Section 6(b)(4),¹³ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members. The Exchange believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to Members.

The Exchange believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges as its fees for physical connectivity are reasonably constrained by competitive alternatives. If a particular exchange charges excessive fees for connectivity, affected Members and non-Members may opt to terminate their connectivity arrangements with that exchange, and adopt a possible

range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, if the Exchange charges excessive fees, it would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

Furthermore, the proposed rule change is also an equitable allocation of reasonable dues, fees, and other charges as the Exchange believes that the increased fees obtained will enable it to cover its increased infrastructure costs associated with establishing physical ports to connect to the Exchange's Systems. The additional revenue from the increased fees will also enable the Exchange to continue to maintain and improve its market technology and services.

Physical Ports

The Exchange believes that the proposed fees for a 10 gigabyte circuit of \$6,000 per month is reasonable in that they are less than analogous fees charged by the Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("Arca"), which range from \$10,000—\$15,000 per month for 10 gigabyte circuits.¹⁴ The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members and non-Members. Members and non-Members will continue to choose whether they want more than one physical port and choose the method of connectivity based on their specific needs. All Exchange Members that voluntarily select various service options will be charged the same amount for the same services. As is true of all physical connectivity, all Members and non-Members have the option to select any connectivity option, and there is no differentiation with regard to the fees charged for the service.

Logical Ports

The Exchange believes that the increase of fees for logical ports represents an equitable allocation of reasonable dues, fees and other charges. The Exchange believes that its proposed changes to logical port fees are reasonable in light of the benefits to

Exchange participants of direct market access and receipt of data. The Exchange believes its proposed fees are reasonable because Nasdaq and NYSE Arca charge comparable rates for logical ports to access such markets.¹⁵

Bats Connect

The Exchange also believes that its proposed fees for Bats Connect provide for the equitable allocation of reasonable dues, fees and other charges among members and other persons using its facilities. First, the Exchange charges a connectivity fee to subscribers utilizing Bats Connect to route orders to other exchanges and market centers that are connected to the Exchange's network, which varies based solely on the amount of bandwidth selected by the subscriber. The proposed increased connectivity fees remain reasonable and competitive as compared to similar fees charged by other exchanges. For purposes of order routing, the Exchange proposes to now charge \$500 for 1 Mb, \$1,000 for 5 Mb, and \$1,250 for 10 Mb. The New York Stock Exchange, Inc. ("NYSE") currently charges \$300 for 1 Mb, \$700 for 5 Mb, and \$900 for 10 Mb.¹⁶ In addition, the proposed rates continue to be less than what a subscriber would pay to connect directly to another exchange.¹⁷ The Exchange notes that, overall, the connectivity fee for routing of orders to other market centers proposed by the Exchange is similar to that charged by the NYSE.

Second, with regard to utilizing Bats Connect to receive market data products from other exchanges, the Exchange only charges subscribers a connectivity fee, the amount of which is based solely on the amount of bandwidth required to transmit that specific data product to the subscribers. The Exchange believes it is necessary to increase the rates for select market data feeds as described herein to address changes in bandwidth necessary to receive such feeds. The increased fees will also enable the Exchange to continue to cover the increased infrastructure costs while also enabling it to continue to maintain and improve the service.

¹⁵ See Nasdaq Rule 7015(b) (charging a fee of \$575 per month for FIX Trading Ports) and the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (dated December 2, 2016) (charging a fee of \$550 per month for ports for order/quote entry).

¹⁶ See Section 3.6.1 of NYSE's SFTI Americas Product and Service List available at <http://www.nyxdata.com/docs/connectivity>.

¹⁷ See e.g., Nasdaq Rule 7034(b) and the Co-Location section of the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (dated December 2, 2016).

¹¹ The Exchange initially filed the proposed rule change on December 27, 2016. (SR-BatsEDGA-2016-33). On January 5, 2017, the Exchange withdrew SR-BatsEDGA-2016-33 and submitted this filing.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ See Nasdaq Rule 7034(b) and the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (dated December 2, 2016).

The amounts of the connectivity fees continue to be reasonable as compared to similar fees charged by other exchanges. For example, for market data connectivity, Nasdaq charges \$1,412 per month for CQS/CTS data feed, and the Exchange proposes to charge \$1,400 per month connectivity for CQS/CTS data feed.¹⁸

The Exchange believes it is reasonable to offer such discounted pricing to subscribers who purchase connectivity to a bundle of market data products as it would enable them to reduce their overall connectivity costs for the receipt of market data. The Exchange is not required by any rule or regulation to make Bats Connect available; nor are subscribers required by any rule or regulation to utilize Bats Connect. Accordingly, subscribers can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Moreover, the Exchange believes the proposed fees are reasonable and equitable because they continue to be based on the Exchange's costs to cover the amount of bandwidth required to provide connectivity to the select bundle of data feeds. The proposed fees will continue to allow the Exchange to recoup this cost, while providing subscribers with an alternative means to connect to the select bundle of data feeds at a discounted rate.

Lastly, the Exchange believes the proposed fees are reasonable and equitable because they are based on the Exchange's costs to cover hardware, installation, testing and connection, as well as expenses involved in maintaining and managing the service. The proposed fees allow the Exchange to recoup these costs, while providing subscribers with an alternative means to connect to other exchange and market centers. The Exchange believes that the proposed fees are reasonable and equitable in that they reflect the costs and the benefit of providing alternative connectivity.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. The Exchange does not believe that the

proposed changes represent a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors.

Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Further, excessive fees for connectivity would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

Lastly, the Exchange does not believe the proposed fees for Bats Connect will result in any burden on competition. The proposed rule change is designed to provide subscribers with an alternative means to access other market centers on the Exchange's network if they choose or in the event of a market disruption where other alternative connection methods become unavailable. Bats Connect is not the exclusive method to connect to these market centers and subscribers may utilize alternative methods to connect to the product if they believe the Exchange's proposed pricing is unreasonable or otherwise. Therefore, the Exchange does not believe the proposed rule change will have any effect on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and paragraph (f) of Rule 19b-4 thereunder.²⁰ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BatsEDGA-2017-01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-BatsEDGA-2017-01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsEDGA-2017-01 and should be submitted on or before February 8, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-00964 Filed 1-17-17; 8:45 am]

BILLING CODE 8011-01-P

¹⁸ See Nasdaq Rule 7034 (setting forth Nasdaq's connectivity fees for receipt of third party market data products).

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

²¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-32422; File No. 812-14568]

Owl Rock Capital Corporation, et al.; Notice of Application

January 11, 2017.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act permitting certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and under rule 17d-1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies (each, a "BDC") and certain closed-end investment companies to co-invest in portfolio companies with each other and with affiliated investment funds.

APPLICANTS: Owl Rock Capital Corporation (the "Company"); Owl Rock Capital Corporation II ("BDC II") and together with the Company, the "Existing Regulated Funds"); and Owl Rock Capital Advisors LLC ("Owl Rock Adviser").

FILING DATES: The application was filed on October 19, 2015, and amended on March 9, 2016, and December 7, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 6, 2017, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F St. NE., Washington, DC 20549-1090. Applicants: Alan Kirshenbaum, Owl Rock Capital Corporation, 245 Park Avenue, 41st Floor, New York, NY 10167.

FOR FURTHER INFORMATION CONTACT: Kieran G. Brown, Senior Counsel, at

(202) 551-6773 or James M. Curtis, Branch Chief, at (202) 551-6712 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicants' Representations

1. The Company, a Maryland corporation, is organized as a closed-end management investment company that has elected to be regulated as a BDC under section 54(a) of the Act.¹ Applicants state that the Company seeks to generate current income, and to a lesser extent, capital appreciation by targeting investment opportunities with favorable risk adjusted returns.

2. BDC II, a Maryland corporation, was organized on October 15, 2015, for the purpose of operating as an externally managed, closed-end management investment company which will elect to be regulated as a BDC under section 54(a) of the Act. Applicants state that BDC II seeks to generate current income, and to a lesser extent, capital appreciation by targeting investment opportunities with favorable risk adjusted returns.

3. Owl Rock Adviser, a Delaware limited liability company, is registered with the Commission as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). Owl Rock Adviser serves as investment adviser to the Company and will serve as investment adviser to BDC II.

4. Applicants seek an order ("Order") to permit one or more Regulated Funds² and/or one or more Affiliated Funds³ to

¹ Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

² "Regulated Fund" means any of the Existing Regulated Funds and any Future Regulated Fund. "Future Regulated Fund" means any closed-end management investment company (a) that is registered under the Act or has elected to be regulated as BDC, (b) whose investment adviser is an Adviser, and (c) that intends to participate in the Co-Investment Program. The term "Adviser" means (a) Owl Rock Adviser and (b) any future investment adviser that controls, is controlled by, or is under common control with Owl Rock Adviser and is registered as an investment adviser under the Advisers Act.

³ "Affiliated Fund" means any entity (a) whose investment adviser is an Adviser, (b) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, and (c) that intends to participate in the Co-Investment Program.

participate in the same investment opportunities through a proposed co-investment program (the "Co-Investment Program") where such participation would otherwise be prohibited under section 57(a)(4) and rule 17d-1 by (a) co-investing with each other in securities issued by issuers in private placement transactions in which an Adviser negotiates terms in addition to price;⁴ and (b) making additional investments in securities of such issuers, including through the exercise of warrants, conversion privileges, and other rights to purchase securities of the issuers ("Follow-On Investments"). "Co-Investment Transaction" means any transaction in which a Regulated Fund (or its Wholly-Owned Investment Sub, as defined below) participated together with one or more other Regulated Funds and/or one or more Affiliated Funds in reliance on the requested Order. "Potential Co-Investment Transaction" means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.⁵

5. Applicants state any of the Regulated Funds may, from time to time, form one or more Wholly-Owned Investment Subs.⁶ A Wholly-Owned Investment Sub would be prohibited from investing in a Co-Investment Transaction with any Affiliated Fund or Regulated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d-1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of its parent Regulated Fund and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for

⁴ The term "private placement transactions" means transactions in which the offer and sale of securities by the issuer are exempt from registration under the Securities Act of 1933 (the "Securities Act").

⁵ All existing entities that currently intend to rely upon the requested Order have been named as applicants. Any other existing or future entity that subsequently relies on the Order will comply with the terms and conditions of the application.

⁶ The term "Wholly-Owned Investment Sub" means an entity (i) that is wholly-owned by a Regulated Fund (with the Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of the Regulated Fund; (iii) with respect to which the board of directors of the Regulated Fund (the "Board") has the sole authority to make all determinations with respect to the entity's participation under the conditions of the application; and (iv) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act.

purposes of the requested order, as though the parent Regulated Fund were participating directly. Applicants represent that this treatment is justified because a Wholly-Owned Investment Sub would have no purpose other than serving as a holding vehicle for the Regulated Fund's investments and, therefore, no conflicts of interest could arise between the Regulated Fund and the Wholly-Owned Investment Sub. The Regulated Fund's Board would make all relevant determinations under the conditions with regard to a Wholly-Owned Investment Sub's participation in a Co-Investment Transaction, and the Regulated Fund's Board would be informed of, and take into consideration, any proposed use of a Wholly-Owned Investment Sub in the Regulated Fund's place. If the Regulated Fund proposes to participate in the same Co-Investment Transaction with any of its Wholly-Owned Investment Subs, the Board will also be informed of, and take into consideration, the relative participation of the Regulated Fund and the Wholly-Owned Investment Sub.

6. When considering Potential Co-Investment Transactions for any Regulated Fund, the applicable Adviser will consider only the Objectives and Strategies, investment policies, investment positions, capital available for investment as described in the application ("Available Capital"), and other pertinent factors applicable to that Regulated Fund.⁷ The Board of each Regulated Fund, including the directors that are not "interested persons" within the meaning of section 2(a)(19) of the Act (the "Non-Interested Directors"), has (or will have prior to relying on the requested Order) determined that it is in the best interests of the Regulated Fund to participate in Co-Investment Transactions.⁸

7. Other than pro rata dispositions and Follow-On Investments as provided in conditions 7 and 8, and after making the determinations required in conditions 1 and 2(a), the Adviser will present each Potential Co-Investment Transaction and the proposed allocation to the directors of the Board eligible to vote under section 57(o) of the Act ("Eligible Directors"), and the "required majority," as defined in section 57(o) of

the Act ("Required Majority")⁹ will approve each Co-Investment Transaction prior to any investment by the participating Regulated Fund.

8. With respect to the pro rata dispositions and Follow-On Investments provided in conditions 7 and 8, a Regulated Fund may participate in a pro rata disposition or Follow-On Investment without obtaining prior approval of the Required Majority if, among other things: (i) The proposed participation of each Regulated Fund and Affiliated Fund in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition or Follow-On Investment, as the case may be; and (ii) the Board of the Regulated Fund has approved that Regulated Fund's participation in pro rata dispositions and Follow-On Investments as being in the best interests of the Regulated Fund. If the Board does not so approve, any such disposition or Follow-On Investment will be submitted to the Regulated Fund's Eligible Directors. The Board of any Regulated Fund may at any time rescind, suspend or qualify its approval of pro rata dispositions and Follow-On Investments with the result that all dispositions and/or Follow-On Investments must be submitted to the Eligible Directors.

9. No Non-Interested Director of a Regulated Fund will have a financial interest in any Co-Investment Transaction, other than through share ownership in one of the Regulated Funds.

10. If an Adviser or its principal owners (the "Principals"), or any person controlling, controlled by, or under common control with an Adviser or the Principals, and the Affiliated Funds (collectively, the "Holders") own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the "Shares"), then the Holders will vote such Shares as required under condition 14. Applicants believe that this condition will ensure that the Non-Interested Directors will act independently in evaluating the Co-Investment Program, because the ability of an Adviser or the Principals to influence the Non-Interested Directors by a suggestion, explicit or implied, that the Non-Interested Directors can be removed if desired by the Holders will be limited significantly. The Non-Interested Directors will evaluate and approve any such independent party, taking into account its qualifications,

reputation for independence, cost to the shareholders, and other factors that they deem relevant.

Applicants' Legal Analysis

1. Section 57(a)(4) of the Act prohibits certain affiliated persons of a BDC from participating in joint transactions with the BDC or a company controlled by a BDC in contravention of rules as prescribed by the Commission. Under section 57(b)(2) of the Act, any person who is directly or indirectly controlling, controlled by, or under common control with a BDC is subject to section 57(a)(4). Applicants submit that each of the Regulated Funds and Affiliated Funds could be deemed to be a person related to each Regulated Fund in a manner described by section 57(b) by virtue of being under common control. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d-1 also applies to joint transactions with Regulated Funds that are BDCs. Section 17(d) of the Act and rule 17d-1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Section 17(d) of the Act and rule 17d-1 under the Act prohibit affiliated persons of a registered investment company from participating in joint transactions with the company unless the Commission has granted an order permitting such transactions. In passing upon applications under rule 17d-1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

3. Applicants state that in the absence of the requested relief, the Regulated Funds would be, in some circumstances, limited in their ability to participate in attractive and appropriate investment opportunities. Applicants believe that the proposed terms and conditions will ensure that the Co-Investment Transactions are consistent with the protection of each Regulated Fund's shareholders and with the purposes intended by the policies and provisions of the Act. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions will be consistent with the provisions,

⁷ "Objectives and Strategies" means a Regulated Fund's investment objectives and strategies, as described in the Regulated Fund's registration statement on Form N-2 or Form 10, as applicable, other filings the Regulated Fund has made with the Commission under the Securities Act, or under the Securities Exchange Act of 1934, and the Regulated Fund's reports to shareholders.

⁸ The Regulated Funds, however, will not be obligated to invest, or co-invest, when investment opportunities are referred to them.

⁹ In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o).

policies, and purposes of the Act and on a basis that is not different from or less advantageous than that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following conditions:

1. Each time an Adviser considers a Potential Co-Investment Transaction for an Affiliated Fund or another Regulated Fund that falls within a Regulated Fund's then-current Objectives and Strategies, the Regulated Fund's Adviser will make an independent determination of the appropriateness of the investment for such Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. (a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the applicable Adviser to be invested by the applicable Regulated Fund in the Potential Co-Investment Transaction, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Funds, collectively, in the same transaction, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on each participant's Available Capital, up to the amount proposed to be invested by each. The applicable Adviser will provide the Eligible Directors of each participating Regulated Fund with information concerning each participating party's Available Capital to assist the Eligible Directors with their review of the Regulated Fund's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1 and 2(a), the applicable Adviser will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and Affiliated Fund) to the Eligible Directors of each participating Regulated Fund for their consideration. A Regulated Fund will co-invest with one or more other Regulated Funds and/or one or more Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the Potential Co-Investment Transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its

shareholders and do not involve overreaching in respect of the Regulated Fund or its shareholders on the part of any person concerned;

(ii) the Potential Co-Investment Transaction is consistent with:

(A) The interests of the shareholders of the Regulated Fund; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Funds or Affiliated Funds would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from or less advantageous than that of other Regulated Funds or Affiliated Funds; provided that, if any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors or the right to have a board observer or any similar right to participate in the governance or management of the portfolio company, such event shall not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition (2)(c)(iii), if:

(A) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any;

(B) the applicable Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and

(C) any fees or other compensation that any Affiliated Fund or any Regulated Fund or any affiliated person of any Affiliated Fund or any Regulated Fund receives in connection with the right of the Affiliated Fund or a Regulated Fund to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among the participating Affiliated Funds (who each may, in turn, share its portion with its affiliated persons) and the participating Regulated Funds in accordance with the amount of each party's investment; and

(iv) the proposed investment by the Regulated Fund will not benefit the Advisers, the Affiliated Funds or the other Regulated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by condition 13, (B) to the extent permitted by section 17(e) or

57(k) of the Act, as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in condition 2(c)(iii)(C).

3. Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. The applicable Adviser will present to the Board of each Regulated Fund, on a quarterly basis, a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies that were not made available to the Regulated Fund, and an explanation of why the investment opportunities were not offered to the Regulated Fund. All information presented to the Board pursuant to this condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

5. Except for Follow-On Investments made in accordance with condition 8,¹⁰ a Regulated Fund will not invest in reliance on the Order in any issuer in which another Regulated Fund, Affiliated Fund, or any affiliated person of another Regulated Fund or Affiliated Fund is an existing investor.

6. A Regulated Fund will not participate in any Potential Co-Investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for each participating Regulated Fund and Affiliated Fund. The grant to an Affiliated Fund or another Regulated Fund, but not the Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this condition 6, if conditions 2(c)(iii)(A), (B) and (C) are met.

7. (a) If any Affiliated Fund or any Regulated Fund elects to sell, exchange or otherwise dispose of an interest in a security that was acquired in a Co-Investment Transaction, the applicable Advisers will:

¹⁰ This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

(i) notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed disposition at the earliest practical time; and

(ii) formulate a recommendation as to participation by each Regulated Fund in the disposition.

(b) Each Regulated Fund will have the right to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the participating Affiliated Funds and Regulated Funds.

(c) A Regulated Fund may participate in such disposition without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Regulated Fund and each Affiliated Fund in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition; (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such dispositions on a pro rata basis (as described in greater detail in the application); and (iii) the Board of the Regulated Fund is provided on a quarterly basis with a list of all dispositions made in accordance with this condition. In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(d) Each Affiliated Fund and each Regulated Fund will bear its own expenses in connection with any such disposition.

8. (a) If any Affiliated Fund or any Regulated Fund desires to make a Follow-On Investment in a portfolio company whose securities were acquired in a Co-Investment Transaction, the applicable Advisers will:

(i) Notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed transaction at the earliest practical time; and

(ii) formulate a recommendation as to the proposed participation, including the amount of the proposed Follow-On Investment, by each Regulated Fund.

(b) A Regulated Fund may participate in such Follow-On Investment without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer immediately preceding the Follow-On

Investment; and (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application). In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(c) If, with respect to any Follow-On Investment:

(i) The amount of the opportunity is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the applicable Adviser to be invested by the applicable Regulated Fund in the Follow-On Investment, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Funds, collectively, in the same transaction, exceeds the amount of the investment opportunity; then the investment opportunity will be allocated among them pro rata based on each participant's Available Capital, up to the maximum amount proposed to be invested by each.

(d) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in this application.

9. The Non-Interested Directors of each Regulated Fund will be provided quarterly for review all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Non-Interested Directors may determine whether all investments made during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the conditions of the Order. In addition, the Non-Interested Directors will consider at least annually the continued appropriateness for the Regulated Fund of participating in new and existing Co-Investment Transactions.

10. Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under

these conditions were approved by the Required Majority under section 57(f) of the Act.

11. No Non-Interested Director of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise an "affiliated person" (as defined in the Act) of an Affiliated Fund.

12. The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective investment advisory agreements with Affiliated Funds and the Regulated Funds, be shared by the Regulated Funds and the Affiliated Funds in proportion to the relative amounts of the securities held or to be acquired or disposed of, as the case may be.

13. Any transaction fee¹¹ (including break-up or commitment fees but excluding broker's fees contemplated by section 17(e) or 57(k) of the Act, as applicable), received in connection with a Co-Investment Transaction will be distributed to the participating Regulated Funds and Affiliated Funds on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by such Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1) of the Act, and the account will earn a competitive rate of interest that will also be divided pro rata among the participating Regulated Funds and Affiliated Funds based on the amounts they invest in such Co-Investment Transaction. None of the Affiliated Funds, the Advisers, the other Regulated Funds or any affiliated person of the Regulated Funds or Affiliated Funds will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in condition 2(c)(iii)(C); and (b) in the case of an Adviser, investment advisory fees paid in accordance with the agreement

¹¹ Applicants are not requesting and the staff is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

between the Adviser and the Regulated Fund or Affiliated Fund.

14. If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares as directed by an independent third party when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the 1940 Act or applicable state law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017-00963 Filed 1-17-17; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional "peg" rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 2.00 percent for the January-March quarter of FY 2017.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Dianna Seaborn,

Acting Director, Office of Financial Assistance.

[FR Doc. 2017-00973 Filed 1-17-17; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

Meeting of the Interagency Task Force on Veterans Small Business Development

AGENCY: U.S. Small Business Administration.

ACTION: Notice of open Federal Interagency Task Force Meeting.

SUMMARY: The U.S. Small Business Administration (SBA) is issuing this

notice to announce the location, date, time and agenda for the next meeting of the Interagency Task Force on Veterans Small Business Development. The meeting is open to the public.

DATES: Wednesday, March 8, 2017, from 1:00 p.m. to 4:00 p.m.

ADDRESSES: Eisenhower Conference Room B, located on the concourse level, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Interagency Task Force on Veterans Small Business Development (Task Force). The Task Force is established pursuant to Executive Order 13540 to coordinate the efforts of Federal agencies to improve capital, business development opportunities, and pre-established federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans.

Moreover, the Task Force shall coordinate administrative and regulatory activities and develop proposals relating to "six focus areas": (1) Improving capital access and capacity of small business concerns owned and controlled by veterans and service-disabled veterans through loans, surety bonding, and franchising; (2) ensuring achievement of the pre-established Federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans through expanded mentor-protégé assistance and matching such small business concerns with contracting opportunities; (3) increasing the integrity of certifications of status as a small business concern owned and controlled by a veteran or service-disabled veteran; (4) reducing paperwork and administrative burdens on veterans in accessing business development and entrepreneurship opportunities; (5) increasing and improving training and counseling services provided to small business concerns owned and controlled by veterans; and (6) making other improvements relating to the support for veterans business development by the Federal Government.

Additional Information: This meeting is open to the public. Advance notice of attendance is requested. Anyone wishing to attend and/or make comments to the Task Force must contact SBA's Office of Veterans Business Development no later than March 6, 2017 at veteransbusiness@sba.gov.

sba.gov. Comments for the record should be applicable to the "six focus areas" of the Task Force and will be limited to five minutes in the interest of time and to accommodate as many participants as possible. Written comments should also be sent to the above email no later than March 6, 2017. Special accommodations requests should also be directed to SBA's Office of Veterans Business Development at (202) 205-6773 or to veteransbusiness@sba.gov. For more information on veteran owned small business programs, please visit www.sba.gov/veterans.

Dated: January 11, 2017.

Miguel J. L'Heureux,

SBA Committee Management Officer.

[FR Doc. 2017-00955 Filed 1-17-17; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF STATE

[Public Notice: 9857]

Notice of Determinations; Culturally Significant Objects Imported for Exhibition Determinations: "The Medici's Painter: Carlo Dolci and 17th-Century Florence" Exhibition

Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236-3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition "The Medici's Painter: Carlo Dolci and 17th-Century Florence," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Davis Museum at Wellesley College, Wellesley, Massachusetts, from on or about February 9, 2017, until on or about July 9, 2017, at the Nasher Museum of Art at Duke University, Durham, North Carolina, from on or about August 24, 2017, until on or about January 14, 2018, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: section2459@state.gov). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Mark Taplin,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2017–00957 Filed 1–17–17; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 9846; No. 2016–04]

Determination Pursuant to the Foreign Missions Act

Pursuant to the authority vested in the Secretary of State under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.* (“the Act”), and delegated pursuant to Department of State Delegation of Authority No. 214 of September 20, 1994, I hereby determine it is reasonably necessary to achieve one or more of the proposes set forth in section 204(b) of the Act (22 U.S.C. 4304(b)) to designate 115 Town Point Lane, Centerville, MD 21617, which is owned by the Government of the Russian Federation, as a location and facilities for which entry or access is strictly prohibited by all individuals, including but not limited to representatives or employees of the Russian Government and their dependents, without first obtaining written permission from the Department of State’s Office of Foreign Mission (OFM). Such prohibitions will take effect as of noon on December 30, 2016.

As a result, all persons on said property are required to depart the premises no later than the date and time stated above.

For purposes of this determination, 115 Town Point Lane, Centerville, MD 21617 includes both:

- A 45.52 acre parcel, owned by the Russian Federation, and documented in the records of the Maryland Department of Assessments and Taxation for the Queen Anne’s County as account number 03–017249; and

- A 39,300 square foot parcel, owned by the Russian Federation, and documented in the records of the Maryland Department of Assessments and Taxation for Queen Anne’s County as account number 03–002829.

Access to the property will be subject to terms and conditions set forth by the Office of Foreign Missions.

Gentry O. Smith,

Director, The Office of Foreign Missions, Department of State.

[FR Doc. 2017–01052 Filed 1–17–17; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice: 9847; No. 2016–05]

Determination Pursuant to the Foreign Missions Act

Pursuant to the authority vested in the Secretary of State under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.* (“the Act”), and delegated pursuant to Department of State Delegation of Authority No. 214 of September 20, 1994, I hereby determine it is reasonably necessary to achieve one or more of the proposes set forth in section 204(b) of the Act (22 U.S.C. 4304(b)) to designate 136 Mill River Road, Upper Brookville, NY, which is owned by the Government of the Russian Federation, as a location and facilities for which entry or access is strictly prohibited by all individuals, including but not limited to representatives or employees of the Russian Government and their dependents, without first obtaining written permission from the Department of State’s Office of Foreign Mission (OFM). Such prohibitions will take effect as of noon on December 30, 2016.

As a result, all persons on said property are required to depart the premises no later than the date and time stated above.

For purposes of this determination, 136 Mill River Road, Upper Brookville, NY includes both:

- A 14.06 acre parcel, owned by the Russian Federation, and documented in the records of Nassau County, NY as NYS SWIS Code number 282427;
- Comprised of lot grouping 164A, 164C & 296–297.

Access to the property will be subject to terms and conditions set forth by the Office of Foreign Missions.

Gentry O. Smith,

Director, The Office of Foreign Missions, Department of State.

[FR Doc. 2017–01053 Filed 1–17–17; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2015–0017]

Z RIN 2132–ZA04

National Public Transportation Safety Plan

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of availability and response to comments.

SUMMARY: The Federal Transit Administration has placed in the docket and on its Web site, the final National Public Transportation Safety Plan that establishes performance measures to improve the safety of public transportation systems that receive FTA Federal financial assistance. Transit agencies will set performance targets based on the measures in order to monitor and assess the safety performance of their public transportation systems.

FOR FURTHER INFORMATION CONTACT: For program matters, James Bartell, Office of Transit Safety and Oversight, (202) 366–4050 or James.Bartell@dot.gov. For legal matters, Candace Key, Office of Chief Counsel, (202) 366–4011 or Candace.Key@dot.gov.

SUPPLEMENTARY INFORMATION:

Availability of Final Plan

This notice provides a summary of the final changes to the National Public Transportation Safety Plan and responses to comments. The final Plan itself is not included in this notice; instead, an electronic version is available on FTA’s Web site, at www.transit.dot.gov, and in the docket, at www.regulations.gov. Paper copies of the final Plan may be obtained by contacting FTA’s Administrative Services Help Desk, at (202) 366–4865.

Table of Contents

- I. Background
- II. Summary of Public Comments and FTA’s Responses

I. Background

Congress first directed FTA to create and implement a National Public Transportation Safety Plan (National Safety Plan) under the Moving Ahead for Progress in the 21st Century (MAP–21) Act, which authorized a new Public Transportation Safety Program (Safety Program) at 49 U.S.C. 5329. Public Law 112–141 (2012). The Safety Program was reauthorized by the Fixing America’s Surface Transportation (FAST) Act. Public Law 114–94 (December 4, 2015).

On October 3, 2013, FTA introduced the transit industry to fundamental changes to the Federal transit program authorized by MAP-21 with a consolidated advance notice of proposed rulemaking (ANPRM). *78 FR 61251*. FTA issued the consolidated ANPRM to provide the public with an understanding of FTA's proposed approach to implementing the requirements for transit asset management and safety.

In the ANPRM, FTA sought specific comment on the statutorily required components of the National Safety Plan. Pursuant to 49 U.S.C. 5329(b) a National Safety Plan must include: (1) Safety performance criteria for all modes of public transportation; (2) the definition of the term "state of good repair" established under a rulemaking to implement a National Transit Asset Management System pursuant to 49 U.S.C. 5326(b); (3) minimum safety performance standards for public transportation vehicles used in revenue operations that are not otherwise regulated by any other Federal agency, and that, to the extent practicable, take into account relevant recommendations of the National Transportation Safety Board and other industry best practices and standards; (4) minimum safety standards to ensure the safe operation of public transportation systems that are not related to vehicle performance standards;¹ and (5) a safety certification training program.

On February 5, 2016, FTA published a **Federal Register** notice (81 FR 6372) seeking comment on a proposed National Safety Plan. FTA conducted a number of public outreach sessions and a webinar series related to the proposed National Safety Plan and the Public Transportation Agency Safety Plan notice of proposed rulemaking (Agency Safety Plan rule) that also was published in the **Federal Register** on February 5, 2016. 81 FR 6343. Specifically, on February 12, 2016, FTA conducted public outreach for tribes and hosted a Tribal Technical Assistance Workshop wherein FTA presented its proposed National Safety Plan and Agency Safety Plan rule and responded to technical questions from tribes. FTA subsequently delivered the same presentation during a webinar series open to the public on February 24, March 1, March 2, and March 3, 2016. On March 7, 2016, FTA delivered the same presentation at an outreach session hosted by the National Rural

Transit Assistance Program, which also was open to the public.

During each of these public outreach sessions and the public webinar series, FTA received and responded to numerous technical questions regarding the proposed Plan and NPRM. FTA recorded the presentations, including the question and answer sessions, and made available the following documents on the public docket for this Notice: (1) FTA's PowerPoint Presentation from the public outreach sessions and public webinar series; (2) a written transcript of FTA's public webinar of March 1, 2016; (3) a consolidated list of Questions and Answers from the public outreach sessions and public webinar; and (4) the results of polling questions from FTA's public outreach sessions. FTA also uploaded an audiovisual recording of its webinar from March 1, 2016. The video is available at the following link: <https://www.youtube.com/watch?v=FBj5HRatwGA&feature=youtu.be>.

The National Safety Plan is FTA's primary tool for communicating with the transit industry about its safety performance. FTA expects to update the National Safety Plan, from time to time, in response to trends in risk management in the transit industry, emerging technologies, best practices, findings from research, and other industry developments. FTA will issue substantive revisions to any future iterations of the National Safety Plan through a public notice-and-comment process.

The National Safety Plan is based on the principles and methods of Safety Management Systems (SMS): A formal, top-down, data-driven organization-wide approach to managing safety risks and ensuring the effectiveness of a public transportation agency's safety risk mitigations. On August 11, 2016, FTA published a final rule for the Public Transportation Safety Program that formally adopted SMS as the basis for FTA's development and implementation of the Safety Program. 81 FR 53046.

II. Summary of Public Comments and FTA's Responses

The public comment period for the proposed National Safety Plan closed on April 5, 2016. FTA received comment submissions from 119 entities, including States, transit agencies, trade associations, and individuals. FTA reviewed all of the comments and took them into consideration when developing today's final National Safety Plan.

Some comments received were outside of the scope of the proposed National Safety Plan. For example, FTA

received a number of comments related to the definitions of "injury" and "serious injury." FTA defined "injury" in the proposed National Safety Plan to provide clarity regarding the performance measure for injuries. In this Notice FTA responds to comments received regarding the definition of "injury" to the extent it relates to the National Safety Plan, but does not respond to comments related to reporting thresholds for certain injuries under the final State Safety Oversight rule at 49 CFR part 674.

Similarly, FTA received several comments related to the definition of the term "state of good repair," a term FTA was required to define in a rulemaking for transit asset management pursuant to 49 U.S.C. 5326. On July 26, 2016, FTA issued a final rule for Transit Asset Management wherein FTA defines the term "state of good repair," and FTA has adopted that definition in the final National Safety Plan. See the preamble of the Transit Asset Management final rule for FTA's responses to comments received related to the proposed definition of "state of good repair" (<https://www.gpo.gov/fdsys/pkg/FR-2016-07-26/pdf/2016-16883.pdf>).

Relatedly, a number of commenters noted inconsistencies with certain definitions found throughout FTA's several safety rulemakings. In response, FTA has aligned the definitions in the final National Safety Plan with other safety rulemakings and the Transit Asset Management final rule to ensure consistency.

FTA made a number of clarifying, organizational, and substantive revisions to the final National Safety Plan which are discussed below in the summary of public comments and FTA's responses. Comments and responses are subdivided by their corresponding sections of the proposed National Safety Plan and subject matter.

A. Chapter I: Introduction

Comments

General

A number of commenters provided general support for the proposed National Safety Plan. Of these commenters, several broadly supported efforts by FTA to improve transportation safety. Multiple commenters stated that while they support FTA's efforts to develop a safety plan, they would prefer that FTA not impose significant regulatory and implementation burdens on States and others under an "already extremely safe public transportation system."

¹ The requirement for operational standards was added by the FAST Act. However, the ANPRM did include a discussion on operational standards.

SMS

Several commenters supported FTA's proposal to incorporate SMS into a National Safety Plan, however, a few did not support FTA's application of SMS as a mandated approach to safety, especially for that portion of the nation's transit network that is delivered by State DOT subrecipients.

A couple of commenters stated that encouraging agencies to compare and contrast safety data results with other agencies when creating their safety plans runs contrary to the premise of SMS, where agencies are encouraged to improve their individual performance without regard to others.

Two commenters recommended that the National Safety Plan be consistent with Military Standard 882.

Workforce Development and Training

An individual commenter while commenting that the National Safety Plan is a rehash of 49 CFR part 659, questioned how FTA will handle and address workforce development issues stemming from the Agency Safety Plan rule and the National Safety Plan.

Multiple commenters requested that FTA issue technical assistance tools and non-binding guidance with templates to State agencies and transit operators to help agencies create a safety plan in line with the National Safety Plan.

Figures and Tables

Several commenters stated that the figures and tables in the National Safety Plan are not well labeled, specifically indicating that Table 5-1, as referenced in the text, does not exist.

Updates to the National Safety Plan

Several commenters provided suggestions on the frequency of updates to the National Safety Plan. One commenter stated that the National Safety Plan must be continually updated to reflect trends in risk management and best practices, and should be updated no less than once every two years. One commenter stated that future National Safety Plan updates should be accomplished through additional and periodic guidance regarding the minimum mandatory standards created in the rulemaking process. An additional commenter requested more information from FTA concerning the frequency of anticipated National Safety Plan updates and what the expectations, process, and timeline will be for transit agencies to respond or adapt their Public Transportation Agency Safety Plans' accordingly.

Two commenters requested that FTA clarify whether or not the National

Safety Plan will ultimately be turned into a regulation.

Public Transportation Safety Certification Training Program

Several commenters requested more information about the Safety Certification Training Program. One commenter indicated that the National Safety Plan references the training program, but does not explain the program's details.

Reporting Systems

One commenter stated that the National Safety Plan could be improved by implementing an employee safety reporting system that implements confidential close call reporting. This commenter also suggested that FTA include close call reporting in the list of SMS performance measures so that FTA could track and analyze close call events.

FTA's Response

General

FTA appreciates those comments in support of the National Safety Plan. Although transit is a relatively safe mode of travel, the statistical reality is that as transit ridership increases, data indicates that the total number of fatalities and serious accidents likely will also increase. FTA does not intend to adopt a prescriptive or burdensome approach to improving transit safety. Instead, FTA has adopted the principles and methods of Safety Management Systems (SMS) because SMS is both scalable and flexible and can accommodate the diversity of modes, expertise, and resources that exist within the transit industry.

SMS

For the last three decades the public transportation industry has implemented plans and programs based on the "system safety" principles outlined in the Military Standard 882 series (Standard Practice for System Safety, <http://www.system-safety.org/Documents/MIL-STD-882E.pdf> [external link]). This approach focuses on the application of engineering and management principles, criteria, and techniques to achieve an acceptable level of safety throughout all phases of a system lifecycle.

FTA has adopted SMS as the basis for the initiatives FTA will undertake to improve the safety of public transportation because it is both scalable and flexible. SMS is a collaborative approach that will help management and labor work together to build on the industry's existing safety foundation to better control risk, detect and correct

safety problems earlier, share and analyze safety data more effectively, and measure safety performance more accurately. SMS empowers transit operators to assess their own safety risks and prioritize the application of resources to those risks, which in turn supports a cost-effective allocation of resources.

The main difference between the system safety approach and SMS is that, because of its engineering roots, system safety focuses mostly on the safety implications of technical aspects and components of the system under consideration, somewhat at the expense of the human component. The SMS approach builds on the transit industry's experience with system safety by bringing management processes and organizational culture more squarely into the system safety engineering and hazard management framework. By tackling these "softer" management and human factors issues, SMS supplements system safety's more rigorous engineering processes.

FTA disagrees that the notion of benchmarking an individual agency's performance against the performance of another agency is inconsistent with SMS. The methods and principles of SMS do encourage agencies to improve their individual performance. However, effective implementation of SMS is dependent on the collection and analysis of available data, which can include data from other agencies. FTA has provided detailed responses to comments related to implementation of SMS at the transit agency level in the preamble to the final rule for Public Transportation Agency Safety Plans.

Workforce Development and Training

Although the National Safety Plan does not directly impose any workforce development burdens on recipients, FTA is continuing to develop training, guidance, and other resources to enhance the safety competencies of transit employees. For example, FTA may provide funding through its technical assistance program (49 U.S.C. 5314) to address public transportation workforce needs through research, outreach, training and the implementation of a frontline workforce grant program, and conduct training and educational programs in support of the public transportation industry. In addition, FTA is currently initiating a project to develop guidance that a transit agency could use to help it set up and operate an effective employee reporting system.

FTA will incorporate guidance, technical assistance, and other tools into the Plan as they become available. FTA

will also make resources available on the safety page of its Web site at <https://www.transit.dot.gov/regulations-and-guidance/safety/transit-safety-oversight-tso>. FTA encourages transit providers and sponsors to visit the page regularly to access the most up-to-date resources.

Figures and Tables

FTA has revised the tables used in today's final National Safety Plan for clarity.

Updates to the National Safety Plan

FTA intends for the National Safety Plan to serve as both the primary tool for FTA to communicate with the transit industry about its safety performance, and as a repository of guidance, best practices, technical assistance, tools and other information. FTA believes that a flexible and time sensitive approach to implementing updates to the National Safety Plan is the most effective way to disseminate information. Therefore, FTA plans to propose substantive updates to the National Safety Plan, such as new performance measures, through a public notice and comment process as needed, rather than by regulation. However, components of the Plan, such as the Safety Certification Training Program and standards, will be implemented through regulation.

Public Transportation Safety Certification Training Program

Although the Public Transportation Safety Certification Training Program is a statutory component of the National Safety Plan, FTA must establish the requirements of the Training Program through rulemaking. FTA anticipates publishing a final rule for the Safety Certification Training Program later this year. Until FTA publishes a final rule, State personnel who conduct safety audits and examinations of rail transit systems and for rail transit agency personnel who are directly responsible for safety must participate in the Interim Program. Bus operators may participate in the program on a voluntary basis. For more information on FTA's Training Program, please visit <https://safety.fta.dot.gov/login>.

Reporting Systems

FTA is currently conducting research on the design, demonstration, evaluation, and implementation of employee reporting systems at transit agencies. As a product of this research, FTA intends to issue guidance to the transit industry on how to set up and operate effective employee reporting systems.

In the future, FTA will consider adding close calls to the list of performance measures.

B. Definitions

Comments

General

One commenter noted that the National Safety Plan's performance measures do not match the National Transit Database (NTD) definitions and also stated that the term "system reliability" is not currently defined in the NTD glossary. This commenter also asserted that the definition of "passenger" in the National Safety Plan does not match the NTD.

Another commenter stated that the National Safety Plan needs clearer definitions so that consistent performance measures can be created across agencies.

FTA's Response

There likely will be instances where the definitions of terms in FTA's rules or the National Safety Plan may differ from the definitions of those terms in the NTD. Where necessary, FTA will update the NTD glossary to align with the safety rules and National Safety Plan. However, to the extent that a definition in a safety rule differs from a definition in the NTD glossary, the regulatory definition will apply to the particular statutory requirement under the Safety Program. FTA has made sure to align the definitions in this first final National Safety Plan with definitions in the final rules for safety and transit asset management. As the Safety Program matures, FTA will standardize other definitions to ensure consistent collection, analysis and reporting of safety information.

Fatalities

A few commenters noted that the definition of the term "fatalities" does not match the definition used in the NTD glossary.

FTA's Response

FTA did not include a definition of "fatality" in the proposed National Safety Plan. FTA did include a proposed performance measure for fatalities which was expressed as the total number of fatalities per unlinked passenger trips by mode. FTA's responses to comments on the fatality measure follow the summary of comments on the measure in Section C, below.

Injury and Serious Injury

A few commenters noted that the definition of "injuries" was included in

the National Safety Plan glossary, but the definition of "serious injury" is not.

FTA's Response

Neither the definition of "injury" nor "serious injury" was included in the proposed National Safety Plan glossary. However, FTA has moved the definition of "serious injury" from the footnote on page 41 of the proposed National Safety Plan to the glossary at Appendix A of the final Plan.

Safety Events

The proposed National Safety Plan defines safety events as "the collection of reported events that occur during the operation of public transportation and performance of regular supervisory maintenance activities." One commenter questioned whether the term "operation" refers to revenue service events only, or whether it also includes non-revenue service. The commenter stated that this difference could change current reporting thresholds. A few commenters stated that the definition of "safety events" does not match the definition in the NTD glossary.

FTA's Response

In the final National Safety Plan, FTA clarifies that the definition of "event" includes reported events that occur during both revenue and non-revenue operations. Contrary to comments received, the definition of "safety event" is not included in the NTD glossary. However, the proposed definition of "event" aligns with the definition of that term in the SSO final rule and the in the NTD safety and security reporting module. See Docket FTA-2014-0009 (January 2015).

Requests for New Definitions

A few commenters requested that FTA clarify the definitions of "transit provider." Other commenters requested that FTA define "unlinked passenger trips" and "fires."

FTA's Response

In response to comments, unlinked passenger trips are the number of passengers boarding the public transportation vehicles; passenger miles are the cumulative sum of the distances ridden by each passenger. However, FTA has removed this definition from the final National Safety Plan because it has revised the denominator for several performance measures, as discussed below.

FTA does not believe that it needs to define "transit provider" in the National Safety Plan. The Plan applies to recipients of chapter 53 funds that provide public transportation.

FTA does not agree that it should define the term “fires.” Terms such as “fires” that are not defined in the Plan or by statute or regulation will be interpreted in accordance with the definition set forth in dictionaries of common usage.

B. Chapter II—SMS Framework

Comment

SMS Components and Implementation Phases

Multiple commenters addressed the Safety Management Policy component of SMS. One commenter suggested that FTA’s Safety Management Policy lacked sufficient detail and encouraged FTA to establish minimum hazard criteria for all hazard management programs across all transit agencies to promote conformance. This commenter suggested that allowing each transit agency to establish its preferred method for hazard analysis will lead to varying methodologies, create confusion, and limit the available safety data for analyzing aggregate trends for the nation.

One commenter recommended that safety management policies promote open communication to all agency individuals, not just those identified as “relevant” to specific roles and responsibilities related to the SMS.

One commenter expressed concern about the “management of change” criteria in the National Safety Plan, recommending that FTA include additional guidance in the National Safety Plan concerning transit agency documentation of operation/infrastructure changes, the establishment of safety modification review bodies, the use of past performance when describing future criteria, the use of field monitoring to ensure the implementation, effectiveness, and enforcement of new mitigations, and the use of multi-tiered risk management processes. This commenter also requested expanded guidance for the “continuous improvement” section of the National Safety Plan, including exploration of the link between safety performance monitoring and continuous improvement.

One commenter applauded FTA for developing strong risk management policies, but recommended that FTA revisit and expand the hazard management program. This commenter stated that risk management must be done effectively, noting that there have been multiple instances over the past 11 years in which public transportation accidents have occurred that could have been prevented had the required Hazard

Management Plan and risk assessment been effective.

One commenter recommended that FTA include language in the National Safety Plan specifying that user documentation of a system’s operation, processes, policies, procedures, infrastructure, vehicles and training, as well as maintaining records of previous configurations, will assist in the process of continued system hazard identification. This commenter also suggested FTA add the term “safety risk” to the list of performance criterion in the SMS.

One commenter noted its appreciation for FTA’s recognition of the need for employee involvement in the promotion of system safety, but encouraged FTA to emphasize the importance of motivation, behavior, and attitude when promoting safety. The commenter stated that a poor safety culture in transportation industries can decrease program effectiveness, and that written SMS plans will realize positive outcomes only by engaging employees in a culture of safety.

Several commenters addressed the phased-in approach implementation policy of the SMS. One requested that FTA define and provide the relevant requirements and guidance materials for the list of tasks/expectations that a transportation agency “should have finished” at the completion of Phase 3 of SMS implementation. This commenter indicated that the National Safety Plan references requirements and guidance material that is not included in the National Safety Plan and requested the documentation prior to the National Safety Plan becoming effective.

Two commenters recommended that the National Safety Plan clarify that the phased-in approach is voluntary and that many of the subcomponents of the proposed SMS framework may already be included in current safety plans.

One commenter requested that FTA provide additional guidance on what type of changes require review and what type of oversight is needed during Phase 3. Two commenters stated that FTA should fully define and differentiate among the phrases “safety performance criteria,” “safety performance measures,” and “safety performance indicator” as the proposed National Safety Plan interchanges the terms.

One commenter indicated that Chapter 2 of the National Safety Plan is a verbatim copy of the FTA SMS Framework issued in August, 2015. This commenter recommended that FTA use the National Safety Plan as an opportunity to expand on the 2015

guidance to better help agencies develop SMS.

Fatigue Management

One commenter recommended that FTA include hour-of-service limitations or fitness-for-duty qualifications to the SMS and National Safety Plan to highlight the importance of fatigue management and ensure that it is adequately addressed in the National Safety Plan.

FTA’s Response

Readers should please be aware that the SMS Framework in the final National Safety Plan is not binding. The purpose of the SMS framework is to provide transit agencies with a brief overview of key SMS concepts, attributes of an effective SMS, FTA’s adopted SMS components and sub-components, and SMS development phases and sample tasks. FTA has refined its approach to the development of SMS guidance. FTA is currently working to develop more comprehensive, scalable SMS implementation guidance and will take comments received in to consideration during this process.

This summer, FTA initiated the SMS Implementation Pilot Program (SMS Pilot Program) so that FTA and participating transit agencies can work together to move SMS implementation forward. Through the SMS Pilot Program, FTA is partnering with transit agencies to assist them in transitioning to an SMS approach to managing safety. FTA provides technical assistance to transit agencies on developing and operating an SMS approach, while transit agencies provide opportunities for FTA to test the effectiveness of SMS tools in a diverse set of circumstances. The program is critical to helping FTA identify worthwhile and practical SMS implementation activities and to develop insights on how best to support the industry-wide transition to SMS.

Transit agencies not involved in the pilot program will benefit as well. FTA will apply lessons learned and best practices identified to develop guidance materials and technical assistance for the entire public transportation industry. Accordingly, in the final National Safety Plan, FTA has removed portions of the SMS Framework that provided guidance on implementation. FTA has retained portions of the SMS Framework that outline and describe the four pillars of SMS and revised some language to align with the requirements of the Public Transportation Agency Safety Plan final rule. As FTA refines its guidance materials it will take into consideration the issues and suggestions

raised by commenters on the SMS Framework.

Fatigue Management

In October 2014, FTA's Acting Administrator tasked the Transit Advisory Committee for Safety (TRACS) with developing recommendations for FTA on the elements that should comprise a SMS approach to a fatigue management program. On July, 30, 2015, TRACS issued a report—*Establishing a Fatigue Management Program for the Bus and Rail Transit Industry*—which recommend components of a successful fatigue management program, including hours of service (HOS), shift scheduling, fatigue prevention and awareness training, fitness-for-duty medical evaluations and screenings, work and vehicle environment design, safety culture, incident investigation, and data collection.² FTA is currently reviewing the TRACS recommendations. In the future, FTA may issue guidance or regulations on operator fitness for duty, which could address issues such as hours of service and fatigue management.

C. Chapter II—Performance Management

The reader should note that throughout the proposed National Safety Plan, and final National Safety Plan, FTA uses the term “performance measure” interchangeably with “performance criteria,” which it proposed to define as “categories of measures indicating the level of safe performance within a transit agency.” Although the language at 49 U.S.C. 5329(b) uses the term “performance criteria,” other parts of FTA's authorizing statute, such as the Transit Asset Management provisions of 49 U.S.C. 5326, use the term “performance measures.” FTA believes that Congress intended the terms “performance criteria” and “performance measures” to mean the same thing. To eliminate confusion over distinctions between these terms and to ensure consistency with the use of these terms throughout FTA's programs, FTA is defining “performance criteria” to mean “performance measures,” and it will use the term “performance measures” throughout this notice, the final National Safety Plan and associated rulemakings, accordingly.

Comment—Performance Measures Injuries and Fatalities

One commenter stated that an insufficient amount of fatality information is currently being collected nationally. The commenter suggested that as a result, there is not enough information to appropriately analyze the factors related to fatalities such that anyone would be able to develop actions to prevent incidences from occurring. Without appropriate data, the commenter suggested that FTA cannot conduct a true analysis of factors leading to fatalities.

Two commenters stated that the National Safety Plan indicates that the SSO final rule and all future safety rulemakings will define reportable accident/incidences in terms of injuries. However, they asserted that the SSO rulemaking never defined a reporting measure as proposed in the National Safety Plan and requested additional information on this topic.

One commenter recommended that the National Safety Plan use travel miles (‘train miles’ for the rail industry) instead of unlinked passenger trips for the purpose of standardizing the number of injuries and fatalities for the purpose of the performance measure.

Additional comments recommended that FTA express employee injury rates in terms of injuries per X employees or X hours of work.

FTA's Response

The proposed safety performance measures were derived from information that recipients already report to the NTD. Transit agencies already conduct their own investigations into the probable causes and contributing factors, as well as root cause analyses of organizational issues that influenced the causes or consequences of safety events. Each agency should use its own data to assess its performance.

FTA agrees that it is important to standardize the performance measures. Currently, through the NTD, FTA requires transit agencies to submit their total passenger trips, passenger miles, and vehicle revenue miles. FTA chose unlinked passenger trips as the denominator for the Fatalities and Injuries measures in the proposed National Safety Plan because we believed that it reflected better a passenger's exposure to risk. Based on the comments received, and after further consideration, FTA has changed the denominator for the performance measures from “unlinked passenger trips” to “vehicle revenue miles.” FTA believes that “vehicle revenue miles” is

more closely tied to risk as each additional vehicle mile of service increases risk of a collision with a pedestrian or third party vehicle.

In the first National Safety Plan, the Injury and Fatality measures apply only to passengers. FTA may establish measures for patrons, pedestrians, transit employees, occupants of other vehicles, or trespassers in future National Safety Plan iterations, after receiving input from the public.

Reliability

Multiple commenters questioned the appropriateness of using “reliability” as a performance measure of a SMS program. These commenters stated that performance measures should be limited to safety metrics. Other commenters questioned the redundancy of the term “reliability,” as “state of good repair” requirements should cover reliability issues and render this measure moot. Some commenters went on to request that FTA remove the measure from the performance list. An additional commenter stated that the definition of “reliability” is not defined in the NTD glossary.

Commenters generally supporting the use of reliability measures in the transportation industry commented that there are currently inconsistencies between system reliability standards in the National Safety Plan and the state of good repair measures that were proposed in the Transit Asset Management notice of proposed rulemaking (NPRM). The commenters recommended that system reliability should be more heavily linked with the Transit Asset Management rule rather than the National Safety Plan.

Several commenters provided support for the use of “reliability” as a performance measure but requested additional guidance and greater clarity on certain aspects of the measure. One commenter requested that FTA provide guidance as to what constitutes a reliability issue that requires reporting and recommended that non-safety mechanical failures not be included. Similarly, another commenter advised FTA to clarify the definition of “vehicle failure” to ensure that the term only refers to when a vehicle is unable to transport passengers.

FTA's Response

Through MAP-21, Congress recognized the critical relationship between safety and transit asset management. We note, in particular, the congressional requirement that the National Safety Plan include the definition for “state of good repair” as established in the rulemaking for transit

² The TRACS Report is available at [https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/TRACS_Fatigue_Report_14-02_Final_\(2\).pdf](https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/TRACS_Fatigue_Report_14-02_Final_(2).pdf).

asset management (49 U.S.C. 5329(b)(2)(B)) and the requirement at 49 U.S.C. 5329(d)(1)(C) that public transportation agency safety plans include state of good repair performance targets based on the performance measures established in the National Safety Plan.

The safety and performance of a public transportation system depend, in part, on the condition of its assets. A key challenge in connecting transit asset management to safety planning is that even when assets are not in a state of good repair, they can be operated safely, and, likewise, assets in a state of good repair can be operated unsafely. In the National Safety Plan, reliability is not a synonym for state of good repair. Rather, the proposed reliability measure is intended to serve as an expression of the relationship between safety and asset conditions, and therefore is neither duplicative nor inconsistent with the performance measure under the Transit Asset Management rule.

To clarify, at this time, the reliability measure applies only to revenue vehicles. The mean distance (miles) between failures is a standard industry metric. In the National Safety Plan FTA is not changing the way a "failure" is defined. Currently, FTA requires most Section 5307 recipients to report the following information: (1) Total number of failures (major failures and minor failures); and (2) total vehicle miles by mode. "Major failures" are failures caused by vehicle malfunctions or subpar vehicle condition which requires that it be pulled from service. "Minor failures" represent instances where a vehicle is pulled out of service for local policy reasons. For example, a transit agency may prohibit operation of a bus with inoperable air conditioning (AC) even though the bus could operate without AC.

FTA agrees with the comment suggesting that the reliability measure should only capture major mechanical failures since "minor failures" are linked to local policy. FTA has revised the measure in the final National Safety Plan to be "mean distance between *major mechanical* failures by mode." "Major mechanical failures" only encompass vehicles failures, and not the failure of infrastructure, equipment, etc.

Transit operators should combine this data to arrive at a number for mean distance between major mechanical failures by mode, and then set a target to improve performance for this measure. This may require agencies that currently are not required to report to the NTD, to begin collecting major mechanical failures and vehicle miles by mode. However, nothing in the Plan

changes reporting requirements or requires recipients to report any new information. Each agency will set targets based on the data it collects and FTA will not be collecting those targets.

Establishing Baselines

Several commenters provided commentary on the establishment of baselines for performance metrics. Two commenters questioned how FTA will gather sufficient and consistent data to establish baseline measurements. One commenter stated that FTA may struggle to gather consistent three-year data to be able to establish an initial time-weighted average for FTA's proposed safety criterion measures. Another commenter stated that baselines should not be established for all performance measures and that it is not appropriate for agencies to set baseline targets for fatalities and injuries, as anything above zero would be inappropriate.

An additional commenter recommended that FTA require transit agencies to establish baseline performance metrics for each different system (age, use, etc.) within the larger transportation system. This commenter asserted that large transit systems often have heterogeneous transportation infrastructure and it may not be appropriate or efficient to combine all systems under one set of metrics.

FTA's Response

FTA acknowledges that it may be difficult for agencies with immature safety risk management processes to establish baselines. However, FTA believes that establishing baseline targets is necessary for agencies to assess improvements in safety performance for future comparison. Although the baseline target for any safety performance measure should include at least three years of data to establish an initial time-weighted average (metric) for the measure, initial baseline targets may be based on the best available information to an agency.

The National Safety Plan does not prescribe a methodology for establishing baseline targets. FTA recognizes that each transit agency has its own operating policies that impact how performance is measured. However, FTA hopes that bringing greater attention to safety performance through the National Safety Plan will encourage more robust, consistent data collection, analysis and reporting in the future.

Other Comments on Safety Performance Measures

Multiple commenters recommended expanding the list of performance measures. One commenter requested

that FTA avoid duplicative requirements in performance measures. One commenter recommended that FTA expand the list of performance measures to include measures for job safety analysis, operational performance for employees, rule compliance, close calls and near misses, and hazard identification and mitigation. Two commenters requested that FTA add leading indicators to the list of measures to promote proactive aspects of the SMS.

Several commenters requested that FTA provide more information about the performance measures, including additional information about implementation and guidance concerning "local safety plans." One commenter asserted that the current performance measures are inappropriate.

One commenter stated that the current NTD has sufficient data to create performance targets at the national level, thereby developing consistent safety goals throughout the transit industry.

FTA's Response

The performance measures proposed in the National Safety Plan were designed to provide a strategic approach to improving safety performance in the day-to-day operations of public transportation. As the Safety Program matures, FTA will establish additional performance measures. Until such time, the final National Safety Plan maintains the proposed performance measures. In addition, at this time, FTA is not establishing national performance targets, but may do so in the future.

FTA disagrees that the proposed performance measures are inappropriate. The proposed safety performance measures were derived from information that recipients already report to the NTD. It is important to note that the performance measures established in the final National Safety Plan are the minimum measures that operators must set targets to under their public transportation agency safety plans. Until such time as FTA establishes additional measures based on leading indicators, FTA encourages transit agencies to add more proactive, leading measures into their own performance metrics.

MAP-21 created a performance-based and multimodal program to strengthen the U.S. transportation system. By focusing on national goals, increasing accountability, and improving transparency, these changes will improve decision-making through better informed planning and programming. The U.S. Department of Transportation

is implementing the new MAP-21 performance requirements through a number of rulemakings and Plans that establish performance measures and target setting requirements for recipients. FTA will issue guidance to assist the transit industry as it implements safety and transit asset management performance management. Upon issuance of the Agency Safety Plan rule FTA will provide specific guidance on implementing the requirements for public transportation agency safety plans.

Data Collection

One commenter requested clarification on how data gathered under an SMS program can be used to anticipate future risks if the exact causes of many accidents are often unknown. The commenter also questioned how FTA will gather at least three years of consistent data to establish averages for FTA's proposed safety performance measures, as indicated in the National Safety Plan.

Two commenters stated that data collection must be consistent across all FTA programs and clear reporting definitions must be crafted to ensure consistency. A couple of commenters requested additional clarification regarding how agencies should use the data they collect in conjuncture with data collected by other transit agencies. Those commenters asked whether or not transit agencies should compare safety data with other agencies when creating their own SMS plans. Some commenters expressed concern about the potential burdens of data collection if agencies are encouraged to collect and analyze safety data from other organizations to include in their safety plans.

One commenter recommended that FTA establish a strategic data management plan to aid in the standardization and analysis of safety data, suggesting that the NTD and SSO program should be used to analyze historical safety trends and establish minimum hazard criteria and targets. Another commenter indicated that it would be helpful if FTA establish a Web site where safety performance data analysis results could be shared and reviewed.

FTA's Response

Managing safety performance with current data and analysis is critical to the success of any effective SMS. SMS data collection efforts are more comprehensive than traditional methods. If transit agencies lack relevant information it may cause them to leave unaddressed critical gaps in safety. In SMS, agencies anticipate

future risk by measuring proactive mitigation efforts to determine the effectiveness of those efforts. These measures look at behaviors or performance linked to accident prevention or organizational actions taken before accidents occur, which lessen the likelihood the negative events will occur. Lagging measures are also necessary by revealing the frequency of missed targets and identifying where insufficiently mitigated risk needs to be addressed.

FTA recognizes the importance of data collection and analysis and setting goals based on this information. Accordingly, FTA has tasked TRACS to develop recommendations that help define the functional requirements of a comprehensive safety data and performance management approach that will inform FTA of the data required to implement an effective transit Safety Management System and how to collect and employ it to effectively improve safety performance. FTA is seeking specific recommendations on how it should standardize safety performance tools and capabilities, including safety performance monitoring; safety performance measurement, including standard definitions and baselines; hazard management and risk monitoring capabilities; and standard methods for data analysis and storage. FTA intends to utilize the TRACS recommendations in its development of enhanced internal data capabilities and guidance for the transit industry.

Comments: Relationship Between Safety Performance and Transit Asset Management

A couple of commenters stated that there are several inconsistencies between the National Safety Plan and FTA's Transit Asset Management rule, and that these inconsistencies should be eliminated. One commenter recommended that the Transit Asset Management rule serve as the standard across all Section 5329 rules.

FTA's Response

FTA disagrees that the proposed National Safety Plan was inconsistent with Transit Asset Management NPRM. FTA's approach to Transit Asset Management is consistent with SMS. A fundamental aspect of transit asset management is the monitoring of asset condition data as an indicator of system performance. Similarly, SMS is a formal data-driven approach to managing safety risk and assuring the effectiveness of safety risk mitigations. SMS does not require that a specific action be taken to address a specific safety risk. SMS merely provides an agency with the

information necessary to identify and understand safety risks, and subsequently make a determination about how to mitigate those risks.

C. Chapter III—Managing Risks and Assuring Safe Performance in Public Transportation

Comments: Safety Advisories

A few commenters provided comments concerning safety advisories. One commenter stated that safety advisories are beneficial, but they would be more valuable if they were issued with greater frequency and included analysis of the impact of previous safety advisories. Another commenter requested that FTA issue safety advisories for the bus industry along with the rail industry, while another agency requested more information related to how transit agencies should incorporate safety advisories into their safety plans.

FTA's Response

Due to the nature of an advisory, an operator need not "comply" with an advisory, but instead would decide whether or not to adopt the recommended actions. Each operator should determine whether or not the hazard or risk addressed in an advisory is relevant to its system and determine appropriate mitigations.

To date, FTA has only issued advisories related to hazards or risks that may impact rail transit operators. In the future FTA may issue advisories for other modes of transit.

Comments: Standards

Multiple commenters provided input on the voluntary nature of the National Safety Plan's safety standards. Several commenters, including multiple State DOTs and a Federal agency, expressed concern about the voluntary nature of the program. These commenters suggested that Congress intended for (and required) FTA to establish minimum mandatory criteria, not voluntary criteria, and that FTA should adjust the National Safety Plan accordingly by making the National Safety Plan a regulation instead of a guidance document. One commenter asserted that performance measures in operations should be based on robust rules-based compliance programs with an emphasis on mentoring and coaching.

Other commenters approved of the voluntary nature of the National Safety Plan's safety standards. One commenter praised the National Safety Plan for being prescriptively limited and voluntary, which would allow agencies

greater flexibility in implementing a safety program.

One commenter noted that voluntary standards for heavy and light rail are inadequate and are in need of revision. The commenter stated that heavy and light rail vehicles need additional crashworthiness, event recorder, safety appliance, fire, and camera safety standards.

Several commenters responded to a request from FTA to provide examples of voluntary safety standards that transit agencies have adopted.

A couple of commenters strongly encouraged FTA to strengthen vehicle safety performance standards by adding a fire safety component, noting that current fire safety provisions, particularly with regards to the interior of the vehicle, are insufficient. The commenters recommended that fire performance standards for vehicle seating be included in the National Safety Plan. Several commenters stated that FMVSS 302 is not adequate to ensure fire safety in public transit systems and is a standard that has been discredited by repeated scientific study. A number of commenters specifically singled out bus systems as a particularly inappropriate use of the FMVSS 302 standard, stating that FMVSS 302 is a bare minimum standard for cars that should not apply to buses because buses hold more people and have fewer potential exits.

Several commenters provided recommendations for standards that could replace FMVSS 302. Some commenters recommended FTA use the National Safety Council fire test, ASTM E2574, NFPA 130, or a heat release standard instead. These commenters recommended that fire standards should be requirements, not recommendations.

One commenter noted that it has adopted the Federal Motor Carrier Safety Administration (FMCSA) regulations as a baseline to follow for operations and maintenance safety and encouraged FTA to include these standards in the National Safety Plan. Another commenter indicated that it has adopted The American Society of Mechanical Engineers (ASME) safety standards for heavy rail vehicles, Institute of Electrical and Electronics Engineers (IEEE) standards for rail transit event recorders, and National Fire Protection Association (NFPA) standards for fixed guideway transit and passenger rail systems.

One commenter responded to FTA's request for comments on the costs of implementing voluntary safety standards, indicating that the cost of implementing voluntary safety standards was minimal. One commenter

responded to FTA's request for examples of additional standards adopted by transit agencies, stating that it has adopted the R179 Train Specification standards in addition to voluntary safety standards.

Some commenters suggested that FTA include hour-of-service and fitness for duty requirements, as well as standards for train specifications (R179). A transit agency and a professional association recommended that transit policing and customer expectation standards should be included in the National Safety Plan.

FTA's Response

For this first iteration of the National Safety Plan FTA believes that it is appropriate to include only voluntary standards. The FAST Act requires the Secretary of Transportation to conduct a review of public transportation safety standards and protocols to document existing standards and protocols that are currently used in transit and examine their efficacy. The content of the review must include minimum safety performance standards developed by the public transportation industry and safety performance standards, practices, or protocols in use by rail fixed guideway public transportation systems. The review also must include rail and bus safety standards, practices, or protocols in use by public transportation systems regarding rail and bus design and the workstation of rail and bus operators; scheduling fixed route rail and bus service with adequate time and access for operators to use restroom facilities; fatigue management; and crash avoidance and worthiness.

FTA has engaged in this review through the issuance of a **Federal Register** notice requesting public comment on its Compendium (inventory) of transit safety standards and protocols. See 81 FR 30605 (May 17, 2016). The Compendium includes an inventory of transit standards and protocols that FTA has identified, including standards or regulations promulgated by other Federal agencies and the standards and issue areas referenced in the comments.

Upon completion of the review and evaluation, FTA will issue a report presenting the findings of the review of standards; the outcome of the evaluation; a comprehensive set of recommendations to improve the safety of the public transportation industry, including recommendations for regulatory changes, if applicable; and actions taken to address the recommendations provided.

FTA will issue future mandatory standards through the notice and comment rulemaking process.

Carolyn Flowers,

Acting Administrator.

[FR Doc. 2017-00678 Filed 1-17-17; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA-2016-0044]

Notice of Availability of Programmatic Assessment of Greenhouse Gas Emissions From Transit Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of availability.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of a final Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects (Programmatic Assessment) and an accompanying Greenhouse Gas Emissions (GHG) Estimator Tool (Estimator Tool). On November 22, 2016, FTA announced in the **Federal Register** the availability of the draft Programmatic Assessment and Estimator Tool and requested public comment. FTA received five comment letters and presents its responses to those comments in this notice.

DATES: This final Programmatic Assessment and Estimator Tool are effective immediately.

ADDRESSES: The final Programmatic Assessment and Estimator Tool will be made available in the U.S. Government's electronic docket site at <http://www.regulations.gov> under docket number FTA-2016-0044 and on the FTA Web site at <http://www.fta.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Maya Sarna, Office of Environmental Programs, (202) 366-5811, or Christopher Van Wyk, Office of Environmental Programs, (202) 366-1733; Helen Serassio, Office of Chief Counsel, (202) 366-1974. FTA is located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 9:00 a.m. to 5:00 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

In August 2016, the Council on Environmental Quality (CEQ) released its *Final Guidance for Federal Departments and Agencies on*

Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act (NEPA) Reviews. The guidance provides a framework for agencies to consider the effects of a proposed action on climate change, as indicated by its estimated greenhouse gas (GHG) emissions. The CEQ guidance notes that an agency may decide, rather than analyze GHG emissions project-by-project, that it would be useful and efficient to provide an aggregate analysis of GHG emissions or climate change effects through programmatic analysis and then incorporate that analysis by reference into future NEPA reviews. FTA currently considers it practicable to assess the effects of GHG emissions and climate change for a variety of transit projects at a programmatic level.

The purpose of the *Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects* is to: (1) Report on whether certain types of proposed transit projects merit detailed analysis of their GHG emissions at the project-level for purposes of NEPA; and (2) provide a source of data and analysis for FTA and its grantees to reference in future NEPA documents for projects where detailed, project-level GHG analysis would provide only limited information beyond what is collected and considered in the assessment. The Programmatic Assessment presents results from an analysis to estimate direct and indirect GHG emissions generated from the construction, operations, and maintenance phases of projects across select transit modes. The findings provide a reference for FTA and its grantees to use in future NEPA documents to describe the potential effects of proposed transit investments on partial lifecycle GHG emissions. This assessment's results can inform transit project sponsors who are considering the implications of GHG emissions of future transit investments or who might independently want to evaluate the GHG emissions benefits and cost of such investments. As part of the Programmatic Assessment, FTA developed the Estimator Tool. The Estimator Tool is a spreadsheet-based tool that allows users to calculate partial lifecycle GHG emissions estimates by transit mode for the construction, maintenance, and operations phases of transit project development, as well as an estimate of personal vehicle emissions displaced due to transit's "ridership effect."

Comments Received

On November 22, 2016, FTA announced in the **Federal Register** the availability of the draft Programmatic

Assessment and requested comment on it. As of the date of issuance of this notice of availability, FTA considered all comments received in the docket. FTA received comments from one trade association, three transit agencies, and one member of the public. FTA organized these comments by topic. This notice discusses the comments FTA received, provides FTA's responses to those comments, and identifies resulting changes FTA made to the final Programmatic Assessment and Estimator Tool.

One commenter requested clarification on three points: (1) Showing the calculation for deriving the GHG emissions value; (2) provide displaced auto vehicle miles traveled (VMT) data values, including fuel efficiencies and emissions factors used; and (3) discussion of displaced VMT in methodology, including whether annual displaced VMT for buses were included in the assessment.

FTA responds to the points as follows. First, the calculation for the GHG emissions output values are included in the Estimator Tool matrix (Excel spreadsheet that is an accompanying tool to the Programmatic Assessment). The calculation is: (construction sources * emission factor) + (maintenance sources * emission factor) – (displaced VMT sources * emission factor). Second, Table 2–3 includes values for gasoline-fueled sedans. It is the first entry in the sedan/ auto cell on Table 2–3, and is combined with Ethanol. The upstream emissions for gasoline-fueled sedans are 0.0001 MTCO₂eq per mile and the downstream emissions are 0.0003 MTCO₂eq per mile. This emission source was derived from the "Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model" by Argonne National Laboratory (GREET), as described on page 12 of the final Programmatic Study. Third, annual displaced VMT for both bus and rail transit (the change in annual transit VMT between the build and the no-build scenario) are included in the calculation of the project's total annual GHG emissions. The calculation of a project's total annual displaced GHG emissions includes both personal vehicle-displaced VMT and annual transit-displaced VMT. The text of the final Programmatic Assessment will be updated to describe how annual displaced-transit VMT is included in the methodology and how it was used in the scenario testing, as noted by the commenter.

One trade association provided the following comments on the draft

Programmatic Assessment, with support mentioned by a number of transit agencies: (1) Materials for construction should not be included as part of the construction-related emissions factors; (2) litigation issues may arise due to data quality/limitations of construction-related emissions factors; (3) the impact of transit-oriented development and the land use effect in displacing GHG emissions was not included in the draft Programmatic Assessment; (4) incorporating and clarifying the methodology for calculating displaced VMT; (5) exemptions for light rail, streetcar, and BRT projects from completing GHG assessments should be provided.

On the first general point, the Council of Environmental Quality's guidance recommends that agencies quantify a proposed action's projected direct and indirect GHG emissions, taking into account available data and GHG quantification tools that are suitable for and commensurate with the proposed agency action. For the purpose of FTA's Programmatic Assessment, upstream emissions from the construction of public transportation facilities and infrastructure are considered indirect GHG emissions of a proposed project. The methodology used in the Programmatic Assessment is optional and may be edited to suit the requirements of a specific project, especially in scenarios where transit agencies are able to better quantify upstream emissions due to better available material sourcing procurement processes. The Federal Highway Administration's Infrastructure Carbon Estimator (ICE) provides readily available data to estimate the construction-related upstream emissions. The ICE tool provides estimates for the upstream emissions associated with constructing public transportation facilities, including the emissions associated with the extraction, transport, and production of the materials. Transit agencies are encouraged to consider opportunities within their procurement activities to mitigate a project's GHG emissions. As requested specifically by the commenter, FTA recognizes that emissions due to upstream materials acquisition activities are in fact the responsibility of the suppliers and manufacturers of these products. But as this commenter notes, there may be ways of procuring materials that can help to mitigate the GHG emissions associated with those materials, and FTA will consider ways of doing so, providing guidance as appropriate.

On the second general point, the programmatic assessment methodology

relies on the best available data and tools to estimate the GHG emissions associated with transit projects. Where available, the Programmatic Assessment uses conservative emission estimates for construction-related activities that involved direct and indirect emissions—electricity use and sources of construction materials. For example, the Estimator Tool's underground track construction emissions factor corresponding to ICE's most conservative emissions estimate. The emissions factors associated with in the Estimator Tool for electrically powered vehicles use the "U.S. Mix" region from the Environmental Protection Agency's (EPA's) eGRID2012, which represents an average value for the country. EPA's eGRID also provides GHG emission data at the sub-region level, which reflect more region-specific electricity generation. The Programmatic Assessment (Appendix B) and the associated Estimator Tool include the eGRID sub-region electricity emission factors, which reflect more region-specific electricity generation. While FTA understands the issue related to litigation due to data quality issues, the Programmatic Assessment is a capture in time of the best available data. FTA's Programmatic Assessment also establishes the methodology used to derive GHG emissions factors that may be replicated by transit agencies using locally available data sets in the Estimator Tool. Lastly, FTA would note that the GHG emissions provide a conservative understanding of transit's contribution to GHG emissions in order to provide disclosure for purposes of NEPA compliance. The use of the Programmatic Assessment is entirely optional, but FTA believes it would reduce litigation risk by taking a "hard look" at GHG emissions due to transit projects, even if that assessment is more conservative than actual emissions on certain projects.

On the third general point, the Programmatic Assessment acknowledges that, in addition to displacing automobile VMT, transit can help reduce congestion and spur more compact, transit-oriented development, thus reducing GHG emissions that may have otherwise occurred. The longer timeframe associated with realizing the GHG emission reduction benefits from denser development was not the primary reason why a land use component was not included in the methodology. A land use component was not included because the available tools (*i.e.*, the Land Use Benefit Calculator associated with TCRP Report 176) could not be applied at a

programmatic scale due to its location-specific nature. Transit agencies that wish to include the GHG emission benefits associated with the land use effect of transit may do so in NEPA documents. For example, agencies could use the results generated by the Land Use Benefit Calculator and add it to the results generated using the Estimator Tool. FTA notes that including a land use component, if possible for a national Programmatic Assessment, would in most cases reduce the predicted GHG emissions that can be attributed to transit projects.

On the fourth general point, FTA notes that the Programmatic Assessment does not specify the methodology that a transit agency should use to generate travel forecasts. The sample of transit projects analyzed in the Programmatic Assessment included 36 transit projects that applied for funding through the 49 U.S.C. 5309 Capital Investment Grants (CIG) Program. As part of the CIG program, each project developed and submitted travel forecast information, including displaced VMT, using one of the following approaches: Region-wide travel models; incremental data-driven methods; or FTA's Simplified Trips-on-Project Software (STOPS). FTA's Programmatic Assessment cannot include revised methodology incorporating the Land Use Benefit Calculator or STOPS because neither can be developed on a programmatic scale. Transit agencies that choose to calculate GHG emissions for a project can choose the method for calculating VMT.

On the fifth general point, FTA developed the Programmatic Assessment to provide transit agencies with a useful source of methodology, data, and analysis to reference in future environmental review documents to meet NEPA requirements. FTA recommends that NEPA reviews for individual BRT and streetcar projects incorporate this Programmatic Assessment by reference, with no additional need for project-specific analysis for purposes of NEPA. FTA also recommends that light rail projects with a high proportion of displaced VMT to annual transit VMT, regardless of length, alignment, and number of stations, incorporate this Programmatic Assessment by reference, with no additional need for project-specific analysis for purposes of NEPA. In cases where a light rail project is expected to have a lower ratio of displaced VMT to annual transit VMT, however, conducting a project-specific analysis using the Estimator Tool or another locally recommended approach is likely appropriate for purposes of NEPA

compliance. FTA will continue to evaluate the Programmatic Assessment and Estimator Tool to make improvements that will provide better estimates of GHG emissions for transit projects. FTA is making available the final Programmatic Assessment at this time, however, so that it is available for incorporation by reference in NEPA documents going forward while FTA continues to make improvements. FTA is also making available its Estimator Tool for transit agencies that wish to have a more tailored estimate of emissions or for which a project differs substantially from those used to create the Programmatic Assessment.

Authority: 42 U.S.C. 4321, *et seq.*; 40 CFR 1507.3; 49 CFR 1.81(a)(5).

Lucy Garliauskas,

Associate Administrator, Office of Planning and Environment, Federal Transit Administration.

[FR Doc. 2017-00918 Filed 1-17-17; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2015-0075; Notice 2]

PACCAR, Inc., Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: PACCAR, Inc. (PACCAR), has determined that certain Peterbilt and Kenworth trucks do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective devices, and Associated Equipment*. PACCAR filed a noncompliance report dated June 11, 2015, that was later revised on June 12, 2015. PACCAR also petitioned NHTSA on July 9, 2015, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

ADDRESSES: For further information on this decision contact Mike Cole, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-2334, facsimile (202) 366-5930.

SUPPLEMENTARY INFORMATION:

I. Overview

PACCAR, Inc. (PACCAR), has determined that certain Peterbilt and

Kenworth trucks do not fully comply with paragraph S9.3.2 of Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective devices, and Associated Equipment*. PACCAR filed a noncompliance report dated June 11, 2015, that was later revised on June 12, 2015, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. PACCAR also petitioned NHTSA on July 9, 2015, pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of PACCAR's petition was published, with a 30-day public comment period, on September 25, 2015 in the **Federal Register** (80 FR 57911). One comment was received. To view the petition, comments and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2015-0075."

II. Trucks Involved

Affected are approximately 197 MY 2015–2016 Kenworth K270 and K370 manufactured between November 11, 2014 and March 18, 2015 and MY 2015–2016 Peterbilt 220 manufactured between November 10, 2014 and March 18, 2015.

III. Noncompliance

PACCAR explains that due to a programming error in the cab controller software in the subject trucks, the turn signal pilot indicator located on the instrument panel flashes twice as fast as the turn signals flash, and therefore does not meet the requirements of paragraph S9.3.2 of FMVSS No. 108.

IV. Rule Text

Paragraph S9.3.2 of FMVSS No. 108 requires in pertinent part

S9.3.2 The indicator must consist of one or more lights flashing at the same frequency as the turn signal lamps.

V. Summary of PACCAR's Position

PACCAR stated its belief that the subject noncompliance is inconsequential to motor vehicle safety. PACCAR states that the purpose of the turn signal pilot indicator is to assure that the vehicle operator can determine whether the turn signal system is activated. Thus, PACCAR believes that the pilot indicators in the subject trucks fully accomplishes that purpose; *i.e.*,

they flash when the turn signal is activated, and they cease flashing when the turn signal is deactivated (either manually or automatically).

PACCAR reviewed the agency's decisions on petitions for inconsequentiality in connection with various noncompliances with turn signal requirements. While PACCAR did not find any prior decisions that are similar to this noncompliance, PACCAR believes that NHTSA has granted previous petitions in connection with turn signal noncompliance that carried potentially greater safety risks.

PACCAR is not aware of any crashes or injuries associated with the noncompliance and it has not received any consumer complaints or warranty claims related to this issue.

PACCAR additionally informed NHTSA that after the noncompliance was discovered, all production of the noncompliant trucks in PACCAR's possession was put on hold until the software error could be corrected.

In summation, PACCAR believes that the described noncompliance of the subject trucks is inconsequential to motor vehicle safety, and that its petition, to exempt PACCAR from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

NHTSA's Decision

Comments Received: One comment was received from Mr. Bryan Branson who supported granting this petition. Mr. Branson explained that because the in-cab warning to the driver is there and working, this noncompliance causes no safety hazard to the motoring public. Mr. Branson also believed that a recall for this issue would be a costly and difficult burden to the truck owner if they had to take the unit out of service to repair this issue.

NHTSA's Analysis: As noted by PACCAR, the (exterior mounted) turn signal lamps on the affected vehicles comply with all requirements of FMVSS No. 108. As such, surrounding traffic and pedestrians would be unaffected by the noncompliance and would be notified of the driver's intention to make a turn when the affected vehicle's turn signals are activated. The person solely affected by the noncompliance would be the individual driver of the vehicle. When the turn signal lamps are activated, the driver will still be receiving the required notification that the vehicle's turn signals are flashing, albeit at twice the required rate. This could be seen as a minor annoyance to the driver; however, the agency does not

believe that this would distract the driver or cause the driver to refrain from using the turn signal lamps to indicate his intention to turn. Thus, the agency does not believe that this is a safety issue.

Further, PACCAR indicated that most of the trucks in this population are covered by another recall (15V-206) and the remedy for that recall will include a software reflash that will correct the turn signal indicator lamp flash rate at the same time. As such, we believe that truck owners will be afforded a correction for this issue at their truck's next service visit or when receiving the remedy to the aforementioned recall.

NHTSA's Decision: In consideration of the foregoing, NHTSA finds that PACCAR has met its burden of persuasion that the subject FMVSS No. 108 noncompliance is inconsequential to motor vehicle safety. Accordingly, PACCAR's petition is hereby granted and PACCAR is exempted from the obligation of providing notification of, and remedy for the subject noncompliance.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that PACCAR no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after PACCAR notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,
Director, Office of Vehicle Safety Compliance.
[FR Doc. 2017-01003 Filed 1-17-17; 8:45 am]

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DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration****[Docket No. NHTSA–2016–0092; Notice 2]****Mercedes-Benz USA, LLC, Grant of Petition for Decision of Inconsequential Noncompliance****AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).**ACTION:** Grant of petition.

SUMMARY: Mercedes-Benz USA, LLC (MBUSA), has determined that certain model year (MY) 2016 Mercedes GL-Class multipurpose passenger vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less*. MBUSA filed a defect report dated August 12, 2016, and amended it on August 29, 2016. MBUSA then petitioned NHTSA on August 31, 2016, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

ADDRESSES: For further information on this decision contact Mr. Kerrin Bressant, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–1110, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:**I. Overview**

Mercedes-Benz USA, LLC (MBUSA), has determined that certain model year (MY) 2016 Mercedes GL-Class multipurpose passenger vehicles do not fully comply with paragraph S4.3(d) of Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less*. MBUSA filed a report dated August 12, 2016, and amended it on August 29, 2016, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. MBUSA then petitioned NHTSA on August 31, 2016, pursuant to 49 U.S.C. 30118(d) and 30120(h) and their implementing regulations at 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on November 14, 2016, in the **Federal Register** (81 FR 79558). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number “NHTSA–2016–0092.”

II. Vehicles Involved

Affected are 2,917 of the following MY 2016 Mercedes-Benz GL-Class multipurpose passenger vehicles manufactured between December 1, 2015, and February 5, 2016:

- GL 350 Bluetec 4Matic SUV (155 vehicles)
- GL 450 4Matic SUV (2,482 vehicles)
- GL 550 4Matic SUV (280 vehicles)

III. Noncompliance

MBUSA explains that the noncompliance is due to a labeling error. The subject vehicles are equipped with a spare tire, size T155/80 R19 114M; however, the tire information placard affixed to the vehicles' B-pillar incorrectly identifies the spare tire size as T165/90 R19 119M. The placard therefore does not comply with requirements specified in paragraph S4.3(d) of FMVSS No. 110.

IV. Rule Text

Paragraph S4.3 of FMVSS No. 110 states, in pertinent part:

S4.3 *Placard*. Each vehicle, except for a trailer or incomplete vehicle shall show the information specified in S4.3 (a) through (g), and may show, at the manufacturer's option, the information specified in S4.3 (h) through (i), on a placard permanently affixed to the driver's side B-pillar. In each vehicle without a driver's side B-pillar and two doors on the driver's side of the vehicle opening in the opposite directions, the placard shall be affixed on the forward edge of the rear side door . . .

(d) Tire size designation, indicated by the headings “size” or “original tire size” or “original size,” and “spare tire” or “spare,” for the tires installed at the time of the first purchase for purposes other than resale. For full size spare tires, the statement “see above” may, at the manufacturer's option replace the tire size designation. If no spare tire is provided, the word “none” must replace the tire size designation; . . .

V. Summary of MBUSA's Petition

MBUSA described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, MBUSA stated the following:

(a) Both tire sizes can be used on the vehicle. The spare tire with the size of T165/90 R19 119M (the size stated on the B-pillar label) is equipped on older models produced before November 2015. The purpose of FMVSS No. 110 is to “prevent tire overloading,” see 40 CFR 571. S1, and no overloading will result from the incorrect label because either tire size (the one stated on the label or the one actually on the vehicle) can be used.

(b) The tire pressure is the same for both spare tire sizes. When checking the tire pressure for the spare tire, the customer will find the correct tire pressure values on the label. Again, no overloading will result from the incorrect label because the correct tire pressure values are provided.

(c) Information regarding the correct spare tire is available to the vehicle owner. The vehicles are equipped with an Operator's Manual which describes both spare tire sizes. Also, if a tire needs to be replaced on the spare wheel, the dealer Electronic Parts Catalogue (EPC) correctly specifies the proper tire part number. Additionally, further assistance regarding the correct spare tire can be provided by the customer assistance center.

(d) The presumption that the issue described above will have an inconsequential impact on safety is supported by field data: MBUSA is not aware of any customer complaints, accidents, or injuries alleged to have occurred as a result of this tire label discrepancy in the United States.

MBUSA concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA's Decision

NHTSA's Analysis: The intent of FMVSS No. 110 is to ensure that vehicles are equipped with tires appropriate to handle maximum vehicle loads and prevent overloading. MBUSA explained that the tire placard on the affected GL-Class vehicles specifies a spare tire size (T165/90 R19 119M) that is different than the originally equipped spare tire size (T155/80R19 114M). MBUSA stated that no overloading will occur if either tire is used. The agency analyzed the load rating specifications of both spare tire sizes and confirmed that either tire could be used and are appropriate for the subject vehicle's maximum loaded weight conditions.

MBUSA explained that the recommended tire inflation pressure for the labeled spare tire listed on the FMVSS No. 110 tire placard is the same inflation pressure that MBUSA would recommend for the originally equipped spare tire. The agency verified that both spare tire sizes at the labeled recommended inflation pressure are appropriate for the maximum loaded weight of the subject vehicles. If a consumer inadvertently used the labeled inflation pressure to inflate the originally equipped spare tire, the tire load rating would be sufficient for the maximum loaded vehicle weight.

Furthermore, MBUSA explained that the subject vehicle's owner's manuals describe both spare tire sizes. The agency believes this additional information can be used by the consumer to ensure either size is appropriate for use.

NHTSA's Decision: In consideration of the foregoing, NHTSA finds that MBUSA has met its burden of persuasion that the subject FMVSS No. 110 noncompliance in the affected vehicles is inconsequential to motor vehicle safety. Accordingly, MBUSA's petition is hereby granted and MBUSA is consequently exempted from the obligation of providing notification of, and a free remedy for, the subject noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that MBUSA no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after MBUSA notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,
Director, Office of Vehicle Safety Compliance.
[FR Doc. 2017-01006 Filed 1-17-17; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2016-0115; Notice 1]

BMW Group of America, LLC, Incorporated, Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: BMW of North America, LLC (BMW), has determined that certain model year (MY) 2016–2017 BMW, Mini, and Rolls-Royce vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 209, *Seat Belt Assemblies*. BMW filed a report dated October 13, 2016. BMW also petitioned NHTSA on November 4, 2016, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

DATES: The closing date for comments on the petition is February 17, 2017.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- **Mail:** Send comments by mail addressed to U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

- **Hand Delivery:** Deliver comments by hand to U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

- **Electronically:** Submit comments electronically by logging onto the Federal Docket Management System (FDMS) Web site at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

- Comments may also be faxed to (202) 493-2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have

submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at <https://www.regulations.gov> by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477-78).

SUPPLEMENTARY INFORMATION:

I. Overview

BMW of North America, LLC (BMW), has determined that certain model year (MY) 2016–2017 BMW, Mini, and Rolls-Royce vehicles do not fully comply with paragraph 4.3(j)(2)(ii) of Federal Motor Vehicle Safety Standard (FMVSS) No. 209, *Seat Belt Assemblies*. BMW filed a report dated October 13, 2016, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. BMW also petitioned NHTSA on November 4, 2016, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of BMW's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

II. Vehicles Involved

Approximately 15,630 of the following MY 2016–2017 BMW, Mini, and Rolls-Royce vehicles manufactured

between June 29, 2016 and October 10, 2016 are potentially involved:

- 2017 BMW X1 SAV (X1 sDrive28i, X1 xDrive28i)
- 2017 BMW 5 Series Gran Turismo (535i Gran Turismo, 535i xDrive Gran Turismo, 550i xDrive Gran Turismo)
- 2016 BMW 5 Series (528i, 528i xDrive, 535i, 535i xDrive, 550i, 550i xDrive, M5)
- 2016 BMW 5 Series (535d, 535d xDrive)
- 2016 Mini Cooper Clubman and Mini Cooper S Clubman
- Mini Hardtop 4-door Cooper and Mini Hardtop 4-door Cooper S
- 2017 Rolls-Royce Ghost

III. Noncompliance

BMW explains that the noncompliance involves the Emergency Locking Retractor (ELR) in the safety belt assembly of the vehicle's front left seat. These ELRs are equipped with a vehicle-sensitive locking mechanism and a webbing-sensitive locking mechanism. The noncompliance specifically involves the vehicle-sensitive locking mechanism, which does not lock as designed when subjected to the requirements of paragraph S4.3(j)(2)(ii) of FMVSS No. 209.

IV. Rule Text

Paragraph S4.3 of FMVSS No. 209 states in pertinent part:

S4.3 *Requirements for hardware . . .*

(j) *Emergency-locking retractor . . .*

(2) *For seat belt assemblies manufactured on or after February 22, 2007 and for manufacturers opting for early compliance.* An emergency-locking retractor of a Type 1 or Type 2 seat belt assembly, when tested in accordance with the procedures specified in paragraph S5.2(j)(2) . . .

(ii) Shall lock before the webbing payout exceeds the maximum limit of 25 mm when the retractor is subjected to an acceleration of 0.7 g under the applicable test conditions of S5.2(j)(2)(iii)(A) or (B). The retractor is determined to be locked when the webbing belt load tension is at least 35 N.

V. Summary of BMW's Petition

BMW described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, BMW submitted the following reasoning:

(a) The vehicle-sensitive locking mechanism functions, but the noncompliance involves a slight exceedance of the FMVSS No. 209 Section S4.3(j)(2)(ii) requirement.

(b) The slight exceedance is such that, based upon testing of non-compliant units, the vehicle-sensitive locking mechanism locks at approximately 1.0g within 25mm, or at 0.7 g within 90mm.

(c) The tilt-lock function of the ELR is compliant, and locks at angles greater than 15-deg up to 41-deg when subjected to the FMVSS No. 209 Section S4.3(j)(2) rollover requirements.

(d) The ELR also contains a voluntary webbing-sensitive locking mechanism which provides crash and rollover restraint performance comparable to the performance provided by an FMVSS No. 209 compliant vehicle-sensitive locking mechanism.

(e) Crash test results comparing FMVSS No. 209 S4.3(j)(2)(ii) compliant ELRs and ELRs in which the vehicle-sensitive locking mechanism has been disabled (to demonstrate a "worst-case scenario", even though in affected vehicles the vehicle-sensitive mechanism remains functional) demonstrate comparable results according to FMVSS No. 208 assessments.

Test results indicate that any performance differences are with normal "data scatter" and are attributed to test tolerances.

(f) Affected safety belt assemblies comply with all other applicable provisions of FMVSS No. 209.

(g) NHTSA previously granted a petition from General Motors in which the ELR's vehicle-sensitive locking mechanism was completely non-functional, whereas the ELR's vehicle-sensitive locking mechanism in the affected BMW vehicles is functional, but may experience a slight exceedance of the FMVSS no. 209 S4.3(j)(2)(ii) requirement.

(h) BMW has not received any customer complaints related to this issue.

(i) BMW is not aware of any accidents or injuries related to this issue.

(j) Vehicle production has been corrected.

BMW concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

To view BMW's petition, test data and analyses in its entirety you can visit <https://www.regulations.gov> by following the online instructions for accessing the dockets and by using the docket ID number for this petition shown in the heading of this notice.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the

duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that BMW no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after BMW notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2017-01005 Filed 1-17-17; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Theft Prevention Standard; General Motors LLC

AGENCY: National Highway Traffic Safety Administration, Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the General Motors LLC's (GM) petition for an exemption of the Chevrolet Volt vehicle line in accordance with 49 CFR part 543, *Exemption from Vehicle Theft Prevention Standard*. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of 49 CFR part 541, *Federal Motor Vehicle Theft Prevention Standard* (Theft Prevention Standard).

DATES: The exemption granted by this notice is effective beginning with the 2018 model year (MY).

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Mazyck, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, W43-443, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Mazyck's phone number is (202) 366-4139. Her fax number is (202) 493-2990.

SUPPLEMENTARY INFORMATION: In a petition dated October 6, 2016, GM requested an exemption from the parts-marking requirements of the Theft Prevention Standard for the Chevrolet Volt vehicle line beginning with MY 2018. The petition requested an exemption from parts-marking pursuant to 49 CFR part 543, Exemption from Vehicle Theft Prevention Standard, based on the installation of an antitheft device as standard equipment for the entire vehicle line.

Under 49 CFR part 543.5(a), a manufacturer may petition NHTSA to grant an exemption for one vehicle line per model year. In its petition, GM provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the MY 2018 Chevrolet Volt vehicle line. GM stated that its Chevrolet Volt vehicle line will be installed with the PASS-Key III+ antitheft device as standard equipment. The PASS-Key III+ is a passive, transponder based, electronic engine immobilizer antitheft device. GM stated that a keyless ignition system will be installed on its Chevrolet Volt vehicle line. Key components of its PASS-Key III+ system will include an electronically-coded ignition key, a body control module (BCM) with integrated PASS-Key III+ controller, engine control module (ECM), immobilizer exciter module, radio frequency (RF) receiver module, passive antenna module and low frequency antennas (LF). The electronic key is incorporated within a remote key fob. The key fob contains buttons to perform normal remote keyless door entry functions. GM stated that the device will provide protection against unauthorized use (*i.e.*, starting and engine fueling), but will not provide any visible or audible indication of unauthorized vehicle entry (*i.e.*, flashing lights or horn alarm).

GM's submission is considered a complete petition as required by 49 CFR 543.7, in that it meets the general requirements contained in § 543.5 and the specific content requirements of § 543.6.

In addressing the specific content requirements of 543.6, GM provided information on the reliability and durability of its proposed device. To ensure reliability and durability of the device, GM conducted tests based on its own specified standards. GM provided information on the specific tests it uses to validate the integrity, durability and reliability of the PASS-Key III+ device and believes that the device is reliable and durable since the components must operate as designed after each test. GM

also stated that the design and assembly processes of the PASS-Key III+ subsystem and components are validated for 10 years of vehicle life and 150,000 miles of performance. The PASS-Key III+ incorporates a higher level of electrical sophistication by utilizing an electronic key that is protected from electrical duplication.

GM stated that the PASS-Key III+ device is designed to be active at all times without direct intervention by the vehicle operator. No separate intentional action to turn on the security system is needed to achieve protection. Activation of the device occurs when the operator pushes the engine Start/Stop switch to the "OFF" position. Deactivation of the immobilizer device occurs when a valid key and matching immobilization code is verified, allowing the engine to start and continue normal operations. When the operator pushes the Engine Start/Stop switch to begin vehicle operation, the vehicle transmits randomly generated data and a vehicle identifier within the passenger compartment of the vehicle through three low-frequency antennas that is controlled by the passive antenna module. The electronic key receives the data and compares its vehicle identifier with the identifier previously assigned to the vehicle. If the vehicle identifier matches the identifier of the vehicle for which the key is programmed, the electronic key will transmit a response through the RF channel to a vehicle mounted receiver. The PASS-Key III+ control module receives the RF transmission and compares the received response with an internally calculated response. If the values match, the key is recognized as valid and a password is then transmitted through a serial data link to the ECM to enable fueling and vehicle starting. If an invalid key code is detected, the system will not transmit a password to the ECM to allow operation of the vehicle. Additionally, if an invalid electronic key code is received, the vehicle will not be allowed to transition from the "Off" mode to the "Accessory", "On", or "Start" mode positions inhibiting starting, ignition, and fuel flow of the vehicle.

GM further stated that the ignition key contains electronics which provides billions of possible electronic combinations. The electronics receive energy and data from the antenna module. Upon receipt of the data, and a vehicle indicator match, the electronic key will calculate a response to the data using an internal encryption algorithm and transmit the response back to the vehicle. The antenna module then translates the radio frequency signal received from the key into a digital

signal and passes the signal on to the controller module. The controller module then compares the received response to an internally calculated value. If the values match, the key is recognized as valid and a password is transmitted through a serial data link to the ECM to enable fueling and vehicle starting. GM also stated that a secondary data challenge and response process using another encryption algorithm must be validated by the engine controller to allow continued operation. If an invalid key code is received, the PASS-Key III+ controller module will send a "Disable Password" to the engine control module and starting, ignition, and fuel flow will be inhibited.

GM stated that the PASS-Key III+ device has been designed to enhance the functionality and theft protection provided by its first, second and third generation PASS-Key, PASS-Key II, and PASS-Key III devices. GM also referenced data provided by the American Automobile Manufacturers Association (AAMA) in support of the effectiveness of GM's PASS-Key devices in reducing and deterring motor vehicle theft found in the AAMA's comments referencing the agency's Preliminary Report on "Auto Theft and Recovery Effects of the Anti-Car Theft Act of 1992 and the Motor Vehicle Theft Law Enforcement Act of 1984", (Docket 97-042; Notice 1).

GM also noted that theft data have indicated a decline in theft rates for vehicle lines equipped with comparable devices that have received full exemptions from the parts-marking requirements. GM stated that the theft data, as provided by the Federal Bureau of Investigation's National Crime Information Center (NCIC) and compiled by the agency, show that theft rates are lower for exempted GM models equipped with the PASS-Key like systems than the theft rates for earlier models with similar appearance and construction that were parts-marked. Based on the performance of the PASS-Key, PASS-Key II, and PASS-Key III devices on other GM models, and the advanced technology utilized in PASS-Key III+, GM believes that the PASS-Key III+ device will be more effective in deterring theft than the parts-marking requirements of 49 CFR part 541.

GM stated that it believes that PASS-Key III+ devices will be at least as effective in deterring theft as the parts-marking requirements and that the agency should find that installation of the PASS-Key III+ device on the Chevrolet Volt vehicle line is sufficient to qualify it for full exemption from the parts-marking requirements.

Based on the evidence submitted by GM, the agency believes that the antitheft device for the Chevrolet Volt vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR 541).

GM's proposed device lacks an audible or visible alarm. Therefore, this device cannot perform one of the functions listed in 49 CFR part 543.6(a)(3), that is, to call attention to unauthorized attempts to enter or move the vehicle. The agency concludes that the device will provide the four of the five types of performance listed in § 543.6(a)(3): Promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.7(b), the agency grants a petition for exemption from the parts-marking requirements of part 541 either in whole or in part, if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541. The agency finds that GM has provided adequate reasons for its belief that the antitheft device for the Chevrolet Volt vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541). This conclusion is based on the information GM provided about its device.

For the foregoing reasons, the agency hereby grants in full GM's petition for exemption for the Chevrolet Volt vehicle line from the parts-marking requirements of 49 CFR part 541 beginning with the 2018 model year. The agency notes that 49 CFR part 541, Appendix A-1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR part 543.7(f) contains publication requirements incident to the disposition of all part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking requirements of the Theft Prevention Standard.

If GM decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if GM wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, part 543.9(c)(2) provides for the submission of petitions "to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption."

The agency wishes to minimize the administrative burden that part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95.

Raymond R. Posten,

Associate Administrator for Rulemaking.

[FR Doc. 2017-00977 Filed 1-17-17; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2015-0035; Notice 2]

General Motors, LLC, Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT)

ACTION: Grant of petition

SUMMARY: General Motors, LLC, (GM) has determined that certain model year (MY) 2012–2015 Chevrolet Sonic passenger cars do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective*

Devices and Associated Equipment. GM has filed a noncompliance report dated March 2, 2015. GM also petitioned NHTSA on March 24, 2015, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

ADDRESSES: For further information on the decision contact Mike Cole, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-5319, facsimile (202) 366-3081.

SUPPLEMENTARY INFORMATION:

I. Overview

General Motors, LLC, (GM) has determined that certain model year (MY) 2012–2015 Chevrolet Sonic passenger cars do not fully comply with paragraph S6.5.3.4.1 of Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices and Associated Equipment*. GM has filed a noncompliance report dated March 2, 2015, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. GM also petitioned NHTSA on March 24, 2015, pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556) for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the GM petition was published, with a 30-day public comment period, on May 12, 2015, in the **Federal Register** (80 FR 27229). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2015-0035."

II. Vehicles Involved

Affected are approximately 310,243 MY 2012–2015 Chevrolet Sonic passenger cars manufactured between May 5, 2011 and February 4, 2015.

III. Noncompliance:

GM explains that the noncompliance is that the high-beam headlamp lenses on the subject vehicles are not marked with "HB3" (the HB bulb type) as required by paragraph S6.5.3.4.1 of FMVSS No. 108.

IV. Rule Text

Paragraph S6.5.3.4.1 of FMVSS No. 108 requires in pertinent part:

S6.5.3.4.1 The lens of each replaceable bulb headlamp must bear permanent marking

in front of each replaceable light source with which it is equipped that states either: The HB Type, if the light source conforms to S11 of this standard for filament light sources,

V. Summary of GM's Analyses

GM stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

(A) The high-beam headlamp lenses in question are clearly marked "9005" (the ANSI designation), which GM believes to be a well-known alternative designation recognized throughout the automotive industry and used by lighting manufacturers interchangeably with HB3, the lamp's HB type. GM also verified that the vehicle owner's manuals identify the high beam replacement bulb as 9005.

(B) That the mismarked high-beam headlamps are the correct headlamps for the subject vehicles and that they conform to all other requirements including photometric as required by FMVSS No. 108.

(C) The risk of customer confusion when selecting a correct replacement bulb is remote. Both the HB3 type and the 9005 ANSI designation are marked on the vehicles' headlamp bulb sockets, and packaging for replacement bulbs is commonly marked with both the HB type and the ANSI designation. GM searched a number of national automotive parts stores (Autozone, O'Reilly, Advanced Auto Parts, and Pep Boys), and found that all HB3 replacement bulbs in these stores were marked with the 9005 ANSI designation. Should a consumer attempt to install an incorrect bulb into the headlamp sockets, the bulb could not be successfully installed because of the unique nature of the socket hardware.

(D) GM also cited several previous petitions that NHTSA has granted dealing with noncompliances that GM believes are similar to the noncompliance that is the subject of its petition. Based on these decisions, GM believes that there is also precedent to support granting its petition.

GM is not aware of any VOQ or field data in which a consumer has complained of not being able to identify the proper replacement headlamp bulb for the affected vehicles, which GM believes to be evidence that this noncompliance is not impacting consumers.

GM has additionally informed NHTSA that it has corrected the noncompliance by adding the HB3 designation bulb type to the high-beam headlamp lens in all vehicles produced on or after February 21, 2015.

In summation, GM believes that the described noncompliance of the subject vehicles is inconsequential to motor vehicle safety, and that its petition, to exempt GM from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

NHTSA's Decision

NHTSA's Analysis: We agree with GM that the ANSI "9005" designation is a well-known alternative designation for the HB3 light source and that replacement light source packaging is commonly marked with both the HB type and ANSI designation. As such, we believe that consumers can properly identify and purchase the correct replacement upper beam light source for the affected vehicles. Further, the unique bulb holder design incorporated into the headlamps would prevent consumers from installing a light source other than an HB3/9005 so there would be no effect on headlamp performance.

NHTSA's Decision: In consideration of the foregoing, NHTSA finds that GM has met its burden of persuasion that the subject FMVSS No. 108 noncompliance is inconsequential to motor vehicle safety. Accordingly, GM's petition is hereby granted and GM is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that GM no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after GM notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2017-01004 Filed 1-17-17; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Contracting Initiative

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The DOT is extending the contracting initiative pilot program for a period of 5 years.

DATES: This pilot program became effective on March 6, 2015.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Michael Harkins, Deputy Assistant General Counsel for General Law, Office, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, 202-366-0590 (telephone), Michael.Harkins@dot.gov (email).

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at http://www.archives.gov/federal_register and the Government Printing Office's Web page at <http://www.gpoaccess.gov>.

Background

On March 6, 2015, DOT published a notice in the **Federal Register** (80 FR 12257) establishing a contracting initiative pilot program under which, Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) recipients and subrecipients could utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. The purpose of the pilot program is to determine whether the use of such requirements "unduly limit competition," as provided in an August 23, 2013, opinion from the Department of Justice's Office of Legal Counsel (OLC). DOT established the pilot program for a period of 1 year unless extended. On March 17, 2016, DOT extended this pilot program for a period of 1 additional year, until March 6, 2017 (81 FR14524). To date, DOT has received only limited data from the program. As a result, DOT has decided to extend the pilot program until March

6, 2022, so that it can gather additional data from more projects to better assess the effect of local hire preferences on competition. The extension of this pilot program will provide FHWA and FTA recipients and subrecipients flexibility to continue operating under the pilot program while DOT conducts its evaluation as well as provide DOT with additional projects to consider in evaluating the impacts on competition.

Please note that Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114–113 (FY 2016 Appropriations Act), extended by Public Law 114–223 and Public Law 114–254, continues the restriction on the Federal Transit Administration (FTA) from using FY 2016 funds to implement, administer or enforce 49 CFR 18.36(c)(2) for construction hiring. Accordingly, FTA recipients and subrecipients do not need to submit applications for participation in the pilot program for contracts awarded or advertised on or before September 30, 2016.

Additionally, we note that Section 192 of the FY 2016 Appropriations Act (also extended by Public Law 114–223 and Public Law 114–254) expressly authorizes DOT assisted contracts under titles 49 and 23 of the United States Code utilizing geographic, economic, or other hiring preferences not otherwise authorized by law if the grant recipient certifies the following:

(1) That except with respect to apprentices or trainees, a pool of readily available but unemployed individuals possessing the knowledge, skill, and ability to perform the work that the contract requires resides in the jurisdiction;

(2) That the grant recipient will include appropriate provisions in its bid document ensuring that the contractor does not displace any of its existing employees in order to satisfy such hiring preference; and

(3) That any increase in the cost of labor, training, or delays resulting from the use of such hiring preference does not delay or displace any transportation project in the applicable Statewide Transportation Improvement Program or Transportation Improvement Program.

Accordingly, recipients and subrecipients should follow the application process described in the March 6, 2015, **Federal Register** notice (80 FR 12257), except that recipients and subrecipients must also include the required certifications from Section 192 of the FY 2016 Appropriations Act as discussed above.

Issued in Washington, DC, on December 28, 2016.

Anthony R. Foxx,

Secretary of Transportation.

[FR Doc. 2017–00984 Filed 1–17–17; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Orders (E.O.s) 13722 and 13687.

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (OFAC) is publishing the names of two entities identified as blocked pursuant to E.O. 13722, "Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea," and of seven individuals whose property and interests in property are blocked pursuant to E.O. 13687, "Imposing Additional Sanctions With Respect to North Korea."

DATES: OFAC's actions described in this notice were effective on January 11, 2017.

FOR FURTHER INFORMATION CONTACT: The Department of the Treasury's OFAC: Assistant Director for Licensing, tel.: 202–622–2480, Assistant Director for Regulatory Affairs, tel.: 202–622–4855, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the Chief Counsel (Foreign Assets Control), Office of the General Counsel, tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's Web site (www.treasury.gov/ofac).

Notice of OFAC Actions

On January 11, 2017, OFAC identified the following two entities as blocked pursuant to E.O. 13722, "Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea":

Entities

1. MINISTRY OF LABOR, Korea, North [DPRK3].

2. STATE PLANNING COMMISSION, Korea, North [DPRK3].

In addition, on January 11, 2017, OFAC blocked the property and interests in property of the following seven individuals pursuant to E.O. 13687, "Imposing Additional Sanctions With Respect to North Korea":

Individuals

1. KIM, Won Hong (a.k.a. KIM, Wo'n-hong), Korea, North; DOB 17 Jul 1945; Gender Male; Minister of State Security (individual) [DPRK2].

2. KIM, Yo Jong (a.k.a. KIM, Yo'-cho'ng), Korea, North; DOB 26 Sep 1989; Gender Female; Vice Director of the Workers' Party of Korea Propaganda and Agitation Department (individual) [DPRK2].

3. KIM, Il-Nam (a.k.a. KIM, Il Nam), Korea, North; DOB 09 Apr 1958; Gender Male; Chief, South Hamgyong Province, Ministry of State Security (individual) [DPRK2].

4. CHOE, Hwi, Korea, North; DOB 01 Jan 1954 to 31 Dec 1955; Gender Male; First Vice Director of the Workers' Party of Korea Propaganda and Agitation Department (individual) [DPRK2].

5. JO, Yong-Won (a.k.a. CHO, Yongwon), Korea, North; DOB 24 Oct 1957; Gender Male; Vice Director of the Organization and Guidance Department (individual) [DPRK2].

6. MIN, Byong Chol (a.k.a. MIN, Byong Chun; a.k.a. MIN, Byong-chol; a.k.a. MIN, Pyo'ng-ch'o'l), Korea, North; DOB 10 Aug 1948; Gender Male; Member of the Worker's Party of Korea's Organization and Guidance Department (individual) [DPRK2].

7. KANG, P'il-Hun (a.k.a. KANG, Phil Hun; a.k.a. KANG, Pil Hoon), Korea, North; DOB 11 Jun 1943; Gender Male; Director of the General Political Bureau of the Ministry of People's Security (individual) [DPRK2].

Dated: January 11, 2017.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2017–00920 Filed 1–17–17; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated National and Blocked Person Pursuant to Executive Order 13469

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets

Control (OFAC) is publishing the name of one entity whose property and interests in property have been unblocked pursuant to Executive Order 13469 of July 25, 2008, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe."

DATES: OFAC's actions described in this notice are effective as of January 12, 2017.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202/622-2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202/622-2490, Assistant Director for Licensing, tel.: 202/622-2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622-2410 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (www.treasury.gov/ofac).

Notice of OFAC Actions

On January 12, 2017, OFAC, in consultation with the U.S. Department of State, removed from the SDN List the entity listed below, whose property and interests in property were blocked pursuant to Executive Order 13469 (E.O. 13469).

ZIMRE HOLDINGS LIMITED (a.k.a. WWW.ZHL.CO.ZW; a.k.a. ZIMRE), 9th Floor, Zimre Center, Cnr. Leopold Takawira/Kwame Nkrumah Avenue, P.O. Box 4839, Harare, Zimbabwe; Phone Number 263-4-772963; Fax Number 263-4-772972 [ZIMBABWE—E.O. 13469].

Dated: January 12, 2017.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2017-01040 Filed 1-17-17; 8:45 am]

BILLING CODE 4810-AL-P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing January 26, 2017—Washington, DC.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

ADDRESSES: Room: Dirksen Senate Office Building, Room 419. Thursday, January 26, 2017, 9:00 a.m. to 3:05 p.m. A detailed agenda for the hearing will be posted to the Commission's Web site at www.uscc.gov. Also, please check our Web site for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Leslie Tisdale, 444 North Capitol Street NW., Suite 602, Washington DC 20001; phone: 202-624-1496, or via email at LTisdale@uscc.gov. *Reservations are not required to attend the hearing.*

SUPPLEMENTARY INFORMATION:

Name: Carolyn Bartholomew, Chairman of the U.S.-China Economic and Security Review Commission. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on "the national security implications of the economic relationship between the United States and the People's Republic of China."

Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC On 1/26/2017 on "Chinese Investment in the United States: Impacts and Issues for Policymakers."

Background: This is the first public hearing the Commission will hold during its 2017 report cycle to collect input from academic, industry, and government experts on national security implications of the U.S. bilateral trade and economic relationship with China. This hearing will explore patterns of Chinese investment in the United States and implications for U.S. policymakers. Topics that will be examined include China's increasing investments in strategic sectors, Chinese state-owned companies claiming sovereign immunity in U.S. courts, and duress acquisitions of U.S. entities by Chinese firms. The hearing will also cover the activities of Chinese companies listed on U.S. stock exchanges, assessing implications for U.S. investors and the U.S. economy at large. The hearing will be co-chaired by Commissioners Robin Cleveland and Michael Wessel. Any interested party may file a written statement by January 26, 2017, by mailing to the contact below. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Public Law 106-398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Public Law 108-7), as amended by Public Law 109-108 (November 22, 2005), as amended by Public Law 113-291 (December 19, 2014).

Dated: January 11, 2017

Michael Danis,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2017-00948 Filed 1-17-17; 8:45 am]

BILLING CODE 1137-00-P



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Part II

Department of Energy

10 CFR Part 431

Energy Conservation Program: Energy Conservation Standards for
Dedicated-Purpose Pool Pumps; Direct Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket Number EERE-2015-BT-STD-0008]

RIN 1904-AD52

Energy Conservation Program: Energy Conservation Standards for Dedicated-Purpose Pool Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Direct final rule.

SUMMARY: The Energy Policy and Conservation Act of 1975 (EPCA), as amended, sets forth a variety of provisions designed to improve energy efficiency. Part C of Title III establishes the “Energy Conservation Program for Certain Industrial Equipment.” The covered equipment includes pumps. In this direct final rule, DOE is adopting new energy conservation standards for dedicated-purpose pool pumps. It has determined that the energy conservation standards for these products would result in significant conservation of energy, and are technologically feasible and economically justified.

DATES: The effective date of this rule is May 18, 2017 unless adverse comment is received by May 8, 2017. If adverse comments are received that DOE determines may provide a reasonable basis for withdrawal of the direct final rule, a timely withdrawal of this rule will be published in the **Federal Register**. If no such adverse comments are received, compliance with the standards established for dedicated-purpose pool pumps in this direct final rule is required on and after July 19, 2021.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at www.regulations.gov. All documents in the docket are listed in the www.regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at <https://www.regulations.gov/docket?D=EERE-2015-BT-STD-0008>. The docket Web page contains simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT:

Mr. John Cymbalsky, U.S. Department
of Energy, Office of Energy Efficiency
and Renewable Energy, Building
Technologies Office, EE-5B, 1000
Independence Avenue SW.,
Washington, DC 20585-0121.
Telephone: (202) 586-9507. Email:
*AppliacneStandardsQuestions@
ee.doe.gov.*

Ms. Johanna Jochum, U.S. Department
of Energy, Office of the General Counsel,
GC-33, 1000 Independence Avenue
SW., Washington, DC 20585-0121.
Telephone: (202) 287-6307. Email:
Johanna.Jochum@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Synopsis of the Direct Final Rule
 - A. Benefits and Costs to Consumers
 - B. Impact on Manufacturers
 - C. National Benefits and Costs
 - D. Conclusion
- II. Introduction
 - A. Authority
 - B. Background
- III. General Discussion
 - A. Consensus Agreement
 - B. Compliance Date
 - C. Test Procedure
 - D. Scope
 1. Performance-Based Energy Conservation Standards
 2. Prescriptive Energy Conservation Standards
 3. Dedicated-Purpose Pool Pump Motor
 - E. Technological Feasibility
 1. General
 2. Maximum Technologically Feasible Levels
 - F. Energy Savings
 1. Determination of Savings
 - G. Economic Justification
 1. Specific Criteria
 - a. Economic Impact on Manufacturers and Consumers
 - b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)
 - c. Energy Savings
 - d. Lessening of Utility or Performance of Equipment
 - e. Impact of Any Lessening of Competition
 - f. Need for National Energy Conservation
 2. Other Factors
 2. Significance of Savings
 3. Rebuttable Presumption
- IV. Methodology and Discussion of Related Comments
 - A. Market and Technology Assessment
 1. Equipment Classes and Distinguishing Features
 - a. Strainer or Filtration Accessory
 - b. Self-Priming Ability
 - c. Pump Capacity (Flow, Head, and Power)
 - d. Rotational Speed
 - e. End User Safety
 - f. List of Proposed Equipment Classes
 2. Manufacturers and Industry Structure
 3. Existing Efficiency Programs
 - a. U.S. State-Level Programs
 - b. Voluntary Standards
 4. Shipments Information
 5. Market and Industry Trends
 - a. Equipment Efficiency

- b. Pump Sizing
- 6. Technology Options
 - a. Improved Motor Efficiency
 - b. Ability To Operate at Reduced Speeds
 - c. Improved Hydraulic Design
 - d. Pool Pump Timer
- B. Screening Analysis
 - 1. Screened-Out Technologies
 - 2. Remaining Technologies
- C. Engineering Analysis
 - 1. Summary of Data Sources
 - a. Pool Pump Performance Database
 - b. Manufacturer Production Cost Dataset
 - 2. Representative Equipment
 - a. Self-Priming Pool Filter Pumps
 - b. Non-Self-Priming Pool Filter Pumps
 - c. Pressure Cleaner Booster Pumps
 - d. Waterfall Pumps
 - e. Integral Sand and Cartridge Filter Pool Pump
 - f. Summary of Representative Units
- 3. Baseline Configuration and Performance
 - a. Efficiency Levels
- a. Design Option Applicability and Ordering
 - b. Summary of Available Motor Efficiencies
 - c. Summary of Available Hydraulic Efficiencies
 - d. Representative Unit Performance at Each Efficiency Level
 - e. Efficiency Level Structure for All Pump Capacities
- 5. Manufacturer Production Costs
 - a. Principal Drivers of DPPP Manufacturing Costs
 - b. Pool Filter Pump and Pressure Cleaner Booster Pump Motor Costs
 - c. Pool Filter Pump and Pressure Cleaner Booster Pump Non-Motor Costs
 - d. Cost Analysis of Integral Filter Pool Pump Equipment Classes
 - e. Cost-Efficiency Results
 - f. MPC Cost Components
- 6. Other Analytical Outputs
- 7. Manufacturer Selling Price
- D. Markups Analysis
 - 1. Dedicated-Purpose Pool Pump Markups
 - 2. Replacement Motor Markups
- E. Energy Use Analysis
 - 1. Dedicated-Purpose Pool Pump Consumer Samples
 - 2. Energy Use Estimation
 - a. Power Inputs
 - b. Operating Hours
 - c. Annual Days of Operation
- F. Life-Cycle Cost and Payback Period Analyses
 - 1. Equipment Cost
 - 2. Installation Cost
 - 3. Annual Energy Consumption
 - 4. Energy Prices
 - 5. Repair and Maintenance Costs
 - 6. Equipment Lifetime
 - 7. Discount Rates
 - 8. Energy Efficiency Distribution in the No-Standards Case
- 9. Payback Period Analysis
- G. Shipments Analysis
- H. National Impact Analysis
 - 1. Equipment Efficiency Trends
 - 2. National Energy Savings
 - 3. Net Present Value Analysis
- I. Consumer Subgroup Analysis
- J. Manufacturer Impact Analysis
 - 1. Overview

2. Government Regulatory Impact Model and Key Inputs
 - a. Manufacturer Production Costs
 - b. Shipments Forecasts
 - c. Product and Capital Conversion Costs
 - d. Markup Scenarios
 - K. Emissions Analysis
 - L. Monetizing Carbon Dioxide and Other Emissions Impacts
 1. Social Cost of Carbon
 - a. Monetizing Carbon Dioxide Emissions
 - b. Current Approach
 2. Social Cost of Methane and Nitrous Oxide
 3. Social Cost of Other Air Pollutants
 - M. Utility Impact Analysis
 - N. Employment Impact Analysis
- V. Analytical Results and Conclusions
 - A. Trial Standard Levels
 - B. Economic Justification and Energy Savings
 1. Economic Impacts on Individual Consumers
 - a. Life-Cycle Cost and Payback Period
 - b. Consumer Subgroup Analysis
 - c. Rebuttable Presumption Payback
 2. Economic Impacts on Manufacturers
 - a. Industry Cash-Flow Analysis Results
 - b. Impacts on Direct Employment
 - c. Impacts on Manufacturing Capacity
 - d. Impacts on Subgroups of Manufacturers
 - e. Cumulative Regulatory Burden
 3. National Impact Analysis
 - a. Significance of Energy Savings
 - b. Net Present Value of Consumer Costs and Benefits
 - c. Indirect Impacts on Employment
 4. Impact on Utility or Performance of Equipment
 5. Impact of Any Lessening of Competition
 6. Need of the Nation To Conserve Energy
 7. Other Factors
 8. Summary of National Economic Impacts
 - C. Conclusion
 1. Benefits and Burdens of TSLs Considered for Dedicated-Purpose Pool Pumps
 2. Annualized Benefits and Costs of the Adopted Standards
- VI. Other Prescriptive Requirements
- VII. Procedural Issues and Regulatory Review
 - A. Review Under Executive Orders 12866 and 13563
 - B. Review Under the Regulatory Flexibility Act
 1. Description of Reasons Why Action Is Being Considered
 2. Objectives of, and Legal Basis for, the Rule
 3. Description and Estimate of the Number of Small Entities Affected

- a. Methodology for Estimating the Number of Small Entities
- b. Manufacturer Participation
- c. Dedicated-Purpose Pool Pump Industry Structure and Nature of Competition
4. Description of Compliance Requirements
5. Duplication, Overlap, and Conflict With Other Rules and Regulations
6. Significant Alternatives Considered and Steps Taken To Minimize Significant Economic Impacts on Small Entities
- C. Review Under the Paperwork Reduction Act
- D. Review Under the National Environmental Policy Act of 1969
- E. Review Under Executive Order 13132
- F. Review Under Executive Order 12988
- G. Review Under the Unfunded Mandates Reform Act of 1995
- H. Review Under the Treasury and General Government Appropriations Act, 1999
- I. Review Under Executive Order 12630
- J. Review Under the Treasury and General Government Appropriations Act, 2001
- K. Review Under Executive Order 13211
- L. Information Quality
- M. Congressional Notification
- VIII. Approval of the Office of the Secretary

I. Synopsis of the Direct Final Rule

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, *et seq*; EPCA), sets forth a variety of provisions designed to improve energy efficiency of appliances and commercial equipment. Part C of Title III, which for editorial reasons was redesignated as Part A–1 upon incorporation into the U.S. Code (42 U.S.C. 6311–6317), establishes the “Energy Conservation Program for Certain Industrial Equipment.” Covered industrial equipment includes pumps. (42 U.S.C. 6311(1)(H))¹ Pumps include dedicated-purpose pool pumps, the subject of this document.

The energy conservation standards for dedicated-purpose pool pumps (also referred to as “pool pumps”) established in this document reflect the consensus of a negotiation among interested parties with a broad cross-section of interests, including the manufacturers who produce the subject equipment, environmental and energy-efficiency advocacy organizations, and electric utility companies. A working group representing these parties was

established under the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC)² to discuss and, if possible, reach consensus on proposed standards for pool pump energy efficiency. On June 23, 2016, the dedicated-purpose pool pumps (DPPP) Working Group successfully reached consensus on recommended energy conservation standards for pool pumps. See section III.A for further discussion of the Working Group and its recommendations.

After carefully considering the recommendations submitted by the DPPP Working Group and adopted by ASRAC related to energy conservation standards for pool pumps, DOE has determined that these recommendations comprise a statement submitted by interested persons who represent relevant points of view on this matter, and which, if compliant with certain statutory requirements, could result in issuance of a direct final rule.

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 6316(a)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B) and 6316(a)).

In accordance with these and other statutory provisions discussed in this document, DOE is adopting new energy conservation standards for certain dedicated-purpose pool pumps. The adopted standards are shown in Table I–1 and Table I–2. Standards for the equipment classes in Table I–1 are performance based, expressed in terms of weighted energy factor (WEF); standards in Table I–2 are prescriptive. These standards apply to all equipment listed in Table I–1 and Table I–2 and manufactured in or imported into the United States starting on July 19, 2021. DOE is not adopting standby or off-mode standards for this equipment.

TABLE I–1—PERFORMANCE-BASED ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class				Minimum allowable WEF** score
Dedicated-purpose pool pump variety		Hydraulic horsepower applicability*	Motor phase	
Standard-Size Pumps.	Self-Priming Pool Filter	<2.5 hhp and ≥0.711 hhp	Single	WEF = –2.30 * ln (hhp) + 6.59.

¹ All references to EPCA in this document refer to the statute as amended through the Energy

Efficiency Improvement Act of 2015, Public Law 114–11 (Apr. 30, 2015).

² In accordance with the Federal Advisory Committee Act and the Negotiated Rulemaking Act (5 U.S.C. App.; 5 U.S.C. 561–570).

TABLE I-1—PERFORMANCE-BASED ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS—Continued

Equipment class			Minimum allowable WEF** score
Dedicated-purpose pool pump variety	Hydraulic horsepower applicability*	Motor phase	
Small-Size Self-Priming Pool Filter Pumps ..	hhp <0.711 hp	Single	WEF = 5.55 for hhp ≤0.13 hp, – 1.30 * ln (hhp) + 2.90 for hhp >0.13 hp. WEF = 4.60 for hhp ≤0.13 hp, – 0.85 * ln (hhp) + 2.87 for hhp >0.13 hp. WEF = 0.42.
Non-Self-Priming Pool Filter Pumps	hhp <2.5 hp	Any	
Pressure Cleaner Booster Pumps	Any	Any	

* All instances of hhp refer to rated hydraulic horsepower determined in accordance with the DOE test procedure at 10 CFR 431.464 and applicable sampling plans.

** WEF is measured by kgal/kWh.

TABLE I-2—PRESCRIPTIVE ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class			Prescriptive standard
Dedicated-purpose pool pump variety	Hydraulic horsepower applicability	Motor phase	
Integral Sand Filter Pool Pump	Any	Any	Must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.*
Integral Cartridge Filter Pool Pump	Any	Any	Must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.*
All Dedicated-Purpose Pool Pumps Distributed in Commerce with Freeze Protection Controls.	Any	Any	The pump must be shipped with freeze protection disabled or with the following default, user-adjustable settings: <ul style="list-style-type: none"> • The default dry-bulb air temperature setting is no greater than 40 °F; • The default run time setting shall be no greater than 1 hour (before the temperature is rechecked); and • The default motor speed shall not be more than ½ of the maximum available speed.

* Pool pump timer means a pool pump control that automatically turns off a dedicated-purpose pool pump after a run-time of no longer than 10 hours.

A. Benefits and Costs to Consumers³

Table I-3 presents DOE's evaluation of the economic impacts of the adopted standards on consumers of pool pumps,

as measured by the average life-cycle cost (LCC) savings and the simple payback period (PBP).⁴ The average LCC savings are positive for all equipment classes, and the PBP is much less than

the average lifetime of dedicated-purpose pool pumps, which is estimated to range from 4 to 7 years, depending on equipment class (see section IV.F.6).

TABLE I-3—IMPACTS OF ADOPTED ENERGY CONSERVATION STANDARDS ON END USERS OF DEDICATED-PURPOSE POOL PUMPS

Equipment class	Average LCC savings (2015\$)	Simple payback period (years)
Standard-Size Self-Priming Pool Filter Pump	2,140	0.7
Small-Size Self-Priming Pool Filter Pump	295	0.8
Standard-Size Non-Self-Priming Pool Filter Pump	191	0.2
Extra-Small Non-Self-Priming Pool Filter Pump	36	0.9
Pressure Cleaner Booster Pump	111	0.6
Integral Cartridge Filter Pool Pump	128	0.4
Integral Sand Filter Pool Pump	73	0.5

³ All monetary values in this document are expressed in 2015 dollars and, where appropriate, are discounted to 2016 unless explicitly stated otherwise.

⁴ The average LCC savings refer to consumers that are affected by a standard are measured relative to the efficiency distribution in the no-standards case, which depicts the market in the compliance year in

the absence of new or amended standards (see section IV.H.2). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline model (see section IV.C.3).

DOE's analysis of the impacts of the adopted standards on consumers is described in section V.B.1 of this document.

B. Impact on Manufacturers

The industry net present value (INPV) is the sum of the discounted cash flows to the industry from the reference year through the end of the analysis period 2016–2050. Using a real discount rate of 11.8 percent, DOE estimates that the INPV for manufacturers of dedicated-purpose pool pumps in the case without standards is \$212.8 million in 2015\$. Under the new standards, DOE expects the change in INPV to range from –21.8 percent to 3.3 percent, which is approximately –\$46.3 million to \$7.0 million. In order to bring equipment into compliance with the new standards, DOE expects the industry to incur total conversion costs of \$35.6 million.

DOE's analysis of the impacts of the new standards on manufacturers is described in section IV.J and section V.B.2 of this document.

C. National Benefits and Costs

DOE's analyses indicate that the adopted energy conservation standards for dedicated-purpose pool pumps would save a significant amount of energy. Relative to the case without new standards, the lifetime energy savings for dedicated-purpose pool pumps purchased in the 30-year period that begins in the anticipated year of compliance with the standards (2021–2050), amount to 3.8 quadrillion British thermal units (Btu), or quads.⁵ This represents an estimated savings of 61 percent relative to the energy use of this equipment in the case without standards (referred to as the “no-standards case”).

The cumulative net present value (NPV) of total consumer benefits of the standards for dedicated-purpose pool pumps ranges from \$11 billion (at a 7-percent discount rate) to \$24 billion (at a 3-percent discount rate). This NPV

⁵ The quantity refers to full-fuel-cycle (FFC) energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.*, coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.2.

expresses the estimated total value of future operating-cost savings minus the estimated increased equipment costs for dedicated-purpose pool pumps purchased in 2021–2050.

In addition, the standards for dedicated-purpose pool pumps are projected to yield significant environmental benefits. DOE estimates that the standards would result in cumulative greenhouse gas emission reductions (over the same period as for energy savings) of 202 million metric tons (Mt) of carbon dioxide (CO₂), 147 thousand tons of sulfur dioxide (SO₂), 257 thousand tons of nitrogen oxides (NO_x), 968 thousand tons of methane (CH₄), 3.0 thousand tons of nitrous oxide (N₂O), and 0.50 tons of mercury (Hg).⁷ The cumulative reduction in CO₂ emissions through 2030 amounts to 48 Mt, which is equivalent to the emissions resulting from the annual electricity use of 7.1 million homes.

The value of the CO₂ reduction is calculated using a range of values per metric ton (t) of CO₂ (otherwise known as the “Social Cost of Carbon Dioxide,” or SC-CO₂) developed by a Federal interagency working group.⁸ The derivation of the SC-CO₂ values is discussed in section IV.L. Using discount rates appropriate for each set of SC-CO₂ values, DOE estimates that the present value of the CO₂ emissions reduction is between \$1.5 billion and \$21 billion. Using the central SCC case represented by \$40.6/metric ton (t) in 2015 and a discount rate of 3-percent produces a value of \$6.8 billion.

DOE also calculated the value of the reduction in emissions of the non-CO₂ greenhouse gases, methane and nitrous oxide, using values for the social cost of

methane (SC-CH₄) and the social cost of nitrous oxide (SC-N₂O) recently developed by the interagency working group.⁹ See section IV.L.2 for description of the methodology and the values used for DOE's analysis. The estimated present value of the methane emissions reduction is between \$0.32 billion and \$2.6 billion, with a value of \$0.99 billion using the central SC-CH₄ case, and the estimated present value of the N₂O emissions reduction is between \$0.008 billion and \$0.09 billion, with a value of \$0.03 billion using the central SC-N₂O case.

DOE also estimates the present value of the NO_x emissions reduction to be \$0.21 billion using a 7-percent discount rate, and \$0.48 billion using a 3-percent discount rate.¹⁰ DOE is still investigating appropriate valuation of the reduction in other emissions, and therefore did not include any such values in the analysis of this direct final rule.

Table I–4 summarizes the economic benefits and costs expected to result from the adopted standards for dedicated-purpose pool pumps.

⁹ United States Government—Interagency Working Group on Social Cost of Greenhouse Gases. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016. https://www.whitehouse.gov/sites/default/files/omb/inforeg/august_2016_sc_ch4_sc_n2o_addendum_final_8_26_16.pdf.

¹⁰ DOE estimated the monetized value of NO_x emissions reductions associated with electricity savings using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA's Office of Air Quality Planning and Standards. Available at www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis. See section IV.L for further discussion. The U.S. Supreme Court has stayed the rule implementing the Clean Power Plan until the current litigation against it concludes. *Chamber of Commerce, et al. v. EPA, et al.*, Order in Pending Case, 577 U.S. ____ (2016). However, the benefit-per-ton estimates established in the Regulatory Impact Analysis for the Clean Power Plan are based on scientific studies that remain valid irrespective of the legal status of the Clean Power Plan. DOE is primarily using a national benefit-per-ton estimate for NO_x emitted from the Electricity Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). If the benefit-per-ton estimates were based on the Six Cities study (Lepule *et al.* 2011), the values would be nearly two-and-a-half times larger.

⁶ A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO₂ are presented in short tons.

⁷ DOE calculated emissions reductions relative to the no-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2016* (AEO2016). AEO2016 generally represents current legislation and environmental regulations for which implementing regulations were available as of the end of February 2016.

⁸ United States Government—Interagency Working Group on Social Cost of Carbon. *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*. May 2013. Revised July 2015. Available at www.whitehouse.gov/sites/default/files/omb/inforeg/scc-std-final-july-2015.pdf.

TABLE I-4—SUMMARY OF ECONOMIC BENEFITS AND COSTS OF ADOPTED ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS ***

Category	Present value (billion 2015\$)	Discount rate (%)
Benefits		
Consumer Operating Cost Savings	13	7
	26	3
GHG Reduction (using avg. social costs at 5% discount rate) *	1.9	5
GHG Reduction (using avg. social costs at 3% discount rate) *	7.8	3
GHG Reduction (using avg. social costs at 2.5% discount rate) *	12	2.5
GHG Reduction (using 95th percentile social costs at 3% discount rate) *	23	3
NO _x Reduction **	0.21	7
	0.48	3
Total Benefits †	21	7
	35	3
Costs		
Consumer Incremental Installed Costs	1.3	7
	2.6	3
Total Net Benefits		
Including GHG and NO _x Reduction Monetized Value	19	7
	32	3

*** This table presents the costs and benefits associated with pool pumps shipped in 2021–2050. These results include benefits to consumers which accrue after 2050 from the equipment purchased in 2021–2050. The incremental installed costs include incremental equipment cost as well as installation costs. The costs account for the incremental variable and fixed costs incurred by manufacturers due to the proposed standards, some of which may be incurred in preparation for the rule. The CO₂ reduction benefits are global benefits due to actions that occur domestically.

* The interagency group selected four sets of SC-CO₂, SC-CH₄, and SC-N₂O values for use in regulatory analyses. Three sets of values are based on the average social costs from the integrated assessment models, at discount rates of 5 percent, 3 percent, and 2.5 percent. The fourth set, which represents the 95th percentile of the social cost distributions calculated using a 3-percent discount rate, is included to represent higher-than-expected impacts from climate change further out in the tails of the social cost distributions. The social cost values are emission year specific. See section IV.L.1 for more details.

** DOE estimated the monetized value of NO_x emissions reductions associated with electricity savings using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.) See section IV.L.3 for further discussion. DOE is primarily using a national benefit-per-ton estimate for NO_x emitted from the electricity generating unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). If the benefit-per-ton estimates were based on the Six Cities study (Lepule *et al.* 2011), the values would be nearly two-and-a-half times larger.

† Total Benefits for both the 3-percent and 7-percent cases are presented using only the average social costs with 3-percent discount rate.

The benefits and costs of the adopted standards for dedicated-purpose pool pumps sold between 2021–2050 can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increases in equipment purchase prices and installation costs, plus (3) the value of the benefits of CO₂ and NO_x emission reductions, all annualized.¹¹

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered equipment and are measured for the lifetime of dedicated-purpose pool pumps shipped in 2021–2050. The benefits associated with reduced CO₂ emissions achieved as a result of the adopted standards are

also calculated based on the lifetime of dedicated-purpose pool pumps shipped in 2021–2050. Because CO₂ emissions have a very long residence time in the atmosphere, the SC-CO₂ values for emissions in future years reflect CO₂-emissions impacts that continue through 2300. The CO₂ reduction is a benefit that accrues globally. DOE maintains that consideration of global benefits is appropriate because of the global nature of the climate change problem.

Estimates of annualized benefits and costs of the adopted standards are shown in Table I-5. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than GHG reduction (for which DOE used average social costs with a 3-percent discount

rate),¹² the estimated cost of the standards in this rule is \$138 million per year in increased equipment costs, while the estimated annual benefits are \$1.3 billion in reduced equipment operating costs, \$449 million in GHG reductions, and \$22 million in reduced NO_x emissions. In this case, the net benefit amounts to \$1.7 billion per year. Using a 3-percent discount rate for all benefits and costs, the estimated cost of the standards is \$149 million per year in increased equipment costs, while the estimated annual benefits are \$1.5 billion in reduced operating costs, \$449 million in GHG reductions, and \$27 million in reduced NO_x emissions. In this case, the net benefit amounts to \$1.8 billion per year.

¹¹ To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2016, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (e.g., 2020 or 2030), and then

discounted the present value from each year to 2016. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO₂ reductions, for which DOE used case-specific discount rates, as shown in Table . Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in

the compliance year, which yields the same present value.

¹² DOE used average social costs with a 3-percent discount rate because these values are considered as the "central" estimates by the interagency group.

TABLE I-5—ANNUALIZED BENEFITS AND COSTS OF ADOPTED STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS *

	Discount rate (%)	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
Million 2015\$/year				
Benefits				
Consumer Operating Cost Savings	7	1,340	1,221	1,467.
	3	1,516	1,367	1,678.
GHG Reduction (using avg. social costs at 5% discount rate)**.	5	147	129	164.
GHG Reduction (using avg. social costs at 3% discount rate)**.	3	449	392	504.
GHG Reduction (using avg. social costs at 2.5% discount rate)**.	2.5	642	560	721.
GHG Reduction (using 95th percentile social costs at 3% discount rate)**.	3	1,346	1,175	1,510.
NO _x Reduction †	7	22	20	55.
	3	27	24	70.
Total Benefits ‡	7% plus GHG range ..	1,509 to 2,708	1,369 to 2,416	1,686 to 3,032.
	7%	1,811	1,633	2,026.
	3% plus GHG range ..	1,690 to 2,890	1,520 to 2,566	1,912 to 3,258.
	3	1,993	1,783	2,252.
Costs				
Consumer Incremental Product Costs	7	138	124	151.
	3	149	133	164.
Manufacturer Conversion Costs ††	7	3	3	3.
	3	2	2	2.
Net Benefits				
Total ‡	7% plus GHG range ..	1,371 to 2,570	1,245 to 2,292	1,535 to 2,881.
	7%	1,673	1,509	1,875.
	3 plus GHG range	1,542 to 2,741	1,387 to 2,433	1,748 to 3,094.
	3	1,844	1,651	2,088.

* This table presents the annualized costs and benefits associated with pool pumps shipped in 2021–2050. These results include benefits to consumers which accrue after 2050 from the pool pumps purchased from 2021–2050. The incremental equipment costs include incremental equipment cost as well as installation costs. The costs account for the incremental variable and fixed costs incurred by manufacturers due to the adopted standards, some of which may be incurred in preparation for the rule. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices and real GDP from the *AEIO2016* No-CPP case, a Low Economic Growth case, and a High Economic Growth case, respectively. In addition, incremental product costs reflect the default price trend in the Primary Estimate, a high price trend in the Low Benefits Estimate, and a low price trend in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F.1. The benefits and costs are based on equipment efficiency distributions as described in sections IV.F.8 and IV.H.1. Purchases of higher efficiency equipment are a result of many different factors unique to each consumer including past purchases, expected usage, and others. For each consumer, all other factors being the same, it would be anticipated that higher efficiency purchases in the no-new-standards case may correlate positively with higher energy prices. To the extent that this occurs, it would be expected to result in some lowering of the consumer operating cost savings from those calculated in this rule. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

** The interagency group selected four sets of SC-CO₂, SC-CH₄, and SC-N₂O values for use in regulatory analyses. Three sets of values are based on the average social costs from the integrated assessment models, at discount rates of 5 percent, 3 percent, and 2.5 percent. The fourth set, which represents the 95th percentile of the social cost distributions calculated using a 3-percent discount rate, is included to represent higher-than-expected impacts from climate change further out in the tails of the social cost distributions. The social cost values are emission year specific. The GHG reduction benefits are global benefits due to actions that occur nationally. See section IV.L for more details.

† DOE estimated the monetized value of NO_x emissions reductions associated with electricity savings using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.) See section IV.L.3 for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used national benefit-per-ton estimates for NO_x emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). For the High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepule *et al.* 2011); these are nearly two-and-a-half times larger than those from the ACS study.

‡ Total Benefits for both the 3-percent and 7-percent cases are presented using the average social costs with 3-percent discount rate. In the rows labeled “7% plus GHG range” and “3% plus GHG range,” the operating cost and NO_x benefits are calculated using the labeled discount rate, and those values are added to the full range of social cost values.

†† Manufacturers are estimated to incur \$35.6 million in conversion costs between 2017 and 2020.

DOE's analysis of the national impacts of the adopted standards is described in sections IV.H, IV.K, and IV.L of this document.

D. Conclusion

Based on the analyses in this direct final rule, DOE found the benefits to the

nation of the standards (energy savings, consumer LCC savings, positive NPV of consumer benefit, and emission reductions) outweigh the burdens (loss of INPV and LCC increases for some end users of this equipment). DOE has concluded that the standards in this direct final rule represent the maximum

improvement in energy efficiency that is technologically feasible and economically justified, and would result in significant conservation of energy.

II. Introduction

The following sections briefly discuss the statutory authority underlying this

direct final rule, as well as some of the relevant historical background related to the establishment of standards for dedicated-purpose pool pumps.

A. Authority

Title III, Part C¹³ of the Energy Policy and Conservation Act of 1975 (EPCA), (42 U.S.C. 6311–6317, as codified) established the Energy Conservation Program for Certain Industrial Equipment, a program covering certain industrial equipment.¹⁴ “Pumps” are listed as a type of covered industrial equipment. (42 U.S.C. 6311(1)(A))

While pumps are listed as a type of covered equipment, EPCA does not define the term “pump.” To address this, in January 2016, DOE published a test procedure final rule (January 2016 general pumps test procedure final rule) that established a definition for the term “pump.” 81 FR 4086, 4147 (January 25, 2016). In the December 2016 DPPP test procedure final rule (“test procedure final rule”),¹⁵ DOE noted the applicability of the definition of “pump” and associated terms to dedicated-purpose pool pumps.

Pursuant to EPCA, DOE’s energy conservation program for covered equipment consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of covered equipment. (42 U.S.C. 6295(o)(3)(A) and 6316(a)) Manufacturers of covered equipment must use the prescribed DOE test procedure as the basis for certifying to DOE that their equipment complies with the applicable energy conservation standards adopted under EPCA, and when making representations to the public regarding their energy use or efficiency. (42 U.S.C. 6314(d)) Similarly, DOE must use these test procedures to determine whether the equipment complies with standards adopted pursuant to EPCA. *Id.* The DOE test procedures for dedicated-purpose pool pumps appear at title 10 of the Code of Federal Regulations (CFR) part 431, subpart Y, appendix B.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered equipment, including dedicated-purpose pool pumps. Any new or amended standard for covered equipment must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(C), 6295(o), and 6316(a)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) and 6316(a)) Moreover, DOE may not prescribe a standard (1) for certain equipment, including dedicated-purpose pool pumps, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o) and 6316(a)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

1. The economic impact of the standard on manufacturers and consumers of the equipment subject to the standard;
2. The savings in operating costs throughout the estimated average life of the covered equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered equipment that are likely to result from the standard;
3. The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;
4. Any lessening of the utility or the performance of the covered equipment likely to result from the standard;
5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;
6. The need for national energy and water conservation; and
7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) and 6316(a))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings

during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) and 6316(a))

EPCA also contains what is known as an “anti-backsliding” provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) and 6316(a)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4) and 6316(a))

Additionally, EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. DOE must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that equipment within such group (a) consumes a different kind of energy from that consumed by other covered equipment within such type (or class); or (b) has a capacity or other performance-related feature that other equipment within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1) and 6316(a)) In determining whether a performance-related feature justifies a different standard for a group of equipment, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2) and 6316(a))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c) and 6316(a)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d).

With particular regard to direct final rules, the Energy Independence and Security Act of 2007 (EISA 2007), Public

¹³ For editorial reasons, upon codification in the U.S. Code, part C was re-designated part A–1.

¹⁴ All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015).

¹⁵ See https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=41.

Law 110–140 (December 19, 2007), amended EPCA, in relevant part, to grant DOE authority to issue a type of final rule (*i.e.*, a “direct final rule”) establishing an energy conservation standard for a product or equipment (including dedicated-purpose pool pumps) on receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered equipment, States, and efficiency advocates), as determined by the Secretary. (42 U.S.C. 6295(p)(4)(A)) and 6316(a)) That statement must contain recommendations with respect to an energy or water conservation standard that are in accordance with the provisions of 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(A)(i)) A notice of proposed rulemaking (NPR) that proposes an identical energy efficiency standard must be published simultaneously with the direct final rule and a public comment period of at least 110 days provided. (42 U.S.C. 6295(p)(4)(A)–(B)) Not later than 120 days after issuance of the direct final rule, if DOE receives one or more adverse comments or an alternative joint recommendation relating to the direct final rule, the Secretary must determine whether the comments or alternative joint recommendation may provide a reasonable basis for withdrawal under 42 U.S.C. 6295(o) or other applicable law. (42 U.S.C. 6295(p)(4)(C)(i)) If the Secretary makes such a determination, DOE must withdraw the direct final rule and proceed with the simultaneously published NPR, and publish in the **Federal Register** the reason why the direct final rule was withdrawn. (42 U.S.C. 6295(p)(4)(C)(ii))

B. Background

Currently, no Federal energy conservation standards exist for

dedicated-purpose pool pumps. DOE excluded this category of pumps from its recent consensus-based energy conservation standard final rule for general pumps. 81 FR 4368 (January 26, 2016). The general pumps final rule, which was also the product of a pumps working group that had been created through the ASRAC, examined a variety of pump categories. While dedicated-purpose pool pumps were one of the pump categories that were considered during the working group’s discussions, the working group ultimately recommended that DOE initiate a separate rulemaking for dedicated-purpose pool pumps. (Docket No. EERE–2013–BT–NOC–0039, No. 0092 at p. 2)

DOE began the separate rulemaking for dedicated-purpose pool pumps on May 8, 2015, when it issued a Request for Information (RFI) (May 2015 DPPP RFI). 80 FR 26475. The May 2015 DPPP RFI presented information and requested public comment about definitions, metrics, test procedures, equipment characteristics, and typical applications relevant to DPPP equipment. DOE received six written comments in response to the May 2015 DPPP RFI. The commenters included the Association of Pool and Spa Professionals (APSP); Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCG), Southern California Edison (SCE), and San Diego Gas and Electric Company (SDG&E), collectively referred to herein as the California Investor-Owned Utilities (CA IOUs); the Hydraulic Institute (HI); Ms. Tamara Newman; the National Electrical Manufacturers Association (NEMA); and River City Pool and Spa (River City).

In response to the May 2015 DPPP RFI, APSP, HI, and CA IOUs encouraged DOE to pursue a negotiated rulemaking for dedicated-purpose pool pumps.

(Docket. No. EERE–2015–BT–STD–0008, APSP, No. 10 at p. 2; HI, No. 8 at p. 2; CA IOUs, No. 11 at p. 2) Consistent with feedback from these interested parties, DOE began a process through the ASRAC to charter a working group to recommend energy conservation standards and a test procedure for dedicated-purpose pool pumps rather than continuing down the traditional notice and comment route that DOE had already begun. (Docket No. EERE–2015–BT–STD–0008) On August 25, 2015, DOE published a notice of intent to establish a working group for dedicated-purpose pool pumps (the DPPP Working Group) 80 FR 51483. The initial DPPP Working Group charter allowed for 3 months of DPPP Working Group meetings to establish the scope, metric, definitions, and test procedure for dedicated-purpose pool pumps. The charter reserved the discussion of standards for a later set of meetings, after the working group produced a term sheet recommending a scope, metric, definitions, and test procedure for DPPPs. (Docket No. EERE–2013–BT–NOC–0005, No. 56 at p. 27) On October 15, 2015, DOE published a notice of public open meetings of the DPPP Working Group to establish three additional meetings under the initial charter. 80 FR 61996. DOE selected the members of the DPPP Working Group to ensure a broad and balanced array of interested parties and expertise, including representatives from efficiency advocacy organizations and manufacturers, as well as one representative from a state government organization. Additionally, one member from ASRAC and one DOE representative were part of the group. Table II–1 lists the 13 members of the DPPP Working Group and their affiliations.

TABLE II–1—DPPP WORKING GROUP MEMBERS AND AFFILIATIONS

Member	Affiliation	Abbreviation
John Caskey	National Electrical Manufacturers Association (and ASRAC representative)	NEMA.
John Cymbalsky	U.S. Department of Energy	DOE.
Kristin Driskell	California Energy Commission	CEC.
Scott Durfee	Nidec Motor Corporation	Nidec.
Jeff Farlow	Pentair Aquatic Systems	Pentair.
Gary Fernstrom	California Investor-Owned Utilities (PG&E, SDG&E, SCG, and SCE)	CA IOUs.
Patrizio Fumagalli	Bestway USA, Inc	Bestway.
Paul Lin	Regal Beloit Corporation	Regal.
Joanna Mauer	Appliance Standards Awareness Project	ASAP.
Ray Mirzaei	Waterway Plastics	Waterway.
Doug Philhower	Hayward Industries, Inc	Hayward.
Shajee Siddiqui	Zodiac Pool Systems, Inc	Zodiac.
Meg Waltner	Natural Resources Defense Council	NRDC.

The DPPP Working Group commenced negotiations at an open meeting between September 30 and October 1, 2015, and then held three additional meetings to discuss scope, metrics, and the test procedure.¹⁶ The DPPP Working Group completed its initial charter on December 8, 2015, with a consensus vote to approve a term sheet containing recommendations to DOE on scope, metric, and the basis of test procedure (“December 2015 DPPP Working Group recommendations”).¹⁷ The term sheet containing these recommendations is available in the DPPP Working Group docket. (Docket No. EERE–2015–BT–STD–0008, No. 51) ASRAC subsequently voted unanimously to approve the December 2015 DPPP Working Group recommendations during its January 20, 2016 meeting. (Docket No. EERE–2015–BT–STD–0008, No. 0052) The December 2015 DPPP Working Group recommendations pertinent to the test procedure and metric are discussed in section III.C of this document and reflected in DOE’s DPPP test procedure final rule, issued in December 2016.¹⁸ DOE’s test procedure for dedicated-purpose pool pumps appears at title 10 of the Code of Federal Regulations (CFR) part 431, subpart Y, appendix B.

At the January 20, 2016, ASRAC meeting, the DPPP Working Group also requested more time to discuss potential energy conservation standards for dedicated-purpose pool pumps. In response, ASRAC recommended that the DPPP Working Group continue its work in a second phase of negotiations to recommend potential energy conservation standards for dedicated-purpose pool pumps. (Docket No. EERE–2013–BT–NOC–0005, No. 71 at pp. 20–52) The second phase of meetings commenced on March 21, 2016 (81 FR 10152, 10153) and

concluded on June 23, 2016, with approval of a second term sheet (June 2016 DPPP Working Group recommendations). This term sheet contained DPPP Working Group recommendations on performance-based energy conservation standard levels, scope of such standards, certain prescriptive requirements, certain labeling requirements, certain definitions, and certain amendments to its previous test procedure recommendations. (Docket No. EERE–2015–BT–STD–0008, No. 82) ASRAC subsequently voted unanimously to approve the June 2016 DPPP Working Group recommendations during a July 29, 2016 meeting. (Docket No. EERE–2013–BT–NOC–0005, No. 87) The energy conservation standards, definitions, and prescriptive requirements established in this direct final rule directly reflect the June 2016 DPPP Working Group recommendations.

In this direct final rule, DOE refers to both formal recommendations of the DPPP Working Group, as well as informal discussion and suggestions that were not formally recommended. All references to approved recommendations are specified with a citation to the June 2016 DPPP Working Group term sheet and noted with the recommendation number (e.g., Docket No. EERE–2015–BT–STD–0008, No. #82 Recommendation #X at p. Y); all references to discussions or suggestions of the DPPP Working Group not found in the June 2016 DPPP Working Group recommendations will have a citation to meeting transcripts and the commenter, if applicable (e.g., Docket No. EERE–2015–BT–STD–0008, [Organization], No. X at p. Y).

In this direct final rule, DOE also refers to certain submitted comments pertaining to the 2015 RFI that have to do with energy conservation standards (e.g., Docket No. EERE–2015–BT–STD–0008, No. X at p. Y). Any RFI comments related to the test procedure or informational in nature are not included here. DOE notes that many of the interested parties that submitted comments pertaining to the 2015 RFI later became members of the DPPP Working Group, or in the case of APSP, several of their members became

members of the Working Group. As such, the concerns of these commenters were fully discussed as part of the group’s meetings, and their positions may have changed as a result of the compromises inherent in a negotiation. Table II–2 lists the RFI commenters, as well as whether they participated in the DPPP Working Group.

TABLE II–2—LIST OF RFI COMMENTERS

Commenter	DPPP working group member
APSP	No.
CA IOU	Yes.
Hydraulic Institute	No.
Ms. Newman	No.
NEMA	Yes.
River City Pool and Spa	No.

III. General Discussion

A. Consensus Agreement

As discussed in section II.B, DOE established a working group to negotiate a test procedure and energy conservation standards for dedicated-purpose pool pumps. On June 23, 2016, the Working Group reached unanimous consensus on a term sheet related to performance-based energy conservation standards, scope of such standards, certain definitions, certain prescriptive requirements, certain labeling requirements, and certain test procedure aspects for dedicated-purpose pool pumps. This term sheet included the following recommendations related to energy conservation standards:¹⁹

Recommendation #1. Each dedicated-purpose pool pump shall be required to meet the applicable minimum energy efficiency standards (WEF) set forth in the following table on and after July 19, 2021:

¹⁹ Note that the recommendations appear as-written in the June 2016, Working Group recommendation (<https://www.regulations.gov/document?D=EERE-2015-BT-STD-0008-0082>); i.e., all text and tables are verbatim.

¹⁶ Details of the negotiations sessions can be found in the public meeting transcripts that are posted to the docket for the Working Group (www.regulations.gov/#!docketDetail;D=EERE-2015-BT-STD-0008).

¹⁷ The ground rules of the DPPP Working Group define consensus as no more than three negative votes. (Docket No. EERE–2015–BT–0008–0016 at p. 3) Abstention was not construed as a negative vote.

¹⁸ See https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=41.

Equipment Class	Eff. Level	WEF Equation
Self-priming pool filter pumps <2.5 HHP and ≥0.711 HHP	6 (uncorrected)	$WEF = -2.30 * \ln(HHP) + 6.59$
Self-priming pool filter pumps <0.711 HHP	2	$WEF = \begin{cases} 5.55, & HHP \leq 0.13 \\ -1.30 * \ln(HHP) + 2.90, & HHP > 0.13 \end{cases}$
Non-self-priming pool filter pumps <2.5 HHP	1	$WEF = \begin{cases} 4.60, & HHP \leq 0.13 \\ -0.85 * \ln(HHP) + 2.87, & HHP > 0.13 \end{cases}$
Pressure cleaner booster pumps	1	DOE will recalculate WEF based on the updated test procedure in Recommendation #8 to be equivalent to EL1 (where the EL1 WEF with the previous test procedure was 0.73).

The working group does not recommend standards for: (1) Waterfall pumps of any size or (2) self-priming and non-self-priming pool filter pumps greater than or equal to 2.5 HHP.

All instances of HHP refer to hydraulic horsepower on Curve C at Max Speed.²⁰

Recommendation #2. On and after July 19, 2021, integral cartridge-filter pool pumps and integral sand-filter pool pumps must be distributed in commerce with a timer. Timer may be integral to the pump or a separate component that is shipped with the pump.

Recommendation #3. The scope of the recommended standards for self-priming pool filter pumps are only applicable to self-priming pool filter pumps served by single-phase power.

The recommended test procedure and reporting requirements would be applicable to all self-priming pool filter pumps (served by single- and three-phase power).

The recommended hydraulic horsepower limitation (<2.5 hydraulic hp) still applies.

Recommendation #4. For the purposes of establishing compliance with the standards for integral cartridge-filter and integral sand-filter pool pumps discussed in Recommendation #2, pool pump timer is defined as follows:

Pool pump timer means a pool pump control that automatically turns off a dedicated-purpose pool pump after a run-time of no longer than 10 hours.

The recommended definition captures the intent of the working group and should be adopted as-written or as modified in a manner that captures the same intent.

Recommendation #6A. All dedicated-purpose pool pumps with freeze protection controls distributed in commerce with the pump shall be

shipped with freeze protection disabled or with the following default, user-adjustable settings:

1. The default dry-bulb air temperature setting is no greater than 40 °F

2. The default run time setting shall be no greater than 1 hour (before the temperature is rechecked); and

3. The default motor speed shall not be more than ½ of the maximum available speed

As part of certification reporting, manufacturers must include the default dry-bulb air temperature setting (in °F), default run time setting (in minutes), and default motor speed (in rpm).

(Docket No. EERE-2015-BT-STD-0008, No. 82) This term sheet was ultimately submitted to, and accepted by the ASRAC, on July 29, 2016 (Docket No. EERE-2013-BT-NOC-0005, No. 87). All recommendations not shown here are related to test procedure or certification and were addressed in the recently issued test procedure final rule.

After carefully considering the consensus recommendations submitted by the DPPP Working Group and adopted by ASRAC related to energy conservation standards for dedicated-purpose pool pumps, DOE has determined that these recommendations, submitted in the previously discussed term sheet, comprise a statement submitted by interested persons who are fairly representative of relevant points of view on this matter. If compliant with certain statutory requirements, the recommendations could result in issuance of a direct final rule. In reaching this determination, DOE considered that the DPPP Working Group, in conjunction with ASRAC members who approved the recommendations, consisted of representatives of manufacturers of the covered equipment at issue, States, and efficiency advocates—all of which are groups specifically identified by Congress as relevant parties to any consensus recommendation. (42 U.S.C. 6295(p)(4)(A) and 6316(a)) As discussed

above, the term sheet was signed and submitted by a broad cross-section of interests, including the manufacturers who produce the subject equipment, environmental and energy-efficiency advocacy organizations, electric utility companies, and a member representing a State.²¹ In addition, the ASRAC Committee approving the DPPP Working Group's recommendations included at least two members representing States, one representing the National Association of State Energy Officials (NASEO) and one representing the State of California.²² By explicit language of the statute, the Secretary has the discretion to determine when a joint recommendation for an energy or water conservation standard has met the requirement for representativeness (*i.e.*, "as determined by the Secretary"). (42 U.S.C. 6295(p) (For today's direct final rule, DOE has determined that the DPPP working group represents all relevant points of view of interested parties.

Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. In making this determination, DOE has conducted an analysis to evaluate whether the potential energy conservation standards under consideration would meet these requirements. This evaluation is the same comprehensive approach that DOE typically conducts whenever it considers potential energy conservation standards for a given type of product or equipment. DOE applies the same principles to any consensus recommendations it may receive to satisfy its statutory obligation to ensure that any energy conservation standard it adopts achieves the maximum improvement in energy efficiency that is technologically feasible and economically justified and will result in

²⁰ The test procedure final rule contains a detailed discussion of the system curves used in pump testing, and section IV.A.1.c of this document describes how system curve C defines the relationship between the power, head, and flow of a pump.

²¹ This individual was Kristen Driskell (CEC).

²² These individuals were Deborah E. Miller (NASEO) and David Hungerford (CEC).

significant conservation of energy. Upon review, the Secretary determined that the term sheet submitted in the dedicated-purpose pool pump rulemaking comports with the standard-setting criteria set forth under 42 U.S.C. 6295(o). Accordingly, the consensus-recommended efficiency levels were included as Trial Standard Level (TSL) 3 for dedicated-purpose pool pumps in this rule (see section V.A for descriptions of all of the considered TSLs). Details regarding how the consensus-recommended TSL complies with the standard-setting criteria are discussed and demonstrated in the relevant sections throughout this document.

In sum, as the relevant criteria under 42 U.S.C. 6295(p)(4) have been satisfied, and the Secretary has determined that it is appropriate to adopt the consensus-recommended energy conservation standards for dedicated-purpose pool pumps through this direct final rule.

As required by the same statutory provision, DOE also is simultaneously publishing a notice of proposed rulemaking (NPR) proposing that the identical standard levels contained in this direct final rule be adopted. Consistent with the statute, DOE is providing a 110-day public comment period on the direct final rule. While DOE typically provides a comment period of 60 days on proposed standards, DOE is providing a 110-day comment period for this NPR, which is the same length as the comment period for the direct final rule. Based on the comments received during this period, the direct final rule will either become effective or DOE will withdraw it if one or more adverse comments is received and if DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, provide a reasonable basis for withdrawal of the direct final rule and for DOE to continue this rulemaking under the NPR. Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. 42 U.S.C. 6295(p)(4)(C). Typical of other rulemakings, it is the substance, rather than the quantity, of comments that will ultimately determine whether a direct final rule will be withdrawn. To this end, the substance of any adverse comment(s) received will be weighed against the anticipated benefits of the jointly submitted recommendations and the likelihood that further consideration of the comment(s) would change the results of the rulemaking. To the extent an adverse issue had been previously raised and addressed in the rulemaking proceeding, such a submission will not

typically provide a basis for withdrawal of a direct final rule. Under the statute, withdrawal would occur by the 120th day after the direct final rule's publication.

B. Compliance Date

EPCA does not prescribe a lead time for pumps, or the number of years between the date of publication of a final standards rule and the date on which manufacturers must comply with the new standard. The DPPP Working Group recommended that the standards for dedicated-purpose pool pumps be applicable 54 months following publication of the direct final rule in the **Federal Register**. (EERE-2015-BT-STD-0008, No. 51, Recommendations #1 and #2 at pp. 1–2) DOE has adopted this date for this direct final rule.

C. Test Procedure

This section discusses DOE's requirements with respect to test procedures as well as summarizes the test procedure for dedicated-purpose pool pumps adopted by DOE.

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6314) Manufacturers of covered equipment must use these test procedures to certify to DOE that their equipment complies with energy conservation standards and to quantify the efficiency of their equipment. As noted, in December 2016, DOE issued the DPPP test procedure final rule to establish test procedures for dedicated-purpose pool pumps.²³ The test procedure for dedicated-purpose pool pumps will appear at title 10 of the CFR part 431, subpart Y, appendix B.

DOE notes that 10 CFR part 430, subpart C, Appendix A established procedures, interpretations, and policies to guide DOE in the consideration and promulgation of new or revised appliance efficiency standards under EPCA. (See section 1.) These procedures are a general guide to the steps DOE typically follows in promulgating energy conservation standards. The guidance recognizes that DOE can and will, on occasion, deviate from the typical process. (See 10 CFR part 430, subpart C, appendix A, section 14(a)) In this particular instance, DOE deviated from its typical process by conducting a negotiated rulemaking process, per the request of multiple key stakeholders and as chartered by ASRAC. The DPPP Working Group initially met four times and successfully reached consensus on

the recommended test procedure and metric for different varieties of dedicated-purpose pool pumps. Following ASRAC approval, the DPPP Working Group commenced a second phase of meetings, resulting in consensus on the recommended energy conservation standards as well as certain additional test procedure recommendations. These recommendations are contained in the December 2015 and June 2016 DPPP Working Group term sheets, which ASRAC adopted. (Docket No. EERE-2015-BT-STD-0008, No. 51 and 82, respectively)

As discussed in section III.A, the June 2016 term sheet meets the criteria of a consensus recommendation, and DOE has determined that these recommendations are in accordance with the statutory requirements of 42 U.S.C. 6295(p)(4) (and 6316(a)) for the issuance of a direct final rule. DOE ultimately adopted the test procedure provisions and recommended standard levels that the DPPP Working Group included in the term sheets, which illustrates that DOE's deviations from the typical rulemaking process in this instance did not adversely impact the manufacturers' ability to understand and provide input to DOE's rulemaking process. The process that DOE used, in this case, was a more collaborative negotiated rulemaking effort resulting in an agreement on recommended standard levels, which DOE is fully implementing in this direct final rule.

Consistent with the recommendations of the DPPP Working Group, in September 2016 DOE published a test procedure notice of proposed rulemaking proposing (September 2016 DPPP TP NPR) to propose new definitions, a new test procedure, new sampling and rating requirements, and new enforcement provisions for dedicated-purpose pool pumps. DOE held a public meeting on September 26, 2016, to discuss and request public comment on the September 2016 DPPP test procedure NPR. Subsequently, DOE published a test procedure final rule reflecting relevant recommendations of the DPPP Working Group, as well as input from interested parties received in response to the September 2016 DPPP test procedure NPR. (Docket No. EERE-2016-BT-TP-0002)

In the test procedure final rule, DOE prescribed a test procedure for measuring the WEF for certain varieties of dedicated-purpose pool pumps. Specifically, the adopted test procedure applies only to self-priming and non-

²³ See https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=41.

self-priming pool filter pumps,²⁴ waterfall pumps, and pressure cleaner booster pumps. The test procedure does not apply to integral cartridge filter pool pumps, integral sand filter pool pumps, storable electric spa pumps, or rigid electric spa pumps.

For those applicable varieties of dedicated-purpose pool pumps, DOE prescribed methods to measure and calculate WEF, which is determined as a weighted average of water flow rate over the input power to the dedicated-purpose pool pump at different load

points, depending on the variety of dedicated-purpose pool pump and the number of operating speeds with which it is distributed in commerce. The equation for WEF is shown in Equation 1:

$$\text{WEF} = \frac{\sum_{i=1}^n \left(w_i \times \frac{Q_i}{1000} \times 60 \right)}{\sum_{i=1}^n \left(w_i \times \frac{P_i}{1000} \right)}$$

Equation 1

Where:

WEF = weighted energy factor in kgal/kWh;

w_i = weighting factor at each load point i ;

Q_i = flow at each load point i in gal/min;

P_i = input power to the motor (or controls, if present) at each load point i in W;

i = load point(s), defined uniquely for each DPPP variety; and

n = number of load point(s), defined uniquely for each speed configuration.

DOE prescribed unique load points for the different varieties and speed

configurations of dedicated-purpose pool pumps, as recommended by the DPPP Working Group. The load points (i) and weights (w_i) used in determining WEF for each pump variety are presented in Table III–1.

²⁴ DOE's DPPP test procedure applies to certain varieties of dedicated-purpose pool pumps that are

served by both single-phase and three-phase power, whereas this direct final rule only establishes

energy conservation standards for self-priming pool filter pumps served by single-phase power.

Table III-1 Load Points and Weights for Each DPPP Variety and Speed Configuration

DPPP Varieties	Speed Type	Test Points					Weight w_i
		# of Points n	Load Point i	Flow Rate Q	Head H	Speed n	
Self-Priming Pool Filter Pumps And Non-Self-Priming Pool Filter Pumps (with hydraulic hp ≤ 2.5 hp)	Single*	1	High	$Q_{high}(gpm) = Q_{max_speed@C} =$ flow at maximum speed on curve C	$H = 0.0082 \times Q_{high}^2$	Max speed	1.0
	Two-Speed	2	Low	$Q_{low}(gpm) =$ Flow rate associated with specified head and speed that is not below: <ul style="list-style-type: none"> 31.1 gpm if pump hydraulic hp at max speed on curve C is >0.75 or 24.7 gpm if pump hydraulic hp at max speed on curve C is ≤ 0.75 (a pump may vary speed to achieve this load point)	$H \geq 0.0082 \times Q_{low}^2$	Lowest speed capable of meeting the specified flow and head values, if any	0.8
			High	$Q_{high}(gpm) = Q_{max_speed@C} =$ flow at max speed on curve C	$H = 0.0082 \times Q_{high}^2$	Max speed	0.2
	Multi- and Variable-Speed	2	Low	$Q_{low}(gpm)$ <ul style="list-style-type: none"> If pump hydraulic hp at max speed on curve C is >0.75, then $Q_{low} \geq 31.1$ gpm If pump hydraulic hp at max speed on curve C is ≤ 0.75, then $Q_{low} \geq 24.7$ gpm (a pump may vary speed to achieve this load point)	$H = 0.0082 \times Q_{low}^2$	Lowest speed capable of meeting the specified flow and head values	0.8
			High	$Q_{high}(gpm) \geq 0.8 \times Q_{max_speed@C} \geq$ 80% of flow at maximum speed on curve C (a pump may vary speed to achieve this load point)	$H = 0.0082 \times Q_{high}^2$	Lowest speed capable of meeting the specified flow and head values	0.2
	Waterfall Pumps	1	High	Flow corresponding to specified head (on max speed pump curve)	17.0 ft	Max speed	1.0
DPPP	Speed	Test Points					Weight
Pressure Cleaner Booster Pumps	All	1	High	10.0 gpm (a pump may vary speed to achieve this load point)	≥ 60.0 ft	Lowest speed capable of meeting the specified flow and head values, if any	1.0

The test procedure final rule also contains methods to determine the self-

priming capability of pool filter pumps to effectively differentiate self-priming

and non-self-priming pool filter pumps, and the rated hydraulic horsepower,

both of which are necessary to determine the applicable energy conservation standard for certain varieties of dedicated-purpose pool pumps.

D. Scope

In the test procedure final rule, DOE adopted the following definition for dedicated-purpose pool pumps, consistent with that recommended by the DPPP Working Group (EERE-2015-BT-STD-0008, No. 51 Recommendation #4 at p. 3):

“Dedicated-purpose pool pump” means a self-priming pool filter pump, a non-self-priming pool filter pump, a waterfall pump, a pressure cleaner booster pump, an integral sand filter pool pump, an integral cartridge filter pool pump, a storable electric spa pump, or a rigid electric spa pump.

The test procedure final rule also specifically defines several varieties of dedicated-purpose pool pumps, some of which are included in the scope of energy conservation standards. The following sections describe the scope for the adopted performance-based and prescriptive energy conservation standards, respectively, for dedicated-purpose pool pumps.

1. Performance-Based Energy Conservation Standards

The DPPP Working Group recommended energy conservation standards for a subset of dedicated-purpose pool pumps to which the test procedure applies. Specifically, while the test procedure applies to self-priming pool filter pumps, non-self-priming pool filter pumps, pressure cleaner booster pumps, and waterfall

pumps, the DPPP Working Group recommended energy conservation standards only for the first three categories, excepting waterfall pumps due to limited economic benefits. (EERE-2015-BT-STD-0008, No. 82 Recommendation #2 at pp. 1–2). DOE agrees with the reasoning of the DPPP Working Group and is establishing energy conservation standards in this direct final rule only for those pump varieties recommended by the DPPP Working Group. Further detail on the economic benefits and burdens for all dedicated-purpose pool pump varieties analyzed, including waterfall pumps, can be found in section V.B. The scope of the performance-based energy conservation standards established in this document is summarized in Table III–2.

TABLE III–2 SCOPE OF PERFORMANCE-BASED STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Pump variety	Hydraulic horsepower range	Power that pump is served by
Self-priming pool filter pump	All pumps less than 2.5 hhp	Single Phase.
Non-self-priming pool filter pumps	All pumps less than 2.5 hhp	No Restriction.
Pressure cleaner booster pumps	No Restriction	No Restriction.

DOE notes that in response to the May 2015 DPPP RFI, HI suggested that “auxiliary pool pumps [now referred to as pressure cleaner booster pumps] below 1 hp should be excluded because it will be difficult to adequately differentiate them from other CIP ESCC pumps below 1 hp. Including auxiliary pool pumps below 1 hp could potentially extend the scope of the CIP rulemaking outside the ASRAC working group negotiation. [sic]” (Docket. No. EERE-2015-BT-STD-0008, HI, No. 8 at p. 3) DOE acknowledges the concerns raised by HI, and clarifies that in test procedure rulemaking, DOE proposed, received comment on, and ultimately established, a definition for pressure cleaner booster pumps that effectively differentiated these pumps from end suction close-coupled pumps less than 1 horsepower. Specifically, pressure cleaner booster pump was defined to mean an end suction, dry rotor pump designed and marketed for pressure-side pool cleaner applications, and which may be UL listed under ANSI/UL 1081–2014, “Standard for Swimming Pool Pumps, Filters, and Chlorinators.” Because DOE was able to, in the test procedure final rule, develop a definition to adequately differentiate pressure cleaner booster pumps from other end suction close-coupled pump, DOE will not exclude pressure cleaner

booster pumps from energy conservation standards, as recommended by HI.

As shown in Table III–2, the DPPP Working Group recommended a scope of standards that restricts self-priming and non-self-priming pool filter pumps to those with a hydraulic output power less than 2.5 horsepower (Docket No. EERE-2015-BT-STD-0008, No. 82, Recommendation #1 at p. 1). DOE notes that the DPPP Working Group first discussed a cutoff point of 2.5 hydraulic horsepower in the March 21, 2016 DPPP Working Group meeting. Initially, the DPPP Working Group members were confused about whether the discussion of pump capacity was using terms of hydraulic horsepower, nameplate horsepower, or shaft horsepower. DOE clarified that capacity discussions are in terms of hydraulic horsepower. (Docket No. EERE-2015-BT-STD-0008, No. 94 at p. 38–42) In a subsequent April 19 Working Group meeting, DOE again clarified that the scope metric is in terms of hydraulic horsepower. (Docket No. EERE-2015-BT-STD-0008, No. 79 at p. 34–39)

Ultimately, the DPPP Working Group recommendation for horsepower limitations is consistent with the scope of self-priming and non-self-priming pool filter pumps established in the test procedure final rule. The DPPP Working

Group recommended this restriction based on the combination of three key reasons: (1) Low shipments volume, (2) low potential for energy savings (due to the prevalence of motors already regulated by DOE), and (3) lack of performance data. (Docket No. EERE-2015-BT-STD-0008, No. 79 at p. 36–47) DOE agrees with the reasoning of the DPPP Working Group and is adopting this scope restriction in this direct final rule.

DOE notes that prior to the formation of the DPPP Working Group, APSP responded to the May 2015 DPPP RFI and recommended that DOE define scope using total horsepower, noting that it was also open to discussing and developing alternative or additional methods in which we can rate covered pump systems by total input power draw. (Docket. No. EERE-2015-BT-STD-0008, APSP, No. 10 at p. 5) APSP provided no further rationale for their option. APSP’s recommendation conflicts with the use of hydraulic horsepower recommended by the DPPP Working Group and discussed in the previous paragraphs. DOE notes that five members of APSP (Waterway Plastics, Hayward Industries, Inc., Zodiac Pool Systems, Inc., Pentair Aquatic Systems, and Bestway USA, Inc.) participated in the DPPP Working Group and unanimously supported the

term sheet recommendations enumerated in the previous paragraphs. (EERE-2015-BT-STD-0008, No. 51) Further, DOE notes that a representative of APSP was present at the final DPPP Working Group meeting, and offered no public comment in opposition to the term sheet adopted by the DPPP Working Group. (Docket No. EERE-2015-BT-STD-0008, June 23 DPPP Working Group Meeting, No. 92, at p. 3) For these reasons, DOE believes that the interests of APSP were sufficiently satisfied by the recommendations unanimously agreed upon by the DPPP Working Group. Also as shown in Table III-2, the DPPP Working Group recommended that the scope of the recommended standards for self-priming pool filter pumps only be applicable to self-priming pool filter pumps served by single-phase power. The DPPP Working Group clarified that the recommended test procedure and reporting requirements would still be applicable to all self-priming pool filter pumps—both those served by single-phase power and those served by three-phase power. (Docket No. EERE-2015-BT-STD-0008, No. 82

Recommendations #3 at p. 2) Regardless of whether the pump is supplied by single- or three-phase power, the recommended hydraulic horsepower limitation of 2.5 rated hydraulic horsepower would still apply to such self-priming pool filter pumps.

The DPPP Working Group recommended this restriction based on low shipments volume and low potential for energy savings (due to the prevalence of motors already regulated by DOE) (Docket No. EERE-2015-BT-STD-0008, No. 91 at p. 171). DOE agrees with the reasoning of the DPPP Working Group and is adopting this scope restriction in this direct final rule.

Finally, consistent with the test procedure scope, standards do not apply to submersible pumps. In the test procedure final rule, DOE defined a submersible pump as a pump that is designed to be operated with the motor and bare pump fully submerged in the pumped liquid. As discussed in the test procedure final rule, DOE determined that some end suction submersible pond pumps may meet the definition of self-priming or non-self-priming pool filter pump, but were not reviewed by the DPPP Working Group and were not intended by the DPPP Working Group to be in the scope of this rulemaking. In order to exclude these pumps from this regulation, DOE excluded submersible pumps from the scope of the test procedure final rule, and is in turn excluding them from the scope of this direct final rule.

2. Prescriptive Energy Conservation Standards

Consistent with the DPPP Working Group recommendations, DOE is setting prescriptive energy conservation standards for integral cartridge filter pool pumps and integral sand filter pool pumps. This equipment is specifically defined in the test procedure final rule.

DOE notes that before the formation of the DPPP Working Group, APSP responded to the May 2015 DPPP RFI and generally recommended that DOE pursue a performance-based metric versus a prescriptive regulation. (Docket. No. EERE-2015-BT-STD-0008, APSP, No. 10 at p. 11) APSP provided no further rationale for their option. APSP's recommendation conflicts with the mix of performance-based and prescriptive standards recommended by the DPPP Working Group and enumerated in section III.A. DOE notes that five members of APSP (Waterway Plastics, Hayward Industries, Inc., Zodiac Pool Systems, Inc., Pentair Aquatic Systems, and Bestway USA, Inc.) participated in the DPPP Working Group and unanimously supported the term sheet recommendations enumerated in section III.A. (EERE-2015-BT-STD-0008, No. 51) Further, DOE notes that a representative of APSP was present at the final DPPP Working Group meeting, and offered no public comment in opposition to the term sheet adopted by the DPPP Working Group. (Docket No. EERE-2015-BT-STD-0008, June 23 DPPP Working Group Meeting, No. 92, at p. 3) For these reasons, DOE believes that the interests of APSP were sufficiently satisfied by the recommendations unanimously agreed upon by the DPPP Working Group.

3. Dedicated-Purpose Pool Pump Motor

In response to the May 2015 DPPP RFI, NEMA recommended that DOE consider proposing a replacement motor standard for pool pumps, as has been done in the California Title 20 Appliance Efficiency Program. NEMA asserted that the replacement pool filter pump motor subject is one that requires nationwide uniformity of compliance and enforcement through specific language regarding replacement motors within the pool filter pump system. (Docket. No. EERE-2015-BT-STD-0008, NEMA, No. 9 at p. 2) DOE acknowledges that replacement dedicated-purpose pool pump motors may have an impact on national energy consumption. However, establishing energy conservation standards or prescriptive requirements for dedicated-purpose pool pump motors is outside of the scope of authority of this

rulemaking, as replacement motors do not meet the definition of “dedicated-purpose pool pump” or “pump,” as defined in part 431 of title 10 of the Code of Federal Regulations. For this reason, in this direct final rule, DOE will not establish energy conservation standards for replacement dedicated-purpose pool pump motors.

However, DOE notes that in the test procedure final rule, DOE established an *optional* test procedure for rating replacement dedicated-purpose pool pump motors. DOE believes that this optional test procedure will aid the industry in moving towards uniformity in the rating and labeling of replacement dedicated-purpose pool pump motors.

E. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, industry experts, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i).

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; and (3) adverse impacts on health or safety. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(ii)–(iv) Additionally, it is DOE policy not to include in its analysis any proprietary technology that is a unique pathway to achieving a certain efficiency level. Section IV.B of this notice discusses the results of the screening analysis for dedicated-purpose pool pumps, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the direct

final rule technical support document (TSD).

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt or amend a standard for a type or class of covered equipment, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(p)(1)) and 6316(a)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (max-tech) improvements in energy efficiency for dedicated-purpose pool pumps based on the most efficient equipment available on the market for certain equipment classes, and theoretical maximum attainable efficiency for others. The max-tech levels that DOE determined for this rulemaking are described in section IV.C.4 of this direct final rule and in chapter 5 of the direct final rule TSD.

F. Energy Savings

1. Determination of Savings

For each trial standard level (TSL), DOE projected energy savings from application of the TSL to pool pumps purchased in the 30-year period that begins in the year of compliance with any new standards (2021–2050).²⁵ The savings are measured over the entire lifetime of equipment purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-standards case. The no-standards case represents a projection of energy consumption that reflects how the market for equipment would likely evolve in the absence of energy conservation standards.

DOE used its national impact analysis (NIA) spreadsheet model to estimate national energy savings (NES) from potential standards for pool pumps. The NIA spreadsheet model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by equipment at the locations where they are used. For electricity, DOE reports national energy savings in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. DOE also calculates NES in terms of full-fuel-cycle (FFC) energy savings. The FFC metric includes the

energy consumed in extracting, processing, and transporting primary fuels (*i.e.*, coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.²⁶ DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.2 of this direct final rule.

G. Economic Justification

1. Specific Criteria

As noted, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)(VII) and 6316(a)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of a potential amended standard on manufacturers, DOE conducts a manufacturer impact analysis (MIA), as discussed in section IV.J. DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new or amended standards. These measures are discussed further in the following

section. For consumers in the aggregate, DOE also calculates the national net present value of the economic impacts applicable to a particular rulemaking. DOE also evaluates the LCC impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a national standard.

b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II) and 6316(a)) DOE conducts this comparison in its LCC and PBP analyses.

The LCC is the sum of the purchase price of equipment (including its installation) and the operating cost (including energy, maintenance, and repair expenditures) discounted over the lifetime of the equipment. The LCC analysis requires a variety of inputs, such as equipment prices, equipment energy consumption, energy prices, maintenance and repair costs, equipment lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as equipment lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of more efficient equipment through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year in which compliance is required with standards.

For its LCC and PBP analyses, DOE assumes that consumers will purchase the covered equipment in the first year of compliance with new standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new or amended standards. DOE's LCC and PBP analyses are discussed in further detail in section IV.F.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic

²⁵ DOE also presents a sensitivity analysis that considers impacts for equipment shipped in a 9-year period.

²⁶ The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (August 18, 2011), as amended at 77 FR 49701 (August 17, 2012).

justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III) and 6316(a)) As discussed in section IV.H, DOE uses the NIA spreadsheet model to project national energy savings.

d. Lessening of Utility or Performance of Equipment

In establishing equipment classes, and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered equipment. (42 U.S.C. 6295(o)(2)(B)(i)(IV) and 6316(a)) DOE reviewed performance data and characteristics for dedicated-purpose pool pump models that are currently available on the market, including models that meet the standards adopted in this final rule and models that do not meet the standards adopted in this final rule. For these models, DOE examined characteristics such as the capacity, controls, and physical size of the pumps. DOE was unable to identify any DPPP features or associated end-user utility that would become unavailable following the adoption of the standards in this final rule. Consequently, DOE concludes that the standards adopted in this direct final rule would not reduce the utility or performance of the equipment subject to this rulemaking. DOE's assessment of available technology options (*see* section IV.A.6) discusses, in detail, the features and technologies associated with the select standard level.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, which is likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(V) and 6316(a)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii) and 6316(a)) DOE will transmit a copy of this direct final rule to the Attorney General with a request that the Department of Justice (DOJ) provide its determination on this issue. DOE will consider DOJ's comments on the rule in determining whether to proceed with the direct final rule. DOE will also publish and respond

to the DOJ's comments in the **Federal Register** in a separate notice.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a)) The energy savings from the adopted standards are likely to provide improvements to the security and reliability of the nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the nation's needed power generation capacity, as discussed in section IV.M.

DOE maintains that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The adopted standards are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (GHGs) associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K; the estimated emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII) and 6316(a)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described above, DOE could consider such information under "other factors."

2. Significance of Savings

To adopt standards for a covered product or equipment, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6295(o)(3)(B) and 6316(a)) Although EPCA does not define the term "significant," in *Natural Resources Defense Council v. Herrington*, the U.S. Court of Appeals for the District of Columbia indicated that Congress intended "significant" energy savings in the context of EPCA to be savings that

are not "genuinely trivial." 768 F.2d 1355, 1373 (D.C. Cir. 1985). The energy savings for all the TSLs considered in this rulemaking, including the adopted standards, are not trivial, and, therefore, DOE considers them "significant" within the meaning of section 325 of EPCA.

3. Rebuttable Presumption

EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) DOE's LCC and PBP analyses generate values used to calculate the effect potential amended energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under EPCA. (42 U.S.C. 6295(o)(2)(B)(i)) The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback results are discussed in section V.B.1.cof this direct final rule.

IV. Methodology and Discussion of Related Comments

This section addresses the rulemaking analyses DOE performed for this direct final rule. Separate subsections address each component of DOE's analyses.

DOE used several analytical tools to estimate the impact of the standards considered in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential amended or new energy conservation standards. The national impacts analysis uses a second spreadsheet set that provides shipments forecasts and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (GRIM), to assess manufacturer impacts of potential standards. These three spreadsheet tools

are available on the DOE Web site for this rulemaking: https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=67.

Additionally, DOE used output from the Energy Information Administration (EIA)'s *Annual Energy Outlook 2016* (AEO2016), a widely known energy forecast for the United States, for the emissions and utility impact analyses.

A. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the market for dedicated-purpose pool pumps, including purpose of the equipment, industry structure, manufacturers, market characteristics, and technologies used in the equipment. This activity includes both quantitative and qualitative assessments, based primarily on publicly available information (e.g., manufacturer specification sheets and industry publications) and data submitted by manufacturers, trade associations, and other stakeholders. The market and technology assessment for this rulemaking addresses: (1) Equipment classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends, and (6) technologies or design options that could improve the energy efficiency of dedicated-purpose pool pumps. The key findings of DOE's market assessment are summarized below. See chapter 3 of the direct final rule TSD for further discussion of the market and technology assessment.

1. Equipment Classes and Distinguishing Features

When evaluating and establishing energy conservation standards, DOE divides covered equipment into equipment classes by the type of energy used, by capacity, or by other performance-related features that justify differing standards. In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6295(q) and 6316(a))

In the test procedure final rule, DOE defined different varieties of DPPP equipment. A pool filter pump is an end suction pump that either: (1) Includes an integrated basket strainer, or (2) does not include an integrated basket strainer, but requires a basket strainer for operation, as stated in manufacturer literature provided with the pump; and

may be distributed in commerce connected to, or packaged with, a sand filter, removable cartridge filter, or other filtration accessory, as long as the bare pump and filtration accessory are connected with consumer-removable connections that allow the pump to be plumbed to bypass the filtration accessory for testing.

A self-priming pool filter pump is a pool filter pump that is certified under NSF/ANSI 50–2015 to be self-priming or is capable of re-priming to a vertical lift of at least 5 feet with a true priming time less than or equal to 10 minutes, when tested in accordance with NSF/ANSI 50–2015, "Equipment for Swimming Pools, Spas, Hot Tubs and Other Recreational Water Facilities."

A non-self-priming pool filter pump is a pool filter pump that is not certified under NSF/ANSI 50–2015 to be self-priming and is not capable of re-priming to a vertical lift of at least 5 feet with a true priming time less than or equal to 10 minutes, when tested in accordance with NSF/ANSI 50–2015.

A pressure cleaner booster pump is an end suction, dry rotor pump designed and marketed for pressure-side pool cleaner applications, and which may be UL listed under ANSI/UL 1081–2014, "Standard for Swimming Pool Pumps, Filters, and Chlorinators."

A waterfall pump is a pool filter pump with maximum head less than or equal to 30 feet, and a maximum speed less than or equal to 1,800 rpm.

An integral cartridge filter pool pump is a pump that requires a removable cartridge filter, installed on the suction side of the pump, for operation; and the pump cannot be plumbed to bypass the cartridge filter for testing.

An integral sand filter pool pump is a pump distributed in commerce with a sand filter that cannot be bypassed for testing.

The DPPP varieties defined above serve as the basis for the DPPP equipment classes established in this direct final rule. Further, the class of self-priming pool filter pumps is being subdivided into two classes based on pump capacity. In this direct final rule, DOE is establishing DPPP equipment classes based on the following performance-related features:

- Strainer or filtration accessory
- self-priming ability
- pump capacity (flow, head, and horsepower)
- rotational speed

Stakeholder comments regarding equipment classes, the specific separation of equipment classes based on the listed factors, and the final list of proposed equipment classes are

discussed further in sections IV.A.1.a through IV.A.1.d.

a. Strainer or Filtration Accessory

Dedicated-purpose pool pumps employ several different varieties of strainer and filtration accessories, each providing a different utility to the end user. As defined in the test procedure final rule, a pool filter pump either includes a basket strainer or requires a basket strainer for operation. A basket strainer is a specific component that the test procedure final rule defines as "a perforated or otherwise porous receptacle that prevents solid debris from entering a pump, when mounted within a housing on the suction side of a pump. The basket strainer receptacle is capable of passing spherical solids of 1 mm in diameter, and can be removed by hand or with simple tools. Simple tools include but are not limited to a screwdriver, pliers, and an open-ended wrench." The basket strainer provides a direct utility to the pool filter pump end user, as it protects the pump from debris that would otherwise enter the impeller and cause damage to the pump. However, this utility comes at the cost of pump efficiency. The basket strainer has head-loss associated with it, which means a measurable amount of hydraulic power is lost as water traverses the basket strainer and the basket strainer housing. Ultimately, this reduces efficiency for pumps that include or require a basket strainer, compared to those that do not. Based on this relationship between end-user utility and achievable efficiency, DOE concludes that the presence of or requirement for a basket strainer is an appropriate feature to differentiate and establish pool filter pump equipment classes (including standard-size and small-size self-priming pool filter pumps, non-self-priming pool filter pumps, and waterfall pumps).

Typically, if a pool utilizes a pool filter pump, the filtration of particulates less than 1mm in diameter takes place in a separate filtration device, which is either installed separately from the pump, or is attached to the pump and may be removed using simple tools. Alternatively, integral cartridge filter and integral sand filter pump varieties include a filtration accessory, designed to remove particulates less than 1mm in diameter, which is integrally and permanently mounted to the pump. These integral filter pump varieties are typically distributed in commerce with a storable pool (e.g., inflatable or collapsible pools) or as a replacement pump for such a pool. These storable pools are intended for temporary or seasonal use, and their application and

usage profile are unique from other dedicated-purpose pool pump varieties. The end user is required to assemble the pump and pool at the beginning of the season and disassemble the pump and pool for storage at the end of the season. Combining the pump and filtration equipment into one integral piece of equipment enables the user to assemble, disassemble, and store the equipment more easily than if the pump and filter were separate components. Thus, the integral nature of the filtration accessory provides utility to the end user.

Similar to the basket strainer, the integral filtration accessory has head-loss associated with it, which means a measurable amount of hydraulic power is lost as water traverses the integral filtration accessory. However, due to the finer filtering capability of the integral filtration accessory (designed to remove particulates less than 1 mm in diameter), the integral filtration accessory will experience a larger head-loss than a comparably sized strainer basket. Ultimately, this translates to a reduced efficiency for integral cartridge filter and integral sand filter pool pumps, as compared to similarly sized pool filter pumps and other pumps not requiring a basket strainer. Based on this relationship between end-user utility and achievable efficiency, DOE concludes that the presence of an integral filtration accessory is an appropriate feature to differentiate and establish integral pump equipment classes (including integral cartridge filter and integral sand filter pumps).

The two specific varieties of integral filter pumps (integral cartridge and integral sand) offer different utility to end users. Sand filter pumps typically weigh more (when filled with sand media), but require less ongoing intervention and attention by the end user than cartridge filters. However, integral sand filter pool pumps typically have a greater head-loss across the filtration accessory than integral cartridge filter pool pumps. Ultimately, this translates to a reduced efficiency for

integral sand filter pumps, compared to integral cartridge filter pumps. Based on this relationship between end-user utility and achievable efficiency, DOE concludes that the variety of integral filtration accessory (sand filter versus cartridge filter) is an appropriate feature to differentiate integral pumps into two equipment classes, integral cartridge and integral sand filter pumps.

b. Self-Priming Ability

All pool filter pumps on the market are either self-priming or non-self-priming. The test procedure final rule defines a self-priming pool filter pump as, “a pool filter pump that is certified under NSF/ANSI 50–2015 to be self-priming or is capable of re-priming to a vertical lift of at least 5 feet with a true priming time less than or equal to 10 minutes, when tested in accordance with NSF/ANSI 50–2015.” Self-priming pumps are able to lift liquid that originates below the centerline of the pump inlet and, after initial manual priming, are able to subsequently re-prime without the use of external vacuum sources, manual filling, or a foot valve. In contrast, non-self-priming pumps must be re-primed in order to operate after an idle period. This re-priming may be achieved by manually filling the pump with water, or re-priming may be induced by placing the pump at a lower vertical height than the surface of the water it will pump. The self-priming capability of a pool filter pump affects typical applications for which the pump is appropriate, and thus the utility to the end user. For example, typical inground pool constructions consist of a pump at ground level (above the water level), and main and skimmer drains below the water level. In this configuration, when the pump is cycled off (which will typically happen during the day), prime is lost. A self-priming pump provides the end user with the ability to restart the pump (typically using a timer) without any need for manual intervention. Alternatively, a non-self-

priming pump would require the end user to manually refill the pump casing (re-prime) the pump, each time the end user wanted to restart the pump.

To achieve self-priming capability, self-priming pumps are constructed in a different manner than non-self-priming pumps. Specifically, self-priming pool filter pumps typically incorporate diffusers and reservoirs that work together to remove air from the suction side of the pump and regain the prime after an idle period. Prime is achieved by recirculating water that is trapped in the reservoir. The water in the pump mixes with air entering the pump from the suction line, and that mixture is discharged back into the reservoir, where air is released out of the pump discharge. Once all of the air is removed from the suction line, the pump is primed. However, once the self-priming pump is primed and running, the diffuser and reservoir configuration, by design, results in significant water recirculation within the bare pump, compared to a non-self-priming pump, where there is less internal recirculation. Internal water recirculation means that a portion of the hydraulic output of the pump is recirculated back to the reservoir of the pump, and is not immediately discharged out of the pump; as such, recirculation reduces the efficiency of the pump. Based on this relationship between end-user utility and achievable efficiency, DOE concludes that self-priming capability is an appropriate feature to differentiate equipment classes (self-priming versus non-self-priming pool filter pumps).²⁷

c. Pump Capacity (Flow, Head, and Power)

The capacity of a dedicated-purpose pool pump can be expressed using measurements of head, flow, and hydraulic power. These three parameters define the useful output to the end user and are interrelated and bound by the Equation 2:

$$P_{hydro} = \frac{Q * H}{3956}$$

Equation 2

Where:

P_{hydro} = hydraulic power (hp)
 Q = volumetric flow (gpm), and

H = total dynamic head (feet of water)

²⁷ More information on the construction and capabilities of self-priming and non-self-priming pumps is available at Hayward Industries' Web

page of frequently asked questions. In particular, the descriptions of inground and aboveground pump operations discuss priming. These

The requirements of a pool (or any water system), can be expressed in terms of a system curve. When a pump is tested on a system curve (such as descriptions are available at: <https://www.hayward-pool.com/shop/en/pools/faqs#q188>, and at <https://www.hayward-pool.com/shop/en/pools/faqs#q192>.

curve C),²⁸ any one of these three measurements can be used to calculate the other two measurements. Equation 3

and Equation 4 illustrate this relationship.

$$H_{CurveC} = 0.0082 * Q_{CurveC}^2$$

Equation 3

Where:

Q_{CurveC} = volumetric flow on system curve C (gpm) and

H_{CurveC} = head on system curve C (feet of water)

$$P_{hydro,CurveC} = \frac{0.0082 * Q_{CurveC}^3}{3956}$$

Equation 4

Where:

$P_{hydro,CurveC}$ = hydraulic power on system curve C (hp)

In this direct final rule, in agreement with DPPP Working Group recommendations, DOE is subdividing self-priming pool filter pumps into two equipment classes based on capacity, or more specifically, hydraulic horsepower at maximum speed on curve C (which is also referred to as rated hydraulic horsepower in test procedure final rule).

During meetings, some DPPP Working Group members commented that small pool filter pumps are inherently more efficient than large pool filter pumps, and the group considered introducing a breakpoint to divide the self-priming pool filter pump variety into two equipment classes based on capacity. (Docket No. EERE-2015-BT-STD-0008-0101, May 19 DPPP Working Group Meeting, at pp. 78–87) Initially, several DPPP Working Group members proposed to set this breakpoint at a level such that pumps rated above 0.75 thp would fall in a larger equipment class. (Docket No. EERE-2015-BT-STD-0008-0091, June 22 DPPP Working Group Meeting, at pp. 44–50) DPPP manufacturers commented that pumps rated below 1.0 thp make up a small portion of total pool filter pump shipments, and manufacturers proposed a higher breakpoint for the equipment classes, at a hydraulic horsepower corresponding to 1.25 thp. (Docket No. EERE-2015-BT-STD-0008-0091, June 22 DPPP Working Group Meeting, at pp. 54) To aid discussion, DPPP manufacturers provided pool filter pump shipment data to DOE's contractor and DOE presented

aggregated shipment data to the DPPP Working Group. The aggregated shipment data showed that approximately 10 percent of pool filter pump shipments are rated below 1.0 thp and approximately 5 percent of pool filter pump shipments are rated below 0.75 thp. (Docket No. EERE-2015-BT-STD-0008-0092, June 23 DPPP Working Group Meeting, at pp. 233–239) Based on these shipment data, the DPPP Working Group agreed on a recommendation to set the breakpoint between small-size and standard-size self-priming pool filter pumps at 0.711 hhp, so that most of the currently available pool filter pumps rated at 1.0 thp and below would fall below the 0.711-hhp breakpoint. (Docket No. EERE-2015-BT-STD-0008-0092, June 23 DPPP Working Group Meeting, at pp. 276–277; No. 82 Recommendation #1 at p. 1) Equation 4 dictates that 0.711 hhp corresponds to a flow rate of 70 gpm on curve C.

As discussed earlier in this subsection, pump capacity may also be considered in terms of pump head (or total dynamic pressure). In this direct final rule, DOE is distinguishing waterfall pump equipment from other pool filter pump varieties using head limitations. Specifically, as discussed by the DPPP Working Group, pumps used in waterfall applications do not need to produce high heads because waterfall pumps are typically not connected to pool circulation plumbing or to ancillary pool components like heaters and chlorinators (Docket No. EERE-2015-BT-STD-0008-0056, December 7 DPPP Working Group Meeting, at p. 237). Therefore, the DPPP Working

Group recommended distinguishing the waterfall pump equipment class by establishing a maximum pump head of 30 feet (inclusive) for the waterfall pump equipment class. (Docket No. EERE-2015-BT-STD-0008, No. 51 Recommendation #4 at p. 3)

Finally, in this direct final rule, DOE is distinguishing pressure cleaner booster pumps from other pumps based on their unique flow and head output. DPPP Working Group members asked whether pressure cleaner booster pumps would be covered by the energy conservation standard for general pumps. DOE clarified that the pressure cleaner booster pumps would not be covered by the general pumps standard since the general pumps standard has a lower bound of 25 gpm at the pump's best efficiency point, and the best efficiency point of pressure cleaner booster pumps is typically less than 25 gpm. (Docket No. EERE-2015-BT-STD-0008-0058, October 19 Working Group Meeting, at pp. 76–81) As discussed by the DPPP Working Group, pressure cleaner booster pumps must provide a high amount of head at a low flow rate to propel pressure-side pool cleaners along the bottom of the pool and to remove debris as the cleaner moves. Specifically, pressure-side pool cleaners (and associated piping and hoses) require a pump that provides at least 60 feet of head at approximately 10 gpm of flow; noting that the actual head requirements vary with each specific system, but will not typically be lower than 60 feet of head. (Docket No. EERE-2015-BT-STD-0008, March 22 Working Group Meeting, at pp. 207–210) Figure IV.1 illustrates the performance of four

²⁸ The test procedure final rule contains a detailed discussion of the system curves used in pump testing.

pressure cleaner booster pump models from the three largest manufacturers (representing the majority of the

pressure cleaner booster pump market) and highlights the range of head and

flow rates for which these pumps are currently designed.

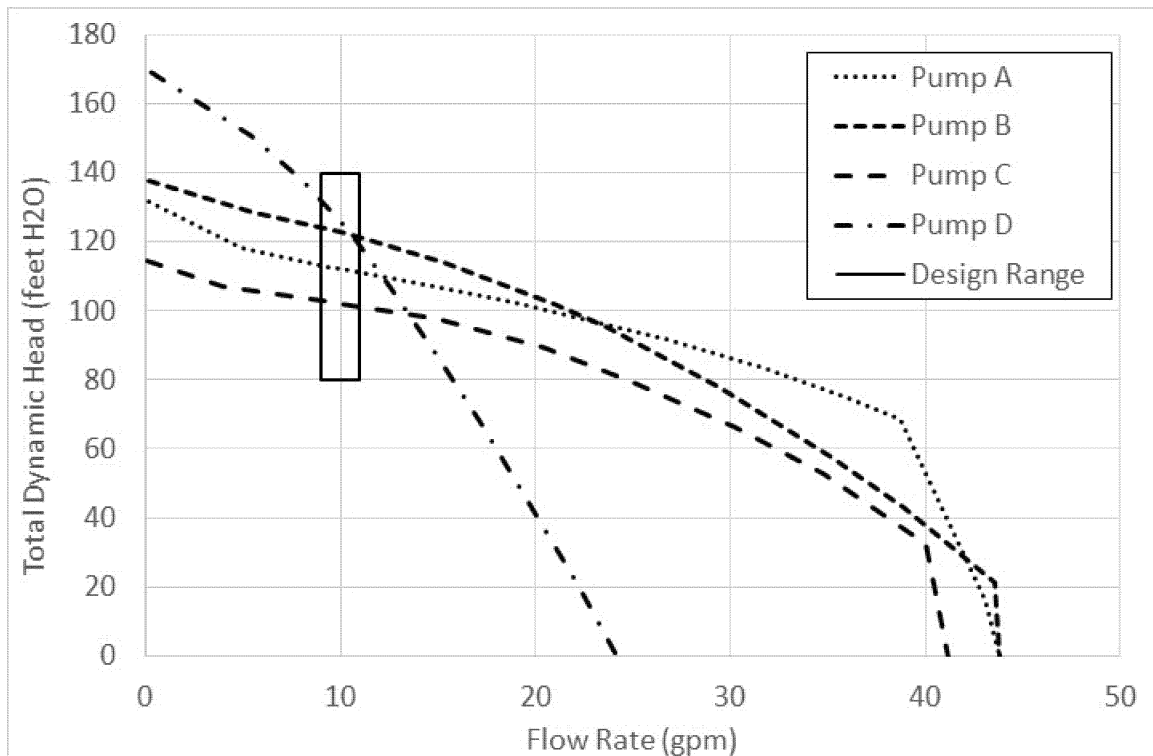


Figure IV.1 Head-Flow Chart for Four Pressure Cleaner Booster Pumps, Highlighting Design Range

Although the pumps in Figure IV.1 all provide between 100 and 127 feet of head at 10 gpm, the DPPP Working Group concluded that certain systems require less head (down to 60 feet of head). DPPP Working Group members expressed a desire that the test procedure allow better ratings for variable-speed pressure cleaner pumps that are able to reduce speed and energy consumption to avoid supplying (and wasting) excess pressure beyond what is required to drive the cleaner. (Docket No. EERE-2015-BT-STD-0008-0101, May 19 Working Group Meeting, at pp. 49) The DPPP Working Group recommended that, for the test procedure, pressure cleaner booster pumps be evaluated at the lowest speed that can achieve 60 feet of head at a flow rate of 10 gpm. (Docket No. EERE-2015-

BT-STD-0008, No. 82 Recommendation #8 at pp. 4) Consequently, DOE has concluded that the aforementioned capacity range provides a specific utility to the consumer, or end user, and is therefore appropriate to use as the basis for distinguishing pressure cleaner booster pumps from other pump equipment classes.

d. Rotational Speed

For dedicated-purpose pool pumps, DOE has determined that rotational speed is not a sufficient differentiator to establish an equipment class without adding specific utility. However, the DPPP Working Group recommended DOE define waterfall pumps as “a pool filter pump with maximum head less than or equal to 30 feet, and a maximum speed less than or equal to 1,800 rpm”

and establish an equipment class for this variety of pool filter pump (Docket No. EERE-2015-BT-STD-0008, No. 44, Recommendation #4 at p. 3). Waterfall pumps are used in applications with low head and high flow requirements; *i.e.*, applications that require “flat” head versus flow performance curves. This is because waterfall pumps are not typically plumbed through a filter or other auxiliary equipment, and thus do not have a large amount of head to overcome.

Pumps running at 1,800 rpm typically exhibit the fairly flat head versus flow operating curve that is usually required by waterfall applications. Figure IV.2 illustrates this property in contrast to the steeper head-versus-flow curves that are typical for self-priming pool filter pumps.

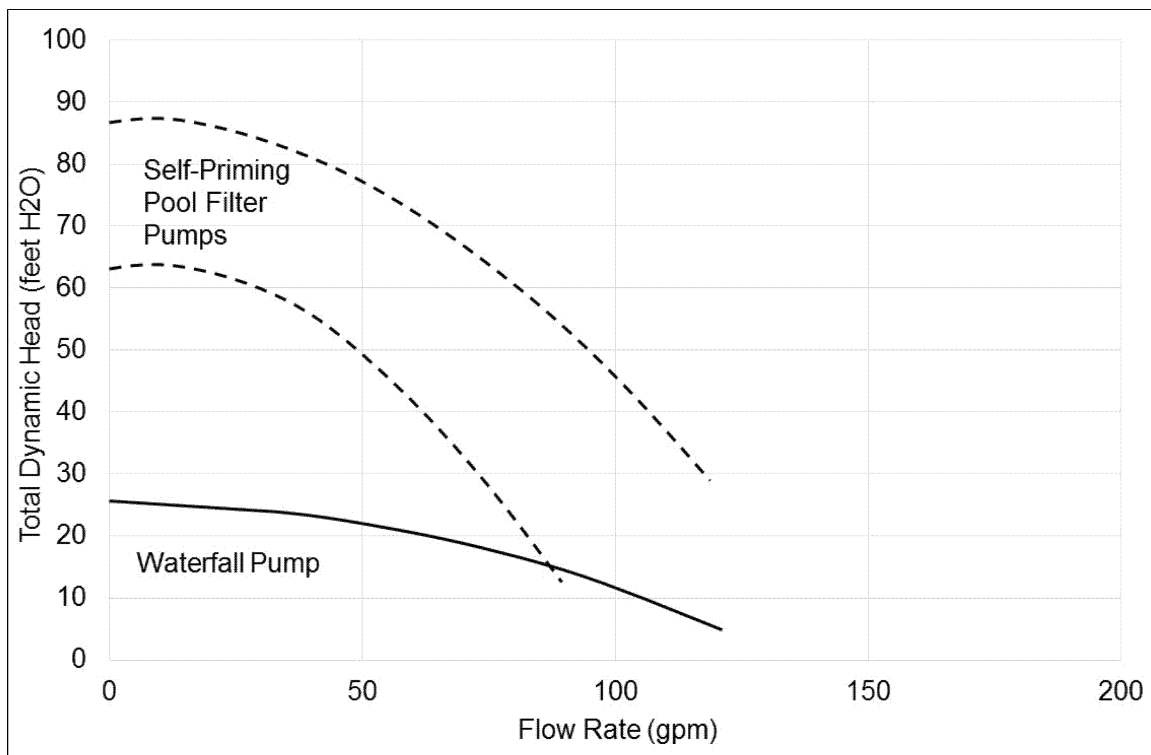


Figure IV.2 Head-Flow Curves of a Waterfall Pump and Self-Priming Pool Filter Pumps

Due to the inherent curve shape of 1,800 rpm pumps, this rotational speed limitation in conjunction with the 30-foot head limitation serves to establish

a capacity differentiation. The limitations recommended by the DPPP Working Group effectively categorize a set of pumps with similar performance

curves (heads, flows, and hydraulic horsepower) into one equipment class—waterfall pumps. Figure IV.3 illustrates this phenomenon.

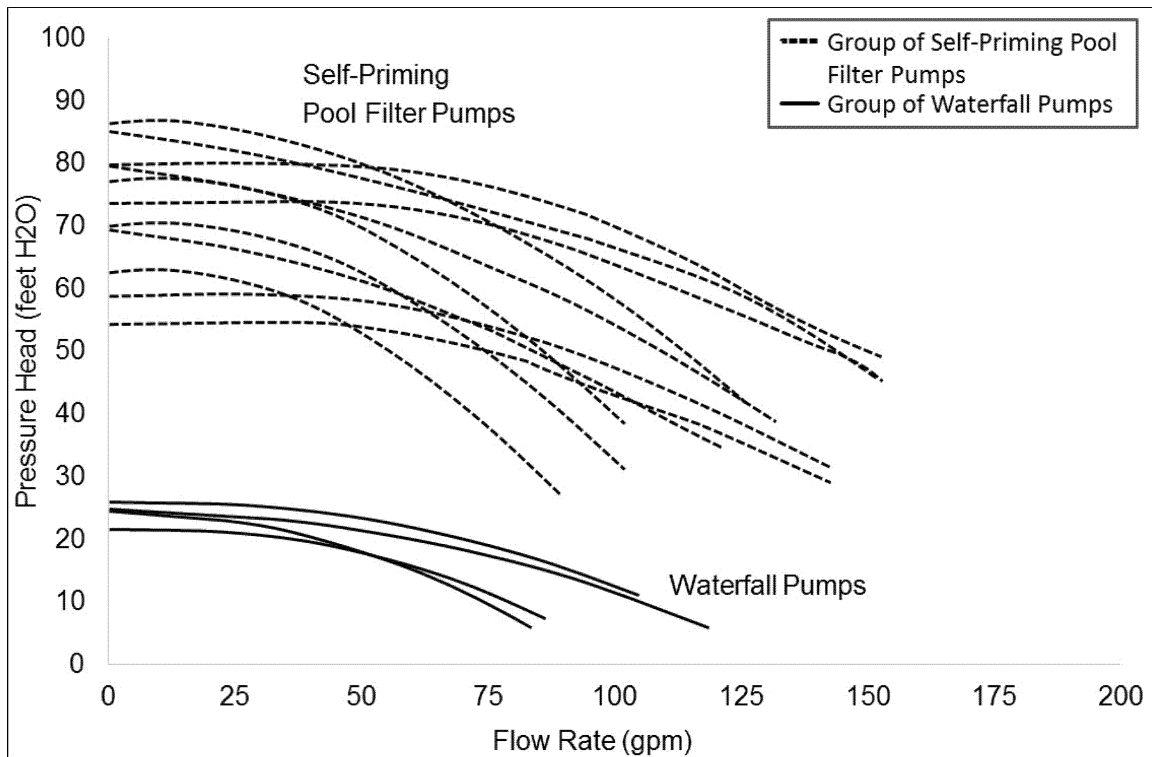


Figure IV.3 Head-Flow Curves of Multiple Waterfall Pumps and Self-Priming Pool Filter Pumps

e. End User Safety

Pressure cleaner booster pumps share many similar design features with end suction close-coupled pumps. However, dedicated-purpose pool pumps (including pressure cleaner booster pumps) must specifically consider the safety of the pool operator (typically a homeowner or renter) in their design (e.g., reduced electrocution or injury risk). To do so, the dedicated-purpose pool pump industry relies on the safety requirements established in the voluntary standard ANSI/UL 1081–

2014, “Standard for Swimming Pool Pumps, Filters, and Chlorinators.”²⁹ Based on DPPP Working Group discussion, DOE concludes that most pool filter pumps and all pressure cleaner booster pumps comply with and are currently listed to ANSI/UL 1081–2014. Conversely, general purpose end suction close-coupled pumps are typically installed in commercial and industrial applications and do not need to account for the same specific safety concerns. Differences in safety consideration result in differences in design choices that ultimately affect the

performance of the pump. Consequently, DOE concludes that safety considerations are appropriate features to differentiate pressure cleaner booster pumps from end suction close-coupled pumps.

f. List of Proposed Equipment Classes

Based on the performance-related features and distinguishing characteristics described from section IV.A.1.a to section IV.A.1.d, DOE is establishing the following equipment classes, listed in Table IV–1 and Table IV–2:

TABLE IV–1—DOE EQUIPMENT CLASSES FOR POOL FILTER PUMPS

Strainer or filtration accessory	Priming capability	Pump capacity		Rotational speed	Equipment class designation
		Pump power	Pump head		
Basket strainer	Self-priming	<2.5 hhp, >0.711 hhp.	n/s *	n/s *	Self-priming pool filter pump, standard-size.
		≤0.711 hhp	n/s *	n/s *	Self-priming pool filter pump, small-size.
	Non-self-priming ...	<2.5 hhp	n/s *	n/s *	Non-self-priming pool filter pump.**
		n/s *	≤30 ft.	≤1800 rpm	Waterfall pump.

* n/s indicates not specified.

** DOE analyzed non-self-priming pool filter pumps as two equipment classes: Extra-small (less than 0.13 hhp) and standard-size (less than 2.5 hhp and greater than 0.13 hhp). These two equipment classes were ultimately merged into one after DOE selected the same efficiency level for both extra-small and standard-size non-self-priming pool filter pumps.

²⁹ ANSI/UL 1081–2014 is available for purchase at http://ulstandards.ul.com/standard/?id=1081_6.

TABLE IV-2—DOE EQUIPMENT CLASSES FOR OTHER DEDICATED-PURPOSE POOL PUMPS

Distinguishing feature(s)	Equipment class designation
Integrated cartridge filter	Integral cartridge filter pool pump.
Integrated sand filter	Integral sand filter pool pump.
• Capacity (designed and marketed for pressure-side pool cleaner applications)	Pressure cleaner booster pump.
• End User Safety (UL listed under ANSI/UL 1081–2014)	

2. Manufacturers and Industry Structure

Manufacturers of dedicated-purpose pool pumps can be categorized into two distinct segments: (1) Those that primarily offer pool filter pumps greater than 0.40 hhp and varieties of auxiliary pumps such as waterfall and pressure cleaner booster pumps, (the pool filter pump industry) and (2) those that offer integral filter pumps and pool filter pumps smaller than 0.40 hhp, but not other auxiliary pumps (the integral filter pump industry). The former typically offers larger self-priming pool filter pumps, non-self-priming pool filter pumps, waterfall pumps, and pressure cleaner booster pumps. The latter typically offers very small pool filter pumps, as well as integral cartridge and sand filter pumps that are sold as a package with a seasonal pool, or as a replacement for a pump sold with a seasonal pool. DOE is unaware of any manufacturers that participate in both segments. Consequently, the two categories are discussed separately.

In the pool filter pump industry, DOE identified 17 manufacturers. Of the 17, DOE found that three large manufacturers hold approximately 90 percent of the market in terms of equipment shipments: Hayward Industries, Inc.; Pentair Aquatic Systems; and Zodiac Pool Systems, Inc. These manufacturers primarily produce equipment at manufacturing facilities in the United States. The remaining 10 percent of the market is held by AquaPro Systems; Aquatech Corp.; Asia Connection LLC; Bridging China International, Ltd.; Carvin Pool Equipment, Inc.; ECO H2O Tech, Inc.; Fluidra USA, LLC; Hoffinger Industries; Raypak; Speck Pumps; SpectraLight Technologies; Waterway Plastics, Inc.; Waterco Ltd.; and Wayne Water Systems.

DOE identified four manufacturers in the integral filter pump industry: Bestway (USA), Inc.; Great American Merchandise and Events (GAME); Intex Recreation Corp.; and Polygroup. Based on public records found in Hoovers,³⁰ DOE determined that all four manufacturers are U.S.-based entities. During the DPPP Working Group

meeting on April 19, 2016, DOE presented the assumption that none of the integral cartridge and integral sand filter pumps are manufactured domestically. (See EERE–2015–BT–STD–0008–0067, at p. 104) When this information was presented to the DPPP Working Group, there were no objections to this assumption. (Docket No. EERE–2015–BT–STD–0008–0079, April 19 Working Group Meeting, at pp. 132–134) DOE therefore concludes that all manufacturers in the integral filter pump industry produce equipment abroad and import it for sale in the United States.

3. Existing Efficiency Programs

DOE reviewed several existing and proposed regulatory and voluntary energy conservation programs for pool pumps. These programs are described in the following sections.

a. U.S. State-Level Programs

The CEC first issued standards for residential pool pumps under the California Code of Regulations (CCR) 2006.³¹ See 20CCR section 1601–1608 (2013). The CEC standards (or similar variations) were subsequently adopted by a number of other states.³² The CEC's regulations cover all residential pool pump and motor combinations, replacement residential pool pump motors, and portable electric spas.

The CEC's current standard (amended in 2008) has prescriptive design requirements, rather than performance-based regulations for residential pool pump and motor combinations. See 20CCR section 1605.3(g)(5). The CEC defines “residential pool pump and motor combination” as a residential pool pump motor coupled to a residential pool pump. “Residential pool pump” is defined as an impeller attached to a motor that is used to circulate and filter pool water in order to maintain clarity and sanitation. “Residential pool pump motor” refers to

a motor that is used as a replacement residential pool pump motor or as part of a residential pool pump and motor combination. (Motors used in these applications are electrically driven.) The CEC imposes a design standard that prohibits the use of split-phase start³³ and capacitor-start-induction-run³⁴ motor designs in residential pool pump motors manufactured on or after January 1, 2006. (*Id.* section 1605.3(g)(5)(A)) The CEC also requires that residential pool pump motors with a motor capacity³⁵ of 1 hp or greater manufactured on or after January 1, 2010, have the capability of operating at two or more speeds. The low speed must have a rotation rate that is no more than one-half of the motor's maximum rotation rate, and must be operated with an applicable multi-speed pump control. (*Id.* section 1605.3(g)(5)(B))

The CEC also prescribes design requirements for pump controls. Pump motor controls that are manufactured on or after January 1, 2008, and are sold for use with a pump that has two or more speeds are required to be capable of operating the pool pump at a minimum of two speeds. The default circulation speed setting shall be no more than one half of the motor's maximum rotation rate, and high speed overrides should be temporary and not for a period exceeding 24 hours. (*Id.* section 1605.3(g)(5)(B))³⁶

In addition to these prescriptive design requirements, the CEC also requires manufacturers of residential pool pump and motor combinations and

³³ Defined as: A motor that employs a main winding with a starting winding to start the motor. After the motor has attained approximately 75 percent of rated speed, the starting winding is automatically disconnected by means of a centrifugal switch or by a relay. 20 CCR1602(g).

³⁴ Defined as: A motor that uses a capacitor via the starting winding to start an induction motor, where the capacitor is switched out by a centrifugal switch once the motor is up to speed. 20 CCR1602(g).

³⁵ Defined as a value equal to the product of motor's nameplate hp and service factor and also referred to a “total hp,” where “service factor (of an AC motor)” means a multiplier which, when applied to the rated hp, indicates a permissible hp loading which can be carried under the conditions specified for the service factor. 20 CCR 1602(g).

³⁶ California Energy Commission, 2014 Appliance Efficiency Regulations, available at www.energy.ca.gov/2014publications/CEC-400-2014-009/CEC-400-2014-009-CMF.pdf.

³⁰ Hoovers Inc., Company Profiles, Various Companies (Available at www.hoovers.com/).

³¹ California Energy Commission. “Appliance Efficiency Regulations.” December 2006. CEC–400–2006–002–REV2. Available at www.energy.ca.gov/2006publications/CEC-400-2006-002/CEC-400-2006-002-REV2.PDF.

³² See, e.g. Ariz. Rev. Stat. § 44–1375 (2015); Conn. Agencies Regs. § 16a–48.4 (2015); Fla. Stat. Ann. § 533.909 (2015); and Wash. Rev. Code Ann. § 19.260.040 (2015).

manufacturers of replacement residential pool pump motors³⁷ to report certain data regarding the characteristics of their certified equipment. This includes information necessary to verify compliance with the requirements of Section 1605.3(g)(5), as well as the tested flow and input power of the equipment at several specific load points. Manufacturers must also submit the pool pump and motor combinations' energy factor (EF) in gallons per watt-hour (gal/Wh) when tested in accordance with the specified test procedure for residential pool pumps. See 20CCR 1604(g)(3).

The CEC is considering revising its pool pump regulations. A recent CEC report³⁸ proposes updated regulations for all single-phase dedicated-purpose pool pump motors under 5 total horsepower³⁹ (thp). This report recommends that pool pump motors be covered regardless of whether they are sold with a new pump, or sold as replacement for use with an existing pump wet-end. The report recommends a timer requirement for integral filter pool pumps, and a requirement for freeze protection for pool filter pumps. Additionally, the report recommends that the CEC move to performance-based standards, rather than prescriptive design standards. The prescriptive standards that exist under the 2008 rule prohibit the use of certain motor technologies, and the 2016 proposal would allow these previously-prohibited technologies as long as they meet minimum efficiency standards. Using the modified CSA C747-09 test procedure, the CEC recommends that single-speed motors less than 0.5 thp use motors that are at least 70 percent efficient. Single-speed pumps greater than or equal to 0.5 thp and less than 1 thp must use motors that are at least 75 percent efficient. Variable-, multi-, and two-speed pumps greater than or equal to 1 and less than or equal to 5 thp must use motors with nameplate

efficiency of at least 80 percent efficient at full speed and at least 65 percent efficient at half speed.⁴⁰ The CEC presented portions of this report that are related to dedicated-purpose pool pumps to the DPPP Working Group. Members of the DPPP Working Group asked clarifying questions to confirm that with the proposed changes (1) California's reporting requirements for pumps will not change, (2) previously disallowed motor types would be allowed, provided they meet the minimum CEC motor efficiency requirements. (Docket No. EERE-2015-BT-STD-0008-0091, June 22 Working Group Meeting, at pp. 6-12) The DPPP Working Group had no further comments or objections. DOE also notes that the DPPP CEC regulations are preempted following the compliance date of this DFR.

b. Voluntary Standards

In response to the May 2015 DPPP RFI, APSP recommended that "DOE should rely on and reference, or recite the applicable language from the ANSI/APSP/ICC-15 2013 standard for residential swimming pool and spa energy efficiency." (Docket No. EERE-2015-BT-STD-0008, APSP, No. 10 at p. 2) In response DOE thoroughly reviewed the 2013 version of the American National Standards Institute (ANSI), APSP, and the International Code Council (ICC) published standard ANSI/APSP/ICC-15a-2013, "American National Standard for Residential Swimming Pool and Spa Energy Efficiency." Similar to the CEC's current standard (amended in 2008), ANSI/APSP/ICC-15a-2013 has prescriptive design requirements, rather than performance-based regulations for residential pool pump and motor combinations. This voluntary standard prohibits split-phase, shaded-pole, or capacitor start-induction run motors in dedicated-purpose pool pumps, with the exception of motors that are powered exclusively by onsite electricity generation from renewable energy sources. The standard also requires that pool pump motors with a capacity of 1.0 total horsepower or greater have the capability of operating at two or more speeds, with the low

speed having a rotation rate that is no more than one-half of the motor's maximum rotation rate. Ultimately, for the reasons discussed throughout this document, DOE is adopting a mix of performance-based and prescriptive standards that differ from those established in ANSI/APSP/ICC-15a-2013. DOE notes that five members of APSP (Waterway Plastics, Hayward Industries, Inc., Zodiac Pool Systems, Inc., Pentair Aquatic Systems, and Bestway USA, Inc.) participated in the DPPP Working Group and unanimously supported the term sheet that serves as the basis for the standards established in this direct final rule. (EERE-2015-BT-STD-0008, No. 51)

4. Shipments Information

DOE gathered annual DPPP shipment data from two general sources: (1) Veris Consulting and PK Data; and (2) interviews with individual manufacturers that were conducted under non-disclosure agreements with DOE's contractors.⁴¹ The Veris Consulting and PK Data information included industrywide shipment information for certain dedicated-purpose pool pump varieties. This data was previously aggregated by Veris Consulting and PK Data for use within the industry. DOE gathered and aggregated shipments information for all varieties of dedicated-purpose pool pump, specifically for this rulemaking. DOE used both sources to shape its initial shipment estimates. These shipments estimates were presented to the DPPP Working Group throughout the negotiation process and were revised based on the group's feedback.

DOE's final estimates of historical shipments by equipment class are shown in Table IV-3. The estimates show that the shipments of all classes of dedicated-purpose pool pumps have increased over the past 5 years. In 2015, the shipments of self-priming pool filter pumps were nearly double the shipments of non-self-priming pool filter pumps. Waterfall pumps made up a small portion of the industry, less than 0.5 percent of total shipments in 2015. Since 2013, the integral cartridge filter and integral sand filter pump classes have totaled over one million shipments per year.

³⁷ Defined as a replacement motor intended to be coupled to an existing residential pool pump that is used to circulate and filter pool water in order to maintain clarity and sanitation. Cal. Code Regs., tit. 20, § 1602, subd. (g).

³⁸ Revised Analysis of Efficiency Standards for Pool Pumps and Motors, and Spas—Draft Staff Report, June 2016. Available at http://docketpublic.energy.ca.gov/PublicDocuments/15-AAER-02/TN211842_20160616T124038_Revised_Analysis_of_Efficiency_Standards_for_Pool_Pumps_and_Mot.pdf.

³⁹ Total hp is the product of motor service factor and motor nameplate (rated) hp.

⁴⁰ Revised Analysis of Efficiency Standards for Pool Pumps and Motors, and Spas—Draft Staff Report. http://docketpublic.energy.ca.gov/PublicDocuments/15-AAER-02/TN211842_20160616T124038_Revised_Analysis_of_Efficiency_Standards_for_Pool_Pumps_and_Mot.pdf.

⁴¹ In developing standards, DOE may choose to contract with third party organizations who specialize in various functions.

TABLE IV-3—ESTIMATES OF HISTORICAL DEDICATED-PURPOSE POOL PUMP SHIPMENTS, BY EQUIPMENT CLASS
[Thousands]

Equipment class	2011	2012	2013	2014	2015
Self-Priming Pool Filter Pump, standard-size	543.8	561.1	578.9	597.3	616.3
Self-Priming Pool Filter Pump, small-size	70.6	72.8	75.1	77.5	80.0
Non-Self-Priming Pool Filter Pump	329.0	339.5	350.2	361.4	372.9
Waterfall Pump	8.8	9.1	9.4	9.7	10.0
Pressure Cleaner Booster Pump	121.6	123.3	125.0	126.8	128.6
Integral Cartridge Filter Pool Pump	843.2	860.4	878.0	895.9	914.2
Integral Sand Filter Pool Pump	130.3	133.0	135.7	138.4	141.3

5. Market and Industry Trends

DOE gathered data on DPPP market and industry trends. Several of DOE's observations and conclusions are noted in the following sections.

a. Equipment Efficiency

DOE assembled a Pool Pump Performance Database that describes the capacity, speed configuration, and estimated efficiency of the majority of dedicated-purpose pool pumps that are available on the market.⁴² Using data from the database, Table IV-4 lists the

ranges of efficiency that are available for the different speed configurations of standard-size self-priming pool filter pumps. In terms of total annual energy consumption, standard-size self-priming pool filter pumps are the largest equipment class covered by this rulemaking.⁴³

TABLE IV-4—RANGES OF DEDICATED-PURPOSE POOL PUMP EFFICIENCY AVAILABLE FOR STANDARD-SIZE SELF-PRIMING POOL FILTER PUMPS

Speed configuration of self-priming pool filter pump, standard-size (0.711 to 2.5 hydro hp)	Efficiency range available in the pool pump performance database WEF
Single-Speed	1.81 to 3.73 kgal/kWh.
Two-speed	3.41 to 5.45 kgal/kWh.
Variable-Speed	5.81 to 10.25 kgal/kWh.

The engineering analysis, found in section IV.C of this document, provides a full discussion of DPPP efficiency data for all of the equipment classes, from the lowest performing pump available on the market to the highest performing pump that is technologically feasible.

b. Pump Sizing

Based on manufacturer interviews, DOE concluded that approximately 76 percent of the installed base of dedicated-purpose pool pumps are single-speed and two-speed pumps that use single-phase induction motors. These pumps come in a wide range of nominal horsepower ratings. Single-phase induction motor pumps are typically available in a wide variety of nominal horsepower ratings, such as 0.5 hp, 0.75 hp, 1 hp, 1.5 hp, 2 hp, 2.5 hp, and 3 hp, as well as other ratings above, below, and in between. This variety gives a pump installation contractor the ability to select a pump that is appropriately sized for the application. The contractor can make this decision based on the volume of water the pump needs to circulate (related to the pool volume) and the head that the pump needs to overcome (related to the piping

and ancillary pool equipment such as heaters and chlorinators).

The remainder of the installed base of dedicated-purpose pool pumps are variable-speed pool pumps that use electronically commutating motors (ECMs) or other variable-speed motor technologies. These variable-speed pumps are typically only available in a small number of nominal horsepower ratings, such as 1.65 hp, 2.40 hp, 2.70 hp, and 3.45 hp. Due to the limited number of nominal horsepower ratings available, it is common for variable-speed dedicated-purpose pool pumps to be oversized for their application, when evaluated at maximum speed capability. A variable-speed pump can be programmed by the installer or end user to operate at an appropriate speed that is less than 100 percent.

6. Technology Options

This section describes the technology options that can be used to reduce the energy consumption of DPPP equipment. The technology options are divided into two categories: Options relevant to DPPP equipment classes that are analyzed for performance standards (e.g., varieties of pool filter pumps, pressure cleaner booster pumps, and

waterfall pumps) and options relevant to DPPP equipment classes that are analyzed for prescriptive standards (e.g., integral cartridge filter pool pumps and integral sand filter pool pumps).

In the May 2015 RFI, DOE requested comments on technology options that could be considered to improve the energy efficiency of dedicated-purpose pool pumps. 80 FR 26483 (May 8, 2015). APSP commented that APSP-15 and California Title 20 capture many of the technology options that are available to the industry. APSP asked DOE to reference these programs. (APSP, No. 10 at p. 13) The following technologies are described in the APSP and California standards:

- APSP-15 and California Title 20 identify motor performance as a technology option to reduce energy consumption, and both standards prohibit the sale of pool pumps that incorporate particular motor constructions. See ANSI/APSP/ICC-15a-2013, section 4.1.1.1; and 20CCR section 1605.3 (g)(5)(A).
- APSP-15 and California Title 20 identify two-speed, multi-speed, and variable-speed pumps as a technology to reduce energy consumption. See ANSI/

⁴² See section IV.C.1.a for more information regarding the Pool Pump Performance Database.

⁴³ The self-priming pool filter pump equipment class is defined in section IV.A.1 of this document.

APSP/ICC–15a–2013, section 4.1.1.2; and 20CCR section 1605.3 (g)(5)(B).

- APSP–15 requires a time switch or similar control mechanism to control the pool pump's operation schedule. See ANSI/APSP/ICC–15a–2013, section 5.3.3.

Based on the DPPP Working Group's review of the APSP and California standards and independent research, DOE identified three technology options that can be used to reduce the energy consumption of the DPPP equipment classes for which performance standards were being analyzed (*i.e.*, self-priming pool filter pumps, non-self-priming pool filter pumps, pressure cleaner booster pumps, and waterfall pumps). Specifically, those performance standard technology options are:

- Improved motor efficiency;
- ability to operate at reduced speeds; and
- improved hydraulic design.

DOE identified one technology option, a pool pump timer, which could be used to reduce the energy consumption of the DPPP equipment classes for which prescriptive standards were being analyzed (*i.e.*, integral cartridge filter pool pumps and integral sand filter pool pumps).

The DPPP Working Group reviewed both sets of technology options (Docket No. EERE–2015–BT–STD–0008–0053, November 12 DPPP Working Group Meeting, at pp. 51–78; Docket No.

EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 37–38) and offered no objections to DOE's approach. The DPPP Working Group ultimately evaluated standards based on efficiency levels determined by these options.

Each technology option is addressed separately in the sections that follow.

a. Improved Motor Efficiency

Different varieties (or constructions) of motors have different achievable efficiencies. Two general motor constructions are present in dedicated-purpose pool pump market: Single-phase induction motors and electronically commutated motors (ECMs).⁴⁴ Single-phase induction motors may be further differentiated and include split phase, capacitor-start induction-run (CSIR), capacitor-start capacitor-run (CSCR), and permanent split capacitor (PSC) motors.

The majority of pool filter pumps available on the market come equipped with single-phase induction motors. According to manufacturer interviews, very few pool filter pumps on the market use split phase or CSIR motors. This is partly due to the regulatory prohibition of these motor constructions in California and other states. Most pool filter pumps on the market use CSCR or PSC motors; both have similar attainable efficiencies, although CSCR motors are

typically able to provide greater starting torque.

ECMs are typically used in variable-speed pool filter pump applications. However, induction motors, coupled to a proper variable speed drive, can also be used in variable-speed pool filter pump applications. ECMs are inherently more efficient than single-phase induction motors because their construction minimizes slip losses between the rotor and stator components. Unlike single-phase induction motors, ECMs require an electronic drive to function. This electronic drive consumes electricity, and variations in drive losses and mechanical designs lead to a range of ECM efficiencies.

As part of the engineering analysis (section IV.C), DOE assessed the range of attainable motor efficiency for certain representative motor capacities and constructions. As motor capacity increases, the attainable efficiency of the motor at full load also increases. Higher horsepower motors also operate close to their peak efficiency for a wider range of loading conditions.⁴⁵ Table IV–5 presents these ranges, based on nameplate (or nominal) motor efficiencies listed in the Pool Pump Performance Database. Motor efficiency data submitted by pump and motor manufacturers to DOE confirms the ranges reported in this table.

TABLE IV–5—RANGES OF NAMEPLATE MOTOR EFFICIENCIES REPORTED FOR THREE CAPACITIES OF SELF-PRIMING POOL FILTER PUMPS

Motor total horsepower (thp) *	Hydraulic horsepower on curve C of a typical dedicated-purpose pool pump with this motor	Range of full speed motor nameplate efficiencies reported in the pool pump performance database, by motor construction * (%) *		
		CSCR †	PSC †	ECM †
0.75	0.44	64–79	51–75	77
1.35	0.95	65–81	61–78	78–86
3.45	1.88	75–81	74–82	77–92

* The three pump capacities described in this table align with the representative unit capacities that are defined in section IV.C.2 and used throughout the engineering analysis in section IV.C.

** Neither split phase nor CSIR motors are listed in this table because no self-priming pool filter pumps in the Pool Pump Performance Database utilize these motor types.

† Members of the DPPP Working Group stated that there may be small errors in the motor nameplate efficiency data reported for pumps in the CEC database that DOE incorporated into the Pool Pump Performance Database. (Docket No. EERE–2015–BT–STD–0008–0056, December 7 DPPP Working Group Meeting, at pp. 38–40).

DPPP manufacturers do not typically manufacture motors inhouse. Instead, they purchase complete or partial motors from motor manufacturers and/or distributors. As such, improving the nameplate motor efficiency of the pump

is typically achieved by swapping a less efficient purchased motor component for a more efficient one.

b. Ability To Operate at Reduced Speeds Self-Priming and Non-Self-Priming Pool Filter Pumps

Self-priming and non-self-priming pool filter pumps at or above 49.4 gpm

⁴⁴ Three-phase induction motors also are found on certain self-priming pool filter pumps; however this motor construction is specifically excluded from the scope of this rulemaking for self-priming pool filter pumps (as described in section III.C).

⁴⁵ U.S. DOE Building Technologies Office. *Energy Savings Potential and Opportunities for High-Efficiency Electric Motors in Residential and Commercial Equipment*. December 2013. Prepared for the DOE by Navigant Consulting, pp. 4.

Available at <http://energy.gov/sites/prod/files/2014/02/f8/Motor%20Energy%20Savings%20Potential%20Report%202013-12-4.pdf>.

max flow on curve C can achieve a higher (more favorable) WEF value if they have the ability to operate at reduced speeds. As discussed previously in section III.C, the WEF metric is a weighted average of energy factors, measured at one or more test points. The DPPP test procedure allows WEF values for two-, multi-, and variable-speed pumps to be calculated as the weighted average of performance at both high and reduced speeds, while

WEF for single-speed pumps is calculated based only on performance at high speed. Due to pump affinity laws, most pumps will achieve higher energy factors at lower rotational speeds, compared to higher rotational speeds. As such, the WEF efficiency metric confers benefits on pool filter pumps that are able to operate at reduced rotational speeds.

Specifically, pump affinity laws describe the relationship of pump

operating speed, flow rate, head, and hydraulic power. According to the affinity laws, speed is proportional to flow such that a relative change in speed will result in a commensurate change in flow, as described in Equation 5. The affinity laws also establish that pump total head is proportional to speed squared, as described in Equation 6, and pump hydraulic power is proportional to speed cubed, as described in Equation 7.

$$\frac{Q_1}{Q_2} = \frac{N_1}{N_2}$$

Equation 5

$$\frac{H_1}{H_2} = \left(\frac{N_1}{N_2}\right)^2$$

Equation 6

$$\frac{P_1}{P_2} = \left(\frac{N_1}{N_2}\right)^3$$

Equation 7

Where:

Q_1 and Q_2 = volumetric flow rate at two operating points

H_1 and H_2 = pump total head at two operating points

N_1 and N_2 = pump rotational speed at two operating points

P_1 and P_2 = pump hydraulic power at two operating points

This means that a pump operating at half speed will provide one half of the pump's full-speed flow and one eighth of the pump's full-speed power.⁴⁶ However, pump affinity laws do not account for changes in hydraulic and motor efficiency that may occur as a pump's rotational speed is reduced. Typically, hydraulic efficiency and motor efficiency will be reduced at lower operating speeds. Consequently, at reduced speeds, power consumption is not reduced as drastically as hydraulic output power. Even so, the efficiency losses at low-speed operation are typically outweighed by the exponential reduction in hydraulic output power at low-speed operation;

this results in a higher (more beneficial) energy factor at low speed operation.

Self-priming and non-self-priming pool filter pumps with a two-speed motor configuration that produce less than 49.4 gpm maximum flow on curve C cannot achieve higher WEF score through reduced speed operation. This is because the test procedure final rule specifies two load points for two-speed self-priming and non-self-priming pool filter pumps—one at 100 percent of maximum speed and one 50 percent of maximum speed. Further, the test procedure final rule specifies that the lower of the two load points cannot be below 24.7 gpm, and that the pump will be tested at the “lowest speed capable of meeting the specified flow and head values.” Consequently, a two-speed pump that delivers less than 49.4 gpm of flow at maximum speed on curve C would deliver less than 24.7 gpm of flow at half of the maximum, which mean the half-speed setting would not be considered in the calculation of the pump's WEF.⁴⁷ Such a two-speed pump

would effectively be tested as a single-speed pump.

Self-priming and non-self-priming pool filter pumps with a variable- or multi-speed motor configuration that produce less than 49.4 gpm max flow on curve C could conceivably achieve a higher WEF score through reduced speed operation. However, DOE did not apply the “ability to operate at reduced speeds” technology option to pumps that provide less than 49.4 gpm at maximum speed on curve C. A flow of 49.4 gpm at maximum speed on curve C is equivalent to a hydraulic power of 0.25 hhp; such a pump would typically require a motor shaft power of approximately 0.60 horsepower. Comparatively, the smallest currently available variable-speed pool pump motor is 1.65 thp. Due to the mismatch in physical size and performance of such a wet end and motor combination, DOE concludes that it is not technologically feasible to pair a 1.65-thp motor with a pump wet end that provides only 49.4 gpm at maximum speed on curve C. For this reason, DOE's analysis assumes that that the design option described as “ability to operate at reduced speeds” does not apply to self-

⁴⁶ A discussion of reduced-speed pump dynamics is available at <https://www.regulations.gov/document?D=EERE-2015-BT-STD-0008-0099>.

⁴⁷ The DOE DPPP test procedure final rule specifies that flow be measured to the nearest tenth of a gpm.

priming or non-self-priming pool filter pumps that are below 49.4 gpm at maximum speed on curve C.

Pressure Cleaner Booster Pumps

In the field, pressure cleaner booster pumps are only operated at one speed and therefore the test procedure final rule specifies only one load point for testing pressure cleaner booster pumps. However, the test procedure final rule specifies that pressure cleaner booster pumps are tested at the lowest speed that can achieve 60 feet of head at the 10 gpm test condition. Consequently, a pressure cleaner booster pump can see benefits from the ability to operate at reduced speeds as the pump may vary its speed to achieve this load point.⁴⁸ For instance, a pressure cleaner booster pump equipped with a variable-speed motor may produce more than 60 feet of head when operated at maximum speed at the 10 gpm test point. Such a pump could be tested at a reduced speed that produces exactly 60 feet of head at 10 gpm, while consuming less power than it would at maximum speed. In this case, testing at a reduced speed would result in a higher (more beneficial) WEF value.

Waterfall Pumps

The test procedure final rule specifies that waterfall pumps are only tested at 100 percent speed. Consequently, waterfall pumps cannot achieve a higher (more beneficial) WEF value if they have the ability to operate at reduced speeds. Consequently, DOE did not consider the “ability to operate at reduced speeds” as a technology option for the waterfall pump equipment class.

c. Improved Hydraulic Design

The performance characteristics of a pump, such as flow, head, and efficiency, are a direct result of the pump’s hydraulic design. For purposes of the DOE analysis, “hydraulic design” is a broad term DOE used to describe the system design of the wetted components of a pump. Although hydraulic design focuses on the specific hydraulic characteristics of the impeller and the volute/casing, it also includes design choices related to bearings, seals, and other ancillary components.

Impeller and volute/casing geometries, clearances, and associated components can be redesigned to a higher efficiency (at the same flow and head) using a combination of historical best practices and modern computer-

aided design (CAD) and analysis methods. The wide availability of modern CAD packages and techniques now enables pump designers to more quickly reach designs with improved vane shapes, flow paths, and cutwater designs, all of which work to improve the efficiency of the pump as a whole.

Self-Priming Pool Filter Pumps

For self-priming pool filter pumps, DOE used empirical data from the Pool Pump Performance Database to estimate the potential efficiency gains available from improved hydraulic design. DOE used hydraulic power, line input power, and nameplate motor efficiency to estimate the hydraulic efficiency of these pumps and to observe the range of hydraulic efficiencies available for self-priming pool filter pumps at pump capacities less than 2.5 hhp. For any given capacity less than 2.5 hhp, DOE found that the best hydraulic efficiency of self-priming pool filter pumps at maximum speed on curve C could be 116.2 percent of the baseline hydraulic efficiency. Chapter 3 of the direct final rule TSD contains more details regarding the hydraulic improvements estimated for self-priming pool filter pumps.

Non-Self-Priming Pool Filter Pumps

For non-self-priming pool filter pumps, DOE attempted to follow a similar methodology to self-priming pumps. While DOE’s Pool Pump Performance Database contains few records of non-self-priming pool filter pumps, these records were sufficient to establish a baseline hydraulic efficiency, which DOE identified as 51.5 percent. In the May 2015 DPPP RFI, DOE requested information regarding the magnitude of efficiency improvements available from any potential technology options. 80 FR 26483 (May 8, 2015). DOE did not receive public comment regarding the range of hydraulic efficiency improvements that are available to pool filter pumps. With limited data, DOE was not able to use this database to empirically identify the maximum hydraulic efficiency that is technologically feasible, nor estimate the range of hydraulic efficiency improvements that are available to non-self-priming pool filter pumps.

Instead, DOE referred to empirical data gathered during the 2016 general pumps⁴⁹ rulemaking. During the general pumps rulemaking, DOE estimated the maximum technologically

feasible hydraulic efficiency for end suction, close-coupled pumps as a function of flow and specific speed.⁵⁰ For this dedicated-purpose pool pumps direct final rule, DOE evaluated a 0.52-hhp, end suction, close-coupled pump that is optimized for curve-C flow and head using equations from the general pumps rulemaking analysis, and found that such a pump can achieve a hydraulic efficiency of up to 69.7 percent.⁵¹ This pump has a configuration that is nearly identical to a non-self-priming pool filter pump, with the exception that non-self-priming pool filter pumps are defined by the presence (or requirement of) a basket strainer. As discussed in section IV.A, the addition of a basket strainer and strainer housing reduce a pump’s hydraulic efficiency by a measurable amount. Based on discussions with pump industry professionals, the impact may be in the range of 1 to 3 points of hydraulic efficiency. Consequently, DOE conservatively established a maximum hydraulic efficiency of 67 percent for non-self-priming pool filter pumps. This represents an improvement of 30 percent over the baseline hydraulic efficiency. At the April 18, 2016, Working Group meeting, DOE presented the DPPP Working Group with values for motor efficiency and wire-to-water efficiency of representative units at each efficiency level. This data enables the calculation of hydraulic efficiency, since wire-to-water efficiency equals the product of motor efficiency multiplied by hydraulic efficiency. (Docket No. EERE-2015-BT-STD-0008-0078, April 18, 2016 DPPP Working Group Meeting, at p. 20-30) At subsequent meetings, DOE presented max tech wire-to-water efficiency results, based on the aforementioned 67 percent hydraulic efficiency. DPPP Working Group members offered no objections to DOE’s hydraulic efficiency assumptions. The DPPP Working Group ultimately evaluated standards based on efficiency levels determined by these assumptions. (Docket No. EERE-2015-BT-STD-

⁵⁰ Specific speed is a dimensionless index describing the geometry of a pump impeller and provides an indication of the pump’s pressure/flow ratio at the pump’s best efficiency point. For more details, see chapter 3 of the general pumps rulemaking final rule TSD, at <https://www.regulations.gov/document?D=EERE-2011-BT-STD-0031-0056>.

⁵¹ See the discussion of efficiency levels for general pumps equipment in the general pumps final rule TSD, available at www.regulations.gov/document?D=EERE-2011-BT-STD-0031-0056. In particular, DOE calculates the standard pump efficiency η_{STD} of 69.7% for the max-tech level of the ESCC.3600 equipment class at a flow rate Q of 63 GPM, a constant C of 125.3, and a specific speed, N_s , of 2,760.

⁴⁸ The DPPP Working Group requested that DOE examine variable-speed pumps as a design option for pressure cleaner booster pumps. (Docket No. EERE-2015-BT-STD-0008-0095, March 22 DPPP Working Group Meeting, at pp. 197–203)

⁴⁹ The pumps energy conservation standard rulemaking docket EERE-2011-BT-STD-0031 contains all notices, public comments, public meeting transcripts, and supporting documents pertaining to this rulemaking.

0008–0100, May 18 DPPP Working Group Meeting, at p. 140–149) Chapter 3 of the direct final rule TSD contains more details regarding the hydraulic improvements estimated for non-self-priming pool filter pumps.

Pressure Cleaner Booster Pumps

DOE's contractor received motor specifications and test data for pressure cleaner booster pumps from manufacturers, which DOE used to calculate the total pump efficiency and the hydraulic efficiency for several pumps at the pressure cleaner booster pump test point of 10 gpm flow. DOE found that the best available hydraulic efficiency of pressure cleaner booster pumps, at the test point of 10 gpm, could be 112.2 percent of the baseline hydraulic efficiency. Chapter 3 of the direct final rule TSD contains more details regarding the hydraulic improvements estimated for pressure cleaner booster pumps.

Waterfall Pumps

DOE's contractor used manufacturer-supplied motor specifications and test data for waterfall pumps to calculate the total pump efficiency and the pump hydraulic efficiency for several pumps at the waterfall pump test point of 17 feet of head. DOE found that the best available hydraulic efficiency of waterfall pumps at this test point could be 111.5 percent of the baseline hydraulic efficiency. Chapter 3 of the direct final rule TSD contains more details regarding the hydraulic improvements estimated for waterfall pumps.

d. Pool Pump Timer

Pool pump timers can reduce the energy consumed by dedicated-purpose pool pumps by reducing the number of hours that the pump is operated unnecessarily.

Many smaller-size pools do not require a dedicated-purpose pool pump to operate 24 hours per day to achieve the desired turnover of pool water. DOE initially surveyed recommendations for pool turnover rates collected by the Consortium for Energy Efficiency.⁵² DOE stated that California recommends one turnover every 12 to 14 hours. (EERE–2015–BT–STD–0008–0059, October 20 DPPP Working Group Meeting, at p. 88) Several members of the DPPP Working Group commented that the California recommendation cited by DOE pertains to commercial

pools, and that the pool industry recommends one turnover per day for residential applications. (EERE–2015–BT–STD–0008–0059, October 20 DPPP Working Group Meeting, at p. 134–135; EERE–2015–BT–STD–0008–0053, November 12 DPPP Working Group Meeting, at p. 134) DOE only considered the pool pump timer design option for the integral cartridge filter pump and integral sand filter pump equipment classes. Pump models in these equipment classes are marketed exclusively to residential end users. Therefore, DOE assumed that the pool pump timer design option applies only to pumps that must provide a minimum of one turnover per day. In support of the DPPP Working Group, DOE reviewed the integral pump products on the market and the pool volumes that they are recommended to service. DOE concluded that, when paired with the appropriate size pool, integral filter pumps should achieve one turnover in 8 hours or less. If a pool pump timer turned off the pump after 10 hours, DOE concluded that it would have allowed at least one full turnover to occur (thus meeting the industry recommendation for daily turnovers and maintaining end user utility), and it would prevent the pump for running unnecessarily for the remainder of the day.

DOE initially suggested that a pool pump timer be defined as a pool pump control that automatically turns a dedicated-purpose pool pump on and off based on a pre-programmed user-selectable schedule. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 112) In response, Bestway requested that the pool pump timer be defined instead as a type of countdown timer, where the end user turns on the pump, the pump runs for a set amount of time, and then the pump shuts off automatically and remains off until the end user starts the pump again. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 39–40) Bestway commented that this style of timer is what currently exists in the market for integrated cartridge and integrated sand filter pumps. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 124–125)

DOE also asked the DPPP Working Group whether end users should be able to program the run time of the pool pump timer or whether the pool pump timer should ship with a preprogrammed run-time that cannot be adjusted by the end user. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 113–115) The DPPP Working Group clarified that integrated cartridge filter pumps

and integrated sand filter pumps are typically sold in a package with the pool that they are meant to service, so the pump run-time necessary to achieve one turnover may be determined prior to sale based upon the relative sizes of the pump and the pool. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 116–117) Therefore, the Working Group agreed that there would be little benefit to allowing end users to modify the pump run-time that the pool pump timer allows.

The DPPP Working Group also discussed whether end users might be burdened by a pool pump timer that cannot automatically turn on a pump, since end users would be required to initiate the pump operation on a daily basis to maintain a sanitary pool. Bestway commented that the burden, if any, on the end user to activate their pump on a daily basis would be minimal. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 116–119) A DPPP Working Group member speculated that if an end user were to leave their home for a week, a simple countdown timer would not be able to activate the pump on a daily basis to maintain sanitary pool conditions while the end user is away. Bestway commented that the pool pump timer definition Bestway proposed does not prevent manufacturers from offering a pool pump timer with automatic start and stop functionality. Bestway commented that, with their proposed definition, manufacturers could offer more advanced timers as a selling feature for their pumps. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 119–121)

The DPPP Working Group voted, and did not reach consensus on a pool pump timer definition that included automatic on-off functionality and user-selectable scheduling. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 124) Instead, the DPPP Working Group voted to recommend defining a pool pump timer to mean a pool pump control that automatically turns off a dedicated-purpose pool pump after a run-time of no longer than 10 hours. (EERE–2015–BT–STD–0008, No. 82 Recommendation #4 at p. 2) DOE agrees with this reasoning and is adopting the definition recommended by the DPPP Working Group in this direct final rule.

B. Screening Analysis

DOE uses the following four screening criteria to determine which technology options are suitable for further

⁵² Consortium for Energy Efficiency. 2012. "CEE High Efficiency Residential Swimming Pool Initiative." Boston, MA. https://library.cee1.org/sites/default/files/library/9986/cee_res_swimmingpoolinitiative_07dec2012_pdf_10557.pdf.

consideration in an energy conservation standards rulemaking:

1. *Technological feasibility.*

Technologies that are not incorporated in commercial products or in working prototypes will not be considered further.

2. *Practicability to manufacture, install, and service.* If it is determined that mass production and reliable installation and servicing of a technology in commercial products could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

3. *Impacts on product utility or product availability.* If it is determined that a technology would have significant adverse impact on the utility of the product to significant subgroups of consumers or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

4. *Adverse impacts on health or safety.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

See 10 CFR part 430, subpart C, appendix A, 4(a)(4) and 5(b).

Technologies that pass through the screening analysis are referred to as “design options” in the engineering analysis. The screening analysis and engineering analysis are discussed in detail, respectively, in chapters 4 and 5 of the direct final rule TSD.

1. Screened-Out Technologies

Of the identified technology options, DOE was not able to identify any that would fail the screening criteria.

2. Remaining Technologies

After reviewing each technology, DOE concluded that all of the identified technologies listed in section IV.A.6 met all four screening criteria to be examined further as design options in DOE’s analysis. In summary, DOE continued its analysis for the following technology options:

- improved motor efficiency
- ability to operate at reduced speeds
- improved hydraulic design
- pool pump timers

DOE determined that these technology options are technologically feasible because they are being used or have been used in commercially

available products or working prototypes. DOE also found that these technology options met the other screening criteria (*i.e.*, practicable to manufacture, install, and service; and do not result in adverse impacts on consumer utility, equipment availability, health, or safety). For additional details, see chapter 4 of the direct final rule TSD.

C. *Engineering Analysis*

In the engineering analysis, DOE describes the relationship between manufacturer production cost (MPC) and improved DPPP efficiency. This relationship serves as the basis for cost-benefit calculations for individual end users, manufacturers, and the Nation. The following sections describe methods DOE used to conduct the engineering analysis.

1. Summary of Data Sources

For the engineering analysis, DOE used two principal data sources: (1) The Pool Pump Performance Database; and (2) the manufacturer production cost dataset. The following subsections provide a brief description of each data source. Complete details are found in chapter 5 of the direct final rule TSD.

a. Pool Pump Performance Database

DOE assembled a database of pool pump performance data by collecting current and archived records of pool pump performance from public databases maintained by the CEC,⁵³ APSP,⁵⁴ and the ENERGY STAR program.⁵⁵ The Pool Pump Performance Database also includes historic records from prior CEC database versions, which were provided to DOE by stakeholders. These historic records include pumps that met previous CEC efficiency standards but do not meet the current CEC standards.

The CEC, APSP, and ENERGY STAR databases contain third-party test data that manufacturers submit as a means of certifying their pump equipment to the relevant entity’s standards. The database records contain pump performance information such as motor horsepower, flow and head on pump performance curves, and pump speed configuration. DOE added records to the database based on pump data published in manufacturer specification sheets.

⁵³ Appliance Efficiency Database: Public Search, California Energy Commission. Available at <https://cacetappliances.energy.ca.gov/Pages/ApplianceSearch.aspx>.

⁵⁴ Energy Efficiency Pool Pumps, APSP. Available at <http://apsp.org/resources/energy-efficient-pool-pumps.aspx>.

⁵⁵ ENERGY STAR Certified Pool Pumps. Available at www.energystar.gov/productfinder/product/certified-pool-pumps/results.

These specification sheets typically publish motor horsepower and performance curves but they do not typically provide information regarding the pump’s electrical performance or efficiency.

DOE filtered the collected data to remove duplicate entries, entries that only represented a replacement motor (but no pump), and entries with incomplete data. To allow for easier analysis, DOE combined and reformatted the databases into a user-friendly format. DOE performed a regression analysis to estimate the part-load efficiencies of variable-speed pumps at the test points specified in the test procedure final rule. DOE then calculated the WEF value of each pump record in the database, according to the calculation method described in section III.C. Chapter 5 of the direct final rule TSD contains more detail regarding the regression analysis and the calculation of WEF values.

b. Manufacturer Production Cost Dataset

DOE collected MPC and performance data from manufacturers for pool pumps and motors across a range of capacities and equipment classes. Data collected for individual DPPP models included the nominal horsepower and efficiency of the pump motor; the MPC of the motor and the finished pump; and the efficiency, flow rate, head, and input power of the pump at full load and partial loads.

DOE also collected retail price data for DPPPs and replacement motors sold by the online retailers Leslie’s Swimming Pool Supplies,⁵⁶ INYO Pools,⁵⁷ and Pool Supply World.⁵⁸ These retail price data are publicly available on each retailer’s Web site. DOE estimated MPCs for various pump models using this retail price data and several assumptions about supply chain markups (see section IV.D for a discussion of markups). DOE primarily used this retail price data analysis to supplement and validate the individual MPCs submitted by manufacturers.

2. Representative Equipment

For the engineering analysis, DOE analyzed the MPC-efficiency relationships for the equipment classes specified in section IV.A.1. Generally, the manufacturing cost and the attainable efficiency of dedicated-purpose pool pumps vary as a function of pump capacity (*i.e.*, hydraulic horsepower). Because it is impractical to assess the MPC-efficiency relationship

⁵⁶ www.lesliespool.com/.

⁵⁷ www.inyopools.com/.

⁵⁸ www.poolsupplyworld.com/.

for all dedicated-purpose pool pump capacities available on the market, DOE selected a set of representative units to analyze. These representative units exemplify typical capacities in each equipment class and are used to quantify the manufacturing costs and the energy savings potential for each equipment class. In general, to determine representative capacities for each equipment class, DOE analyzed the distribution of available models and/or shipments and discussed its finding with the DPPP Working Group. The following subsections discuss each equipment class in further detail.

a. Self-Priming Pool Filter Pumps

The scope of this direct final rule includes self-priming pool filter pumps with capacities less than 2.5 hhp at maximum speed on curve C. As described in section IV.A.1.c of this document, the DPPP Working Group recommended that this range be subdivided into two equipment classes, with a breakpoint of 0.711 hhp. This breakpoint divides the range of self-priming pool filter pumps into a standard-size equipment class and a small-size equipment class. DOE used shipment distributions provided by manufacturers, distributions of models listed in the Pool Pump Performance Database, and feedback from the DPPP Working Group to select representative capacities for these equipment classes.

For the standard-size self-priming pool filter pumps, DOE selected two representative units, with 1.88 hhp and 0.95 hhp. At the baseline efficiency level (discussed further in section IV.C.3), a 1.88-hhp pump and a 0.95-hhp pump require 3.0 hp and 1.6 hp shaft input power from the motor, respectively. Typically, these pumps are equipped with motors rated between 3.5–3.9 thp and 1.7–2.2 thp, respectively.

b. Non-Self-Priming Pool Filter Pumps

For the small-size self-priming pool filter pump equipment class, DOE selected one representative unit with hydraulic horsepower of 0.44 hhp. DOE reviewed an initial selection of representative units with the DPPP Working Group. (Docket No. EERE–2015–BT–STD–0008–0078, April 18 DPPP Working Group Meeting, at pp. 12–19) The DPPP Working Group recommended a break point capacity of 0.711 hhp to separate the small- and standard-size self-priming pool filter pump equipment classes (see section IV.A.1.c for discussion of this break point). DOE revised the capacities of the representative units after this break point was introduced, to include a

representative capacity of 0.44 hhp for the small size self-priming pool filter pump equipment class.

The scope of this direct final rule also includes non-self-priming pool filter pumps with capacities less than 2.5 hhp at maximum speed on curve C. However, the majority of non-self-priming pool filter pump models on the market deliver less than 1.0 hhp at maximum speed on curve C. Accordingly, the representative capacities DOE used to analyze the non-self-priming pool filter pump equipment class were different from the representative capacities used to analyze the self-priming pool filter pump equipment classes. Specifically, DOE selected two representative capacities for non-self-priming pool filter pumps, 0.52 hhp and 0.09 hhp at maximum speed on curve C. The smaller unit (at 0.09 hhp) is representative of pumps that are typically sold with (or as replacements for) seasonal pools. These pumps are typically distributed in commerce on a skid with a sand filter, where the pump and the sand filter are connected with removable hoses. The larger representative unit (at 0.52 hhp) is representative of pumps that are typically sold for applications where the pump is installed and operated below the waterline of the pool that it services, such as in aboveground pool applications. These pumps are typically distributed in commerce as standalone pumps. DOE presented the larger representative capacity (at 0.52 hhp) and the smaller representative capacity (at 0.09 hhp) to the DPPP Working Group. (Docket No. EERE–2015–BT–STD–0008–0078, April 18 DPPP Working Group Meeting, at pp. 27–29; and Docket No. EERE–2015–BT–STD–0008–0091, June 22 DPPP Working Group Meeting, at pp. 115–118) The DPPP Working Group did not offer any opposition to the selected representative capacities and ultimately evaluated standards based on the analysis of these representative capacities.

c. Pressure Cleaner Booster Pumps

The pressure cleaner booster pumps on the market are clustered in a small range of capacities. For this equipment class, DOE selected a capacity that is representative of the cluster of models on the market.

Specifically, DOE selected a representative capacity of 10 gpm of flow and 112 feet of head, which equates to 0.28 hhp. Ten gpm aligns with the testing load point specified in the test procedure final rule for pressure cleaner booster pumps. The DPPP Working Group recommended that

pressure cleaner booster pumps be tested at the load point of 10 gpm and a head greater than 60 feet, to represent the typical pressure cleaner booster pump operation.⁵⁹ (Docket No. EERE–2015–BT–STD–0008, No. 82 Recommendation #8 at pp. 4–5)

At 10 gpm, the pressure cleaner booster pump models from the three largest manufacturers (representing the majority of the pressure cleaner booster pump market) all achieve a similar head in a range from 100 feet to 127 feet of head. To represent the average performance of the pressure cleaner booster pump models available on the market, DOE selected a head value of 112 feet as the value the representative unit would achieve at the test condition of 10 gpm.

d. Waterfall Pumps

The waterfall pumps on the market are clustered in a small range of capacities. For this equipment class, DOE selected a capacity that is representative of the cluster of models on the market. Specifically, DOE selected a representative capacity of 93 gpm of flow and 17 feet of head, which equates to 0.40 hhp. Seventeen feet of head aligns with the testing load point specified in the test procedure final rule for pressure cleaner booster pumps. The DPPP Working Group recommended the testing load point of 17 feet of head (and flow corresponding to 17 feet of head on the pump curve) to represent the typical waterfall pump operation. (Docket No. EERE–2015–BT–STD–0008, No. 51 Recommendation #6 at p. 5)

e. Integral Sand and Cartridge Filter Pool Pump

In this direct final rule, DOE is establishing a prescriptive design standard, rather than a performance standard, for integral sand and cartridge filter pool pumps. The DPPP Working

⁵⁹ The DPPP Working Group initially recommended that pressure cleaner booster pumps be tested at 90 feet of head and a volumetric flow rate that corresponds to 90 feet of head. (Docket No. EERE–2015–BT–STD–0008, No. 51 Recommendation #6 at pp. 5) However, the DPPP Working Group discussed that the minimum pressure requirement to drive a pressure cleaner is approximately 60 feet of head. (Docket No. EERE–2015–BT–STD–0008–0095, March 22 Working Group Meeting, at pp. 207–210) ASAP expressed a desire that the test procedure allow better ratings for variable-speed pressure cleaner pumps that are able to reduce speed to avoid supplying (and wasting) excess pressure beyond what is required to drive the cleaner. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 Working Group Meeting, at pp. 49) The DPPP Working Group subsequently revised its recommendation to recommend that pressure cleaner booster pumps be tested at a flow rate of 10 gpm and the minimum head the pump can achieve that is greater than or equal to 60 feet. (Docket No. EERE–2015–BT–STD–0008, No. 82 Recommendation #8 at pp. 4)

Group considered two alternatives for this analysis: (1) A prescriptive standard that would require a timer for integrated cartridge and integrated sand filter pumps, and (2) a performance standard that would likely be achieved through the use of advanced motors. To help evaluate these alternatives, DOE developed cost-efficiency relationships for integrated cartridge and integrated sand filter pool pumps that describe (1) the use of a timer on all pumps, and (2) the use of advanced motors where possible. The DPPP Working Group reviewed these cost-efficiency relationships. DPPP Working Group members commented that a prescriptive standard requiring a timer may be economically justified, but that a performance standard with advanced motors would not be economically justified. A DPPP Working Group member commented that a prescriptive

standard requiring a timer may not be beneficial because some end users may choose to disable or circumvent the timer mechanism. DOE clarified that the analytical results will account for such instances of misuse, since the rulemaking analysis of a prescriptive standard takes into account that a certain percentage of end users may not use the prescribed technology properly. (Docket No. EERE-2015-BT-STD-0008-0053, November 12 DPPP Working Group Meeting, at pp. 45-78)

As such, in the test procedure final rule, DOE did not establish a test method for these equipment classes. However, as a part of this direct final rule, DOE still evaluated the incremental MPC-efficiency relationship for the prescriptive standard. To do so, DOE established representative models based on performance characteristics of these pumps on system curve C.

DOE examined model availability in the integral sand and cartridge filter pool pumps and selected one representative equipment capacity (0.03 hhp at maximum speed on curve C) for integral sand filter pool pumps, and two representative equipment capacities (0.02 hhp and 0.18 hhp at maximum speed on curve C) for integral cartridge filter pool pumps. The DPPP Working Group reviewed the representative equipment capacities for integral filter pumps and offered no objections. (Docket No. EERE-2015-BT-STD-0008-0094, March 21 DPPP Working Group Meeting, at pp. 54-58)

f. Summary of Representative Units

DOE's representative dedicated-purpose pool pump capacities are summarized in Table IV-6.

TABLE IV-6—CHARACTERISTICS OF REPRESENTATIVE UNITS, BY EQUIPMENT CLASS

DPPP equipment class	Test point	Performance at test point at 100% speed		
		Power hhp	Head feet	Flow gpm
Self-priming pool filter pump, standard-size	Curve C	1.88	76.8	96.8
	Curve C	0.95	48.7	77.1
Self-priming pool filter pump, small-size	Curve C	0.44	29.2	59.7
Non-self-priming pool filter pump	Curve C	0.52	32.6	63.1
	Curve C	0.09	10.1	35.1
Pressure cleaner booster pump	10 gpm flow	0.28	110.0	10.0
Waterfall pump	17 ft. head	0.40	17.0	93.0
Integral sand filter pool pump	n/a *	0.03	4.9	24.4
Integral cartridge filter pool pump	n/a *	0.18	16.1	44.3
	n/a *	0.02	3.7	21.3

** DOE did not establish a test procedure for integral sand filter pool pumps or integral cartridge filter pool pumps, because these equipment classes are not subject to performance standards. However, the performance reported for integral pumps in this table is measured on curve C.

3. Baseline Configuration and Performance

The baseline configuration defines the lowest efficiency equipment in each analyzed equipment class. DOE established baseline configurations by reviewing the configurations and performance of pumps listed in the Pool Pump Performance Database. DOE determined that, for pool filter pumps (including all sub-varieties) and pressure cleaner booster pumps, the baseline configuration has the following characteristics:

- single-speed
- low-efficiency motor
- low hydraulic efficiency

To determine an appropriate level of performance for each representative pool filter pump unit at the baseline, DOE identified pumps in the Pool Pump Performance Database that have similar hydraulic capacity to the representative units, and that share the baseline equipment characteristics. DOE adopted the estimated WEF values of these identified pumps as the baseline performance level for each representative unit. Pressure cleaner booster pumps and waterfall pumps are not listed in the Pool Pump Performance Database. Manufacturers provided test data for several models of pressure cleaner booster pumps and waterfall

pumps, and these test data enabled DOE to estimate the performance of representative units at the baseline.

The baseline configuration for integral filter pumps for which prescriptive standards were considered is characterized by median performance and lack of a timer mechanism.

Table IV-7 summarizes the baseline configurations and performance levels for the representative units used in this analysis. These baseline configurations ultimately define the energy consumption and associated costs for the lowest efficiency equipment analyzed in each equipment class.

TABLE IV-7—BASELINE CONFIGURATIONS AND PERFORMANCE FOR DPPP REPRESENTATIVE UNITS

DPPP representative unit	Baseline configuration	Baseline performance WEF
Self-priming pool filter pump, 1.88 hhp	Single-speed, low efficiency motor, low hydraulic efficiency.	1.74
Self-priming pool filter pump, 0.95 hhp		2.13

TABLE IV–7—BASELINE CONFIGURATIONS AND PERFORMANCE FOR DPPP REPRESENTATIVE UNITS—Continued

DPPP representative unit	Baseline configuration	Baseline performance WEF
Self-priming pool filter pump, 0.44 hhp	No timer	2.69
Non-self-priming pool filter pump, 0.52 hhp		2.77
Non-self-priming pool filter pump, 0.09 hhp		3.93
Pressure cleaner booster pump		0.34
Waterfall pump		7.46
Integral sand filter pool pump		n/a
Integral cartridge filter pool pump, 0.18 hhp		n/a
Integral cartridge filter pool pump, 0.02 hhp		n/a

Chapter 5 of the direct final rule TSD describes the process that DOE used to select the baseline configuration for each equipment class and discusses the baseline in greater detail.

4. Efficiency Levels

For each equipment class, DOE established and analyzed a set of efficiency levels above the baseline configuration to assess the relationship between MPC and DPPP efficiency. These efficiency levels are discrete tiers of energy efficiency that can be represented by the WEF test metric.

a. Design Option Applicability and Ordering

For pool filter pump varieties, DOE considered incremental improvements that could be applied to the baseline configuration; these improvements are related to the three design options discussed in section IV.A.6: (1) Improved motor efficiency, (2) ability to operate at reduced speeds, and (3) improved hydraulic design.

Specifically, for the “improved motor efficiency” design option, DOE considered three tiers of motor efficiency (low, medium, and high efficiency) for both single-speed and two-speed pump motors. The specific nameplate motor efficiency associated with these tiers varied by pump variety and capacity. For the “ability to operate at reduced speeds” design option, DOE considered three motor speed configurations: Single-speed, two-speed, and variable-speed. Finally, for the “improved hydraulic design” design option, DOE considered two hydraulic efficiencies (low and high efficiency). The specific hydraulic efficiencies associated with these tiers varied by pump variety and capacity.

For pressure cleaner booster pumps, DOE evaluated the same design options as pool filter pumps. However, DOE did not consider two-speed motors because pressure cleaner booster pumps only operate at one speed and cannot benefit from the ability to switch between two discrete speeds. Alternatively, DOE did

consider variable-speed motors for pressure cleaner booster pumps, as the WEF metric accounts for energy savings available from adjusting the pump speed to reach the minimum required pressure, *i.e.*, 60 feet.

For waterfall pumps, DOE evaluated the same improved motor efficiency and improved hydraulic efficiency design options as pool filter pumps, but did not evaluate the ability to operate at reduced speeds. This is because DOE determined that waterfall pumps only operate at one speed and therefore cannot benefit from the ability to switch speeds.

To order the design options for each equipment class, DOE considered all of the costs (both incremental MPCs and one-time product conversion costs) that would be incurred with each design option. Based on data from manufacturer interviews, as well as DPPP Working Group discussions (Docket No. EERE–2015–BT–0008, March 21 DPPP Working Group Meeting, at pp. 108–122), DOE concluded that a direct relationship exists between motor MPC and pump WEF score, while a flat relationship exists between motor-related conversion costs and WEF score, *i.e.*, better performing motors cost more, but manufacturers face similar conversion costs for all motor-related design options, regardless of whether they are substituting on the basis of motor efficiency or on the basis of motor speed configuration. DPPP Working Group members clarified that the motor-related conversion costs associated with upgrading a pump motor include the costs of sourcing and qualifying the pump motor as a purchased component, but they do not include the costs that motor manufacturers would incur (*e.g.*, the costs of designing, testing, and marketing a motor model). (Docket No. EERE–2015–BT–0008–0094, March 21 DPPP Working Group Meeting, at pp. 113–114; Docket No. EERE–2015–BT–0008–0100, May 18 DPPP Working Group Meeting, at pp. 89–90) DPPP

Working Group members also clarified that the conversion costs associated with upgrading motors are not cumulative across multiple efficiency levels, *i.e.*, if a manufacturer pays a conversion cost to upgrade from EL 0 to EL 2, they do not pay the conversion cost associated with an interim upgrade to EL 1. (Docket No. EERE–2015–BT–STD–0008–0100, May 18 DPPP Working Group Meeting, at pp. 102)

In discussions with the DPPP Working Group, DOE stated the assumption that MPC does not increase as hydraulic efficiency increases. Hayward commented that the addition of a diffuser would change the efficiency and the MPC of a pump wet end, but DOE noted that the analysis already accounts for this effect. The addition of a diffuser would change a pump’s ability to self-prime and thus, would change the pump’s equipment class, and DOE already determined the MPCs and efficiencies of the different equipment classes on the basis of these design differences. (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 117–118) Based on data from manufacturer interviews and these Working Group discussions, DOE concluded that hydraulic redesign has a negligible effect on MPC, but results in significant conversion costs—much greater than those incurred for motor-related improvement. The DPPP Working Group did not object to these conclusions. Complete discussions of incremental MPC and conversion costs are found in sections IV.C.5 and IV.J.2, respectively.

Ultimately, DOE ordered its design options to first employ all motor-related design options, based on ascending incremental MPC, followed by improved hydraulic design to reach the maximum technologically feasible efficiency level. This ordering was reviewed by the DPPP Working Group (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 58–105), which

offered no objections, and ultimately evaluated standards based on efficiency levels resulting from this ordering.

Table IV–8 describes the design options applied to each equipment class at each

efficiency level from the baseline up to the max-tech level.

TABLE IV–8—DESIGN OPTIONS BY EFFICIENCY LEVEL FOR PUMP VARIETIES SUBJECT TO PERFORMANCE STANDARDS

Efficiency level	DPPP variety		
	Pool filter pumps		Pressure cleaner booster pump
	Self-priming/Non-self-priming	Waterfall pump *	
0 (Baseline)	1-speed motor, Low efficiency motor, Low hydraulic efficiency.	1-speed motor, Low efficiency motor, Low hydraulic efficiency.	1-speed motor, Low efficiency motor, Low hydraulic efficiency.
1	1-speed motor, Medium efficiency motor, Low hydraulic efficiency.	1-speed motor, Medium efficiency motor, Low hydraulic efficiency.	1-speed motor, Medium efficiency motor, Low hydraulic efficiency.
2	1-speed motor, High efficiency motor, Low hydraulic efficiency.	1-speed motor, High efficiency motor, Low hydraulic efficiency.	1-speed motor, High efficiency motor, Low hydraulic efficiency.
3	2-speed motor, Low efficiency motor, Low hydraulic efficiency.	1-speed motor, High efficiency motor, High hydraulic efficiency.	Variable-speed motor, Low hydraulic efficiency.
4	2-speed motor, Medium efficiency motor, Low hydraulic efficiency.	.....	Variable-speed motor, High hydraulic efficiency.
5	2-speed motor, High efficiency motor, Low hydraulic efficiency.		
6	Variable-speed motor, Low hydraulic efficiency.		
7 (max tech)	Variable-speed motor, High hydraulic efficiency.		

* As described in section IV.A.6.b, DOE did not consider efficiency levels above EL2 for non-self-priming pool filter pumps that produce less than 49.4 gpm maximum flow on curve C.

DOE analyzed one design option for the integral cartridge filter pool pump and integral sand filter pool pump classes that are subject to prescriptive

standards. Table IV–9 presents the two efficiency levels considered for those classes: The baseline (without a pool pump timer), and EL1 (with a pool

pump timer). Chapter 5 of the direct final rule TSD contains more details on the development of efficiency levels.

TABLE IV–9—DESIGN OPTIONS BY EFFICIENCY LEVEL FOR DPPP VARIETIES SUBJECT TO A PRESCRIPTIVE STANDARDS

Efficiency level	DPPP variety	
	Integral cartridge filter pumps	Integral sand filter pumps
0 (Baseline)	Does not include pool pump timer	Does not include pool pump timer.
1	Includes pool pump timer	Includes pool pump timer.

b. Summary of Available Motor Efficiencies

For the improved motor efficiency design option, DOE selected a discrete motor efficiency (or efficiencies, for two-speed motors) for each representative unit at each efficiency level. DOE presented initial motor efficiency assumptions to the DPPP Working Group. These initial figures showed full-speed nameplate motor efficiency ranging from 55 percent to 81 percent for motors used in small self-priming pool filter pumps and in 0.52-hhp non-self-priming pool filter pumps; ranging from 75 percent to 92 percent for motors used in 1.88-hp self-priming pool filter pumps; ranging from 55 percent to 77 percent for motors used in pressure cleaner booster pumps; and ranging from 38 percent to 50 percent for motors used in waterfall pumps. (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working

Group Meeting, at pp. 58–65) DPPP Working Group members commented that certain manufacturers offer a wider variety of two-speed motors than were represented in DOE's initial assumptions. In particular, certain manufacturers offer two-speed motors that are designed to have improved efficiency at low speed. The DPPP Working Group requested DOE revise the motor efficiency assumptions to include a new efficiency level representing a two-speed motor with an improved low-speed motor efficiency. (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 76–77) DOE subsequently added an efficiency level (specifically, EL 4) that incorporates a motor with high-speed efficiency of 68 percent and low-speed efficiency of 48 percent.

DPPP Working Group members also commented that the efficiency range DOE assumed for waterfall pumps was

lower than what exists in the market. DPPP Working Group members suggested that DOE examine typical motor efficiencies for dedicated 1725-rpm motors. (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 96–99) DOE reviewed motor catalog data and subsequently revised its waterfall pump motor efficiency assumptions upward. DOE revised the baseline waterfall pump motor efficiency from 38 percent to 65 percent efficient, and the max tech waterfall pump motor efficiency from 50 percent to 78 percent efficient.

Based on motor efficiency data in the CEC pool pump database, DOE initially assumed that variable-speed ECM motors are available with nameplate efficiency of 92 percent. Members of the DPPP Working Group commented that 92 percent would be too high for a nameplate motor efficiency, and suggested that the 92 percent figure did not account for efficiency losses in the

motor's electronic drive. DPPP Working Group members requested that DOE review its assumption for variable-speed nameplate motor efficiency and revise it appropriately. (Docket No. EERE-2015-BT-STD-0008-0094, March 21 DPPP Working Group Meeting, at pp. 80-82) DOE subsequently revised its assumption of typical variable-speed motor efficiency at high-speed from 92 percent downward to 82 percent. The DPPP Working Group did not object to this assumption.

DOE also initially assumed that smaller 48-frame motors typically used in non-self-priming pumps would be able to achieve the same nameplate motor efficiency as the larger 56-frame motors typically used in self-priming

pool filter pumps. DOE initially assumed that both 48-frame and 56-frame single-speed motors would be available ranging from 55 percent efficiency to 77 percent efficiency. DPPP Working Group members commented that, due to constraints of their smaller frame size, 48-frame motors could not always achieve the same efficiency as 56-frame motors at the same capacity, and that 48-frame motors likely could not achieve the 77 percent nameplate efficiency that DOE initially assumed. (Docket No. EERE-2015-BT-STD-0008-0091, June 22 DPPP Working Group Meeting, pp. 132-138 and pp. 189-191) DOE subsequently revised its assumption regarding the nameplate efficiency from 77 percent to 72 percent

for the larger (0.52-hhp) non-self-priming pool filter pump representative unit, which used a 48-frame motor. The DPPP Working Group did not object to this assumption.

Table IV-10 presents the revised motor efficiencies for each combination of motor efficiency and motor configuration described in Table IV-8. DOE selected these motor efficiencies based on data listed in the Pool Pump Performance Database, publicly available catalog data, and motor data that manufacturers submitted to DOE. Motor components with the efficiencies listed in Table IV-10 are currently available on the market at the appropriate frame sizes and capacities to drive the representative unit pumps.

TABLE IV-10—MOTOR NAMEPLATE EFFICIENCIES FOR REPRESENTATIVE UNITS WITH DIFFERENT MOTOR CONFIGURATIONS *

Motor description	Motor efficiencies (and corresponding ELs) for representative units at high speed except as noted						
	Self-priming pool filter pump			Non-self-priming pool filter pump		Pressure cleaner booster pump (%)	Water-fall pump (%)
	0.44 hhp (%)	0.95 hhp (%)	1.88 hhp (%)	0.09 hhp (%)	0.52 hhp (%)		
1-speed, low efficiency (Baseline).	55 (EL0)	55 (EL0)	75 (EL0)	55 (EL0)	55 (EL0)	55 (EL0)	65 (EL0)
1-speed, mid efficiency.	69 (EL1)	69 (EL1)	79 (EL1)	69 (EL1)	69 (EL1)	67 (EL1)	70 (EL1)
1-speed, high efficiency.	76 (EL2)	77 (EL2)	84 (EL2)	72 (EL2)	72 (EL2)	72 (EL2)	78 (EL2-3)
2-speed, low efficiency.	64 high, 38 low (EL3).	64 high, 38 low (EL3).	74 high, 49 low (EL3).	n/a **	61 high, 38 low (EL3).	n/a ‡	n/a ‡
2-speed, mid efficiency.	70 high, 46 low (EL4).	71 high, 46 low (EL4).	76 high, 55 low (EL4).	n/a **	68 high, 48 low (EL4).	n/a ‡	n/a ‡
2-speed, high efficiency.	73 high, 51 low (EL5).	73 high, 51 low (EL5).	83 high, 62 low (EL5).	n/a **	72 high, 51 low (EL5).	n/a ‡	n/a ‡
Variable Speed.	81 (EL6-7)	81 (EL6-7)	82 (EL6-7)	n/a †	81 (EL6-7)	81 (EL3-4)	n/a ‡

* The integral cartridge filter pool pump and integral sand filter pool pump equipment classes are not included in this table because DOE did not separately consider the motor costs for these equipment classes.

** As discussed in section IV.A.6.b this analysis does not consider two-speed motor configurations for the extra-small non-self-priming pool filter pump representative unit. According to the test procedure final rule, this representative unit would always be subject to the single-speed test procedure because the half-speed flow rate for a 0.09 hhp pump would be 17.8 gpm, which is less than the test procedure minimum flow rate of 24.7 gpm.

† As discussed in section IV.A.6.b, this analysis does not consider variable-speed motor configurations for the extra-small non-self-priming pool filter pump representative unit.

‡ Two-speed motors were not considered for waterfall pumps or pressure cleaner booster pumps, and variable-speed motors were not considered for waterfall pumps, because DOE assumes these pump varieties are always operated at a single-speed.

c. Summary of Available Hydraulic Efficiencies

For the “improved hydraulic design” design option, DOE evaluated two discrete hydraulic efficiencies (“low” and “high”) for each representative unit. The low hydraulic efficiency represents

the pump hydraulic efficiency of a baseline unit that has not been optimized. The high hydraulic efficiency represents the hydraulic efficiency of a pump that has been hydraulically redesigned to improve hydraulic efficiency, as described in section IV.A.6.c.

Table IV-11 presents the selected hydraulic efficiencies at each efficiency level described in Table IV-8. DOE selected these hydraulic efficiencies based on data listed in the Pool Pump Performance Database, publicly available catalog data, and pump test data submitted by manufacturers.⁶⁰

⁶⁰ For further information regarding the estimation of hydraulic efficiencies, refer to chapter 5 of the direct final rule TSD.

TABLE IV-11—HYDRAULIC EFFICIENCIES FOR REPRESENTATIVE UNITS

Hydraulic efficiency descriptor (%)	Hydraulic efficiencies and corresponding efficiency levels for representative units at maximum speed						
	Self-priming pool filter pump			Non-self-priming pool filter pump		Pressure cleaner booster pump (%)	Waterfall pump
	0.44 hhp (%)	0.95 hhp (%)	1.88 hhp (%)	0.09 hhp (%)	0.52 hhp (%)		
Low Hydraulic Efficiency (Applicable ELs).	45 (EL0–EL6) ...	59 (EL0–EL6)	62 (EL0–EL6)	23 (EL0–EL2)	51 (EL0–EL6)	24 (EL0–EL3)	61 (EL0–EL2)
High Hydraulic Efficiency (Applicable ELs).	49 (EL7)	63 (EL7)	72 (EL7)	n/a *	67 (EL7)	27 (EL4)	67 (EL3)

* DOE did not have sufficient data to evaluate a 0.09-hhp non-self-priming pool filter pump with high hydraulic efficiency.

d. Representative Unit Performance at Each Efficiency Level

In the previous sections of this direct final rule, DOE described efficiency levels and the available improvements in motor and hydraulic efficiency for different equipment classes. This section describes how DOE used that information to calculate the WEF value of each representative unit at each efficiency level.

The DPPP equipment classes within the scope of this direct final rule are varied in terms of the number of pump models that are offered on the market and in terms of the amount of data available for those models. Because of these variations, DOE calculated WEF values using slightly different methodologies for each equipment class. The following sections describe the methodologies that DOE used for each equipment class.

Self-Priming Pool Filter Pumps

This subsection describes how DOE used the baseline and incremental performance data presented in sections IV.C.3 through IV.C.4.c to determine the WEF value for three representative self-priming pool filter pump units (0.44 hhp, 0.95 hhp, and 1.88 hhp) from efficiency levels one through max tech.

Efficiency levels one and two represent single-speed pumps. For EL1 and EL2, DOE held hydraulic efficiency constant and replaced the baseline maximum speed motor efficiency with the EL1 and EL2 maximum speed motor efficiencies (presented in Table IV-10). In doing so, DOE was able to calculate the wire-to-water efficiency, input power, and ultimately the WEF at maximum speed on curve C. Chapter 5 of the direct final rule TSD provides full details regarding the calculations and estimations presented in this section.

Efficiency levels three through five represent two-speed pumps. For EL3, EL4, and EL5, DOE used the same method as described for EL1 and EL2 to determine pump performance at

maximum speed on curve C. However, a dedicated-purpose pool pump operating at half-speed will exhibit lower hydraulic efficiency and lower motor efficiency compared to its full speed operation. To characterize the performance of pumps at half-speed, DOE referred to the Pool Pump Performance Database, which includes half-speed performance data for listings of two-speed self-priming pool filter pumps. For all three representative units, DOE identified pumps in the Pool Pump Performance Database that exemplify EL3, with design characteristics of low motor efficiency, two-speed motor, and low hydraulic efficiency. DOE used the half-speed motor efficiency and input power for these EL3 units to estimate a representative baseline half-speed hydraulic efficiency.⁶¹ Then DOE calculated the total efficiency and the input power for EL4 and EL5 at half speed by holding the half-speed hydraulic efficiency constant at baseline and substituting the half-speed motor efficiencies assumed for EL4 and EL5 (presented in Table IV-10). DOE calculated WEF for representative units at EL4 and EL5 by combining the half-speed performance with the max-speed performance, as specified in the test procedure final rule.

Efficiency levels 6 and 7 describe variable-speed pumps. Similar to previous ELs, DOE assumed that the baseline motor would be replaced with the EL6 and EL7 motors presented in Table IV-10. Unlike two-speed pumps, the high-speed test point for variable speed pumps is at 80 percent of maximum speed on curve C, and the low-speed test point is at either 24.7 gpm flow or 31.1 gpm flow on curve C (depending on the pump capacity). Although the Pool Pump Performance Database contains performance data for

many variable-speed pumps, data for these pumps is not typically reported at these specific test points. Consequently, DOE used the variable-speed performance data available for other speeds to estimate performance for the representative units at the specific variable-speed test points.

Based on examination of power-flow curves for many variable-speed pumps and variable-speed motor performance data, DOE concluded that total efficiency at 80 percent of maximum speed is approximately equal to the pump's total efficiency at maximum speed. As such, the hydraulic and motor efficiency of each variable-speed representative unit remains constant, between 100 percent and 80 percent of maximum speed.⁶²

However, examination of the same power-flow curves and variable-speed motor performance data indicated that that pump's total efficiency will be lower at the low-speed test point, as hydraulic and motor efficiency tend to be significantly reduced at low speeds. DOE constructed a regression of these power-flow data to quantify the relationship between wire-to-water efficiency and speed reduction. This relationship allowed DOE to estimate wire-to-water efficiency, and thus input power, for each representative unit, based on each unit's wire-to-water efficiency at maximum speed on curve C. The DPPP Working Group reviewed this method of estimating low-speed performance and certain members expressed explicit agreement with the results of this low-speed estimation methodology. (Docket No. EERE-2015-BT-STD-0008-0094, March 21 DPPP Working Group Meeting, at pp. 26–35 and Docket No. EERE-2015-BT-STD-0008-0095, March 22 DPPP Working Group Meeting, at pp. 4–5) None of the DPPP Working Group members

⁶¹ For further information on this method of calculating the half-speed hydraulic efficiency and WEF for two-speed pumps, refer to chapter 5 of the direct final rule TSD.

⁶² See chapter 5 of the direct final rule TSD for more details regarding the estimation of variable-speed pump performance at the 80-percent-speed and the low-speed test points.

expressed disagreement with this method of estimating low-speed performance. The remainder of the DPPP Working Group offered no objections, and ultimately evaluated standards based on this methodology. Details regarding this regression and the estimation of low-speed performance is included in chapter 5 of the direct final rule TSD.

At EL6, DOE also estimated representative baseline low-speed and high-speed hydraulic efficiency using data from the Pool Pump Performance Database. To do so, DOE identified pumps in the Pool Pump Performance Database that exemplify EL6, (those with variable-speed motor and low hydraulic efficiency) and referenced the low-speed and high-speed motor efficiencies and input power values that DOE estimated for those units. DOE used these estimated values to calculate the representative hydraulic efficiency of these pumps at low speed and at high speed. Details regarding this estimation of hydraulic efficiency are included in chapter 5 of the direct final rule TSD.

Then DOE calculated the total efficiency and the input power for EL7 at low speed by holding the low-speed motor efficiency constant at its EL6 level and substituting an improved hydraulic efficiency at maximum speed on curve C, up to the values specified in Table IV–11. DOE calculated the high-speed performance at EL7 in the same way, by calculating total efficiency and input power holding the high-speed motor efficiency constant and substituting an improved hydraulic efficiency. Ultimately, DOE calculated WEF for representative units at EL6 and EL7 by combining low-speed performance with the high-speed performance, as specified in the test procedure final rule.

Non-Self-Priming Pool Filter Pumps

This subsection describes how DOE used the baseline and incremental performance data presented in sections IV.C.3 through IV.C.4.c to determine the WEF values for two representative non-self-priming pool filter pump units (0.09 hhp and 0.52 hhp) from efficiency levels 1 through max tech. DOE analyzed the 0.09-hhp non-self-priming representative unit separately from the 0.52-hhp non-self-priming representative unit.⁶³

⁶³ The DPPP Working Group ultimately determined that separate standard levels were not appropriate for standard-size non-self-priming and extra-small non-self-priming pool filter pumps (Docket No. EERE–2015–BT–STD–0008–0092, June 23 DPPP Working Group Meeting, pp. 277–280), and the two representative capacities are regulated together in one equipment class.

DOE did not analyze any efficiency levels above EL2 for the 0.09-hhp non-self-priming pool filter pump representative unit. As discussed in section IV.A.6.b, the design option described as “ability to operate at reduced speeds” does not benefit pool filter pumps that are below 49.4 gpm at maximum speed on curve C. The representative unit characteristics in Table IV–6 show that the 0.09-hhp non-self-priming representative unit achieves a flow rate of 35.1 gpm at maximum speed on curve C. This flow rate is below the 49.4 gpm threshold, so DOE analyzed only single-speed efficiency levels (EL0 through EL2) for the 0.09-hhp non-self-priming pool filter pump. DOE discussed this point with the DPPP Working Group and the group did not offer any comments or objections. (Docket No. EERE–2015–BT–STD–0008–0091, June 22 DPPP Working Group Meeting, pp. 115–116)

To calculate the WEF of non-self-priming pool filter pumps at EL1 and EL2 at maximum speed on curve C, DOE used the same methods as those described for self-priming pool filter pumps at EL1 and EL2.

To calculate the WEF of 0.52-hhp non-self-priming pool filter pumps at EL3, EL4, and EL5, DOE used the same methods as those described for self-priming pool filter pumps at EL3, EL4, and EL5.

Efficiency levels 6 and 7 describe variable-speed pumps. Similar to previous ELs, DOE assumed that the baseline motor would be replaced with the EL6 and EL7 motors presented in Table IV–10. As described in the discussion of self-priming pool filter pumps, the high-speed test point for variable-speed pumps is at 80 percent of maximum speed on curve C, and the low-speed test point is at either 24.7 gpm flow or 31.1 gpm flow on curve C (depending on the pump capacity). However, the Pool Pump Performance Database does not contain performance data for any variable-speed non-self-priming pool filter pumps, and DOE is not aware of any non-self-priming pool filter pumps on the market that incorporate a variable-speed motor. To characterize EL6 and EL7, DOE estimated the performance of a hypothetical variable-speed non-self-priming pool filter pump. Based on examinations of power-flow curves for self-priming and non-self-priming pool filter pumps, DOE concluded that these two pump varieties experience similar degradation of motor and hydraulic efficiency as pump flow is reduced. DOE estimated the low-speed efficiencies of non-self-priming pumps using the same relationship between

wire-to-water efficiency and speed reduction that was determined by regression of self-priming pool filter pump data. DOE applied this relationship to the 0.52-hhp representative non-self-priming unit to this representative unit at 80-percent speed and at low speed.

DOE then calculated the total efficiency and the input power for EL7 at low speed by holding the low-speed motor efficiency constant at its EL6 level and substituting an improved hydraulic efficiency at maximum speed on curve C, up to the values specified in Table IV–11. Ultimately, DOE calculated WEF for representative units at EL6 and EL7 by combining low-speed performance with the high-speed performance, as specified in the test procedure final rule.

Pressure Cleaner Booster Pumps

This subsection describes how DOE used the baseline and incremental performance data presented in sections IV.C.3 through IV.C.4.c to determine the WEF value for one representative pressure cleaner booster pump (at 0.28 hhp at the test point of 10 gpm flow) from efficiency levels 1 through max tech.

To calculate the WEF of pressure cleaner booster pumps at EL1 and EL2 at the pressure cleaner booster pump test point of 10 gpm of flow, DOE used the same methods as those described for self-priming pool filter pumps at EL1 and EL2.

EL 3 represents a variable-speed pump. As described in section IV.A.6.b, pressure cleaner booster pumps are tested at 100 percent speed or (for variable-speed pumps) at the lowest speed that can achieve 60 feet of head at the 10 gpm test condition.⁶⁴ DOE assumed that the representative unit's motor efficiency would improve from EL2 to EL3, as the shift from single speed to variable speed would likely be achieved by switching from induction motor technology to the more efficient ECM technology.⁶⁵ For EL3, DOE held hydraulic efficiency constant and replaced the EL2 motor efficiency with the EL3 maximum speed motor efficiency (presented in Table IV–10).

⁶⁴ The DPPP Working Group requested that DOE examine variable-speed pumps as a design option for pressure cleaner booster pumps. (Docket No. EERE–2015–BT–STD–0008–0095, March 22 DPPP Working Group Meeting, at pp. 197–203)

⁶⁵ As noted in section IV.A.6.a, ECMs are inherently more efficient than induction motors because their construction minimizes slip losses between the rotor and stator components.

DOE used pump affinity laws⁶⁶ to calculate the input power that the representative unit would consume at 60 feet of head at 10 gpm flow.⁶⁷ In doing so, DOE was able to calculate the wire-to-water efficiency and ultimately WEF at the waterfall pump test point of 10 gpm flow.

Efficiency level four represents a variable-speed pressure cleaner booster pump with improved hydraulic design. DOE calculated the total efficiency and the input power for EL4 by holding the motor efficiency constant at its EL3 level and substituting an improved hydraulic efficiency at maximum speed on curve C, up to the value specified in Table IV–11. Chapter 5 of the direct final rule TSD provides full details

regarding the calculations and estimations presented in this section.

Waterfall Pumps

This subsection describes how DOE used the baseline and incremental performance data presented in sections IV.C.3 through IV.C.4.c to determine the WEF value for one representative waterfall pump (at 0.40 hhp at the test point of 17 feet of head) from efficiency levels 1 through max tech.

To calculate the WEF of waterfall pumps at EL1 and EL2 at the waterfall pump test point of 17 feet of head, DOE used the same methods as those described for self-priming pool filter pumps at EL1 and EL2.

Efficiency level three represents a single-speed pump with improved

hydraulic design. DOE calculated the total efficiency and the input power for EL3 by holding the motor efficiency constant at its EL2 level and substituting an improved hydraulic efficiency at maximum speed on curve C, up to the values specified in Table IV–11. Chapter 5 of the direct final rule TSD provides full details regarding the calculations and estimations presented in this section.

Summary of Representative Unit Performance at Each Efficiency Level

Table IV–12 presents the performance in terms of WEF calculated for each of the representative units at each efficiency level.

TABLE IV–12 PERFORMANCE OF REPRESENTATIVE UNITS AT EACH EFFICIENCY LEVEL

Efficiency level	Representative units						
	Self-priming			Non-self-priming		Water-fall (WEF)	Pressure cleaner (WEF)
	0.44 hhp (WEF)	0.95 hhp (WEF)	1.88 hhp (WEF)	0.09 hhp (WEF)	0.52 hhp (WEF)		
0 (Baseline)	2.69	2.13	1.74	3.93	2.77	7.46	0.34
1	3.37	2.67	2.03	4.93	3.47	7.95	0.42
2	3.72	2.98	2.16	5.14	3.62	8.95	0.45
3	4.68	3.98	3.45	* n/a	4.62	9.85	0.51
4	5.38	4.60	3.66	* n/a	5.47	** n/a	0.56
5	5.77	4.88	4.18	* n/a	5.80	** n/a	** n/a
6	8.78	6.89	5.21	* n/a	7.42	** n/a	** n/a
7							
(Max Tech)	11.71	8.59	6.97	* n/a	11.96	** n/a	** n/a

* DOE evaluated 0.09-hhp non-self-priming pool pumps at single-speed efficiency levels only.

** The max-tech efficiency level is EL3 for waterfall pumps and EL4 for pressure cleaner booster pumps.

e. Efficiency Level Structure for All Pump Capacities

The previous section summarizes the performance of the representative units at each efficiency level. However, the market for self-priming and non-self-priming pool filter pumps is more diverse than these representative units. The self-priming and non-self-priming pool filter pump classes include pumps less than 2.5 hhp, and the range of available pump efficiencies (as measured by WEF) decreases as pump capacity increases. To reflect this variation, DOE developed efficiency levels for these equipment classes in the form of equations to specify the WEF performance of equipment across the range of hydraulic power.

For self-priming and non-self-priming pool filter pumps, DOE constructed

mathematical functions that fit the performance of the representative units at each efficiency level. DOE observed that the natural logarithm function provides curves with the best fit (*i.e.*, the least error) when comparing the calculated curve values to the performance values that DOE estimated for representative units. DOE constructed scatterplots (Figure IV.4 and Figure IV.5) to visualize the performance of the self-priming and non-self-priming pool filter pumps listed in the Pool Pump Performance Database, along with the representative unit performance at each efficiency level and the efficiency level curve equations.

DOE manually adjusted coefficients in the efficiency level curves to shape the curves to meet the needs of the DPPP

Working Group. For instance, DOE adjusted the EL6 curve for self-priming pool filter pumps so that all variable-speed self-priming pool filter pumps listed in the Pool Pump Performance Database would meet a standard set at EL6. The development of the finished efficiency level curve equations is described further in chapter 5 of the direct final rule TSD. After DOE adjusted the efficiency level curves, the DPPP Working Group reviewed them (Docket No. EERE–2015–BT–STD–0008–0078, April 18 DPPP Working Group Meeting, at pp. 17–18), offered no objections, and ultimately evaluated standards based on these efficiency levels. DOE presented an alternate curve for EL 6 that accounted for the statistical error inherent in the estimation of WEF scores.⁶⁸ (Docket No. EERE–2015–BT–

⁶⁶ The pump affinity laws relevant to this calculation are stated in Equation 5, Equation 6, and Equation 7.

⁶⁷ DOE calculated that, for the representative pressure cleaner booster pump, this operating point represents 73 percent of the pump's maximum

speed. Based on examination of power-flow curves for many variable-speed self-priming pool filter pumps and variable-speed motor performance data, DOE concluded that this reduced-speed operation would incur negligible motor efficiency and hydraulic efficiency losses. Thus, DOE assumed

that the representative pressure cleaner booster pump operating at 73 percent speed would exhibit the same motor efficiency and hydraulic efficiency as it would when operating at 100 percent speed.

⁶⁸ DOE did not have access to performance data for variable-speed pool filter pumps at the load

STD-0008-0100, May 18 DPPP Working Group Meeting, at pp. 118-120) The DPPP Working Group ultimately reached consensus, with no dissenting

votes, to recommend the original EL 6 curve that does not include corrections for statistical error. (Docket No. EERE-2015-BT-STD-0008-0092, June 23

DPPP Working Group Meeting, at pp. 282-283).

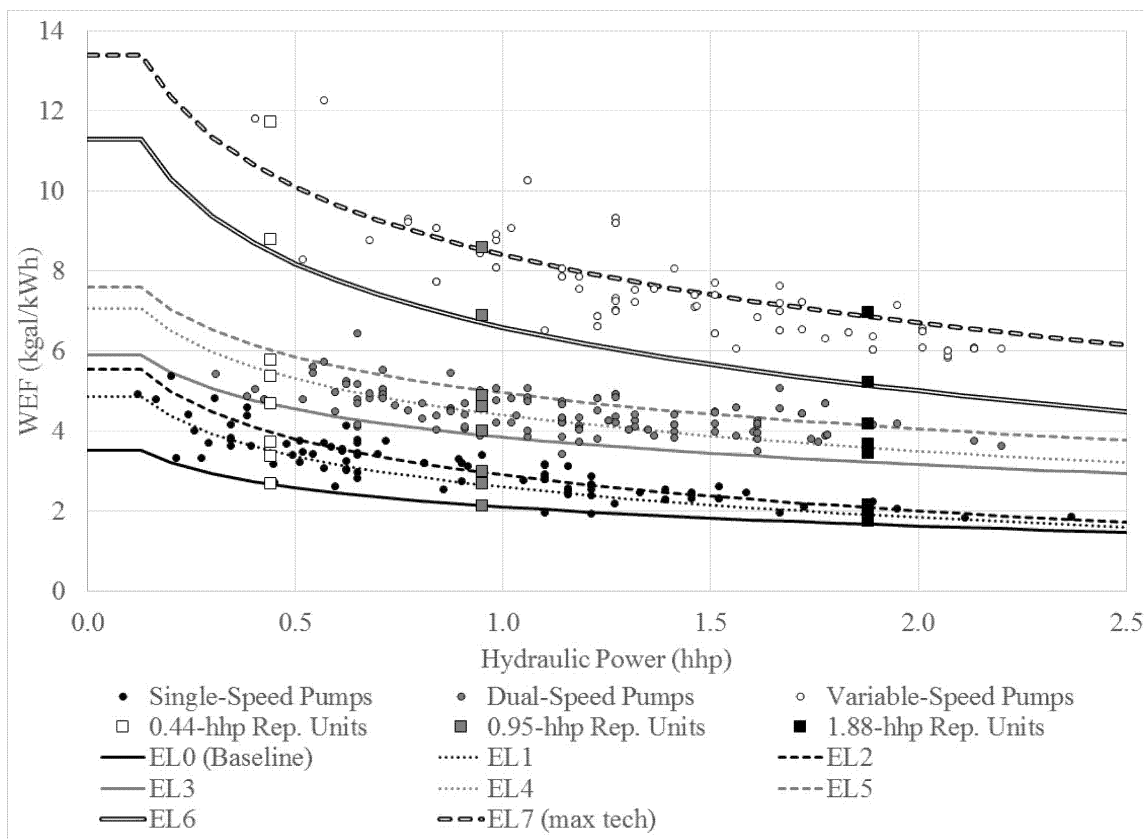


Figure IV.4 WEF versus Hydraulic Power for Self-Priming Pool Filter Pumps, Representative Units, and Efficiency Levels

points prescribed in the test procedure final rule. DOE estimated the performance of pool filter pumps at these load points using statistical

regression analysis, as described in section IV.C.1.a. DOE estimated that the regression analysis introduces statistical error of about 8 percent for the

WEF scores calculated for representative pool filter pump units.

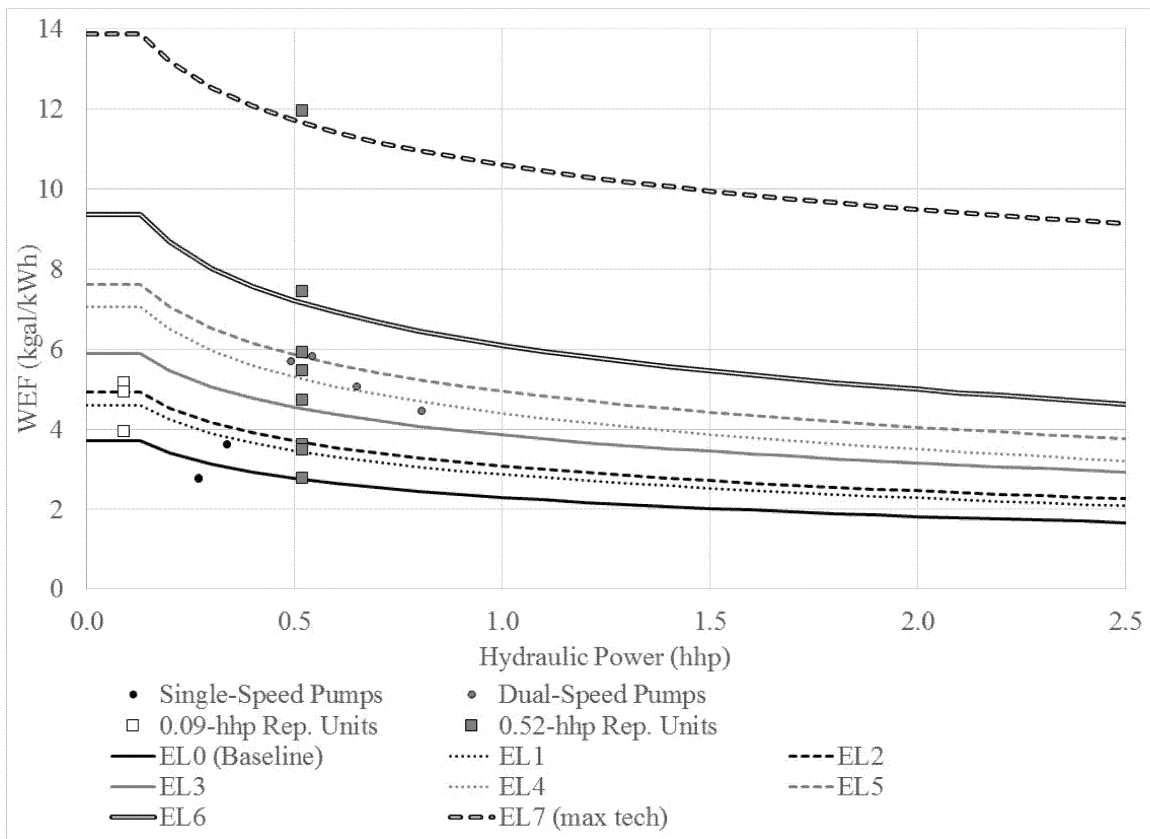


Figure IV.5 WEF versus Hydraulic Power for Non-Self-Priming Pool Filter Pumps, Representative Units, and Efficiency Levels

As evidenced in Figure IV.4 and Figure IV.5, the DPPP Working Group ultimately requested that each efficiency level curve become a flat line at 40 gpm (which is equivalent to 0.13 hhp on curve C) so that for each curve, all flow values below 40 gpm correspond to the WEF score for the efficiency level at 40 gpm. (Docket No. EERE-2015-BT-STD-0008-0092, June 23 DPPP Working Group Meeting, at pp. 277-280) The DPPP Working Group made this request for both self-priming and non-self-priming pool filter pumps.

The pressure cleaner booster pumps on the market are clustered in a small range of capacities, with hydraulic power ranging from 0.26 hhp to 0.32 hhp at the test point of 10 gpm flow. Due to the limit range of available capacities, DOE did not use equations to

describe the efficiency levels for pressure cleaner booster pumps. Instead, DOE selected fixed WEF values to represent the efficiency levels. The DPPP Working Group reviewed this method and recommended that DOE set a standard level for pressure cleaner booster pumps that is a single value. (EERE-2015-BT-STD-0008, No. 82, Recommendation #1 at pp. 1-2) Chapter 5 of the direct final rule TSD contains complete details regarding the development of efficiency levels for pressure cleaner booster pumps.

For waterfall pumps, DOE performed the economic analyses on the waterfall pump representative units from baseline to max tech and presented the results to the DPPP Working Group. DOE's analytical results showed that EL 1 and EL 2 would have negative LCC savings.

Many DPPP Working Group members commented that the energy savings for the waterfall class would be small and thus not economically justifiable to pursue standards for waterfall pumps. (Docket No. EERE-2015-BT-STD-0008-0101, May 19 DPPP Working Group Meeting, at pp. 35-36 and pp. 45-46) Consequently, DOE did not establish detailed potential standard levels for waterfall pumps beyond the aforementioned representative units.

Table IV-13 presents the equations used to calculate the WEF at each efficiency level as a function of hydraulic horsepower for self-priming and non-self-priming pool filter pumps. Table IV-14 presents the fixed WEF values at each efficiency level for pressure cleaner booster pumps.

TABLE IV-13—EFFICIENCY LEVEL WEF EQUATIONS FOR SELF-PRIMING AND NON-SELF-PRIMING POOL FILTER PUMPS

Efficiency level	Equipment class			
	Self-priming pool filter pumps, small and standard classes (WEF)*		Non-self-priming pool filter pumps** (WEF)*	
	≤0.13 hhp	>0.13 hhp	≤0.13 hhp	>0.13 hhp
0 (Baseline)	3.51	$-0.69 \times \ln(\text{hhp}) + 2.10$	3.71	$-0.69 \times \ln(\text{hhp}) + 2.30$.
1	4.84	$-1.10 \times \ln(\text{hhp}) + 2.60$	4.60	$-0.85 \times \ln(\text{hhp}) + 2.87$.

TABLE IV–13—EFFICIENCY LEVEL WEF EQUATIONS FOR SELF-PRIMING AND NON-SELF-PRIMING POOL FILTER PUMPS—Continued

Efficiency level	Equipment class			
	Self-priming pool filter pumps, small and standard classes (WEF)*		Non-self-priming pool filter pumps** (WEF)*	
	≤0.13 hhp	>0.13 hhp	≤0.13 hhp	>0.13 hhp
2	5.55	$-1.30 \times \ln(\text{hhp}) + 2.90$	4.92	$-0.90 \times \ln(\text{hhp}) + 3.08$
3	5.89	$-1.00 \times \ln(\text{hhp}) + 3.85$	5.89	$-1.00 \times \ln(\text{hhp}) + 3.85$
4	7.05	$-1.30 \times \ln(\text{hhp}) + 4.40$	7.05	$-1.30 \times \ln(\text{hhp}) + 4.40$
5	7.60	$-1.30 \times \ln(\text{hhp}) + 4.95$	7.60	$-1.30 \times \ln(\text{hhp}) + 4.95$
6	11.28	$-2.30 \times \ln(\text{hhp}) + 6.59$	9.36	$-1.60 \times \ln(\text{hhp}) + 6.10$
7	13.40	$-2.45 \times \ln(\text{hhp}) + 8.40$	13.86	$-1.60 \times \ln(\text{hhp}) + 10.60$
(Max Tech)				

* hhp represents the hydraulic horsepower of the pump, measured at maximum speed on system curve C and reported in units of horsepower.

** As described in section IV.A.6.b, DOE did not consider efficiency levels above EL2 for non-self-priming pool filter pumps that produce less than 49.4 gpm maximum flow on curve C.

TABLE IV–14—EFFICIENCY LEVEL WEF VALUES FOR PRESSURE CLEANER BOOSTER PUMPS

Efficiency level	Equipment class
	Pressure cleaner booster pumps, at 10 gpm flow (WEF)
0 (Baseline)	0.34
1	0.42
2	0.45
3	0.51
4	0.56

5. Manufacturer Production Costs

This section presents the MPCs at each efficiency level, for each equipment class, and discusses the analytical methods used to develop these MPCs. This section contains six subsections. The first subsection describes the principal drivers of manufacturing costs. The second and third subsections focus on the motor costs and non-motor costs for pool filter pumps and pressure cleaner booster pumps. The fourth subsection focuses specifically on the costs of integral sand filter and integral cartridge filter pumps. The final two subsections present cost-efficiency tables and MPC breakdowns for all DPPP equipment classes.

a. Principal Drivers of DPPP Manufacturing Costs

For most models of pool filter pumps and pressure cleaner booster pumps, the motor is the most expensive component of the pump. As discussed previously, for these equipment classes, all efficiency levels except max tech are defined by a motor substitution. In a motor substitution, the pump motor of a representative baseline (low efficiency, single-speed) unit is exchanged with a motor that will provide improved performance (e.g.,

improved efficiency or ability to operate at reduced speed).

DOE researched the design and engineering constraints associated with motor substitution, examining manufacturer interview responses and holding discussions with the DPPP working group. In particular, Hayward commented that manufacturers would incur costs, such as costs associated with testing, packaging, and labeling, when substituting the motor component of a pump. (Docket No. EERE–2015–BT–STD–0008–0079, April 19 DPPP Working Group Meeting, at pp. 105–106) Zodiac commented that manufacturers would incur costs for motor substitutions associated with qualification testing, reliability testing, and updating catalogs and marketing materials. (Docket No. EERE–2015–BT–STD–0008–0100, May 18 DPPP Working Group Meeting, at pp. 78) DOE included the cost items described by Hayward and Zodiac in the product conversion costs (discussed in section IV.J.2.c) in the MIA and did not account for them in the MPC figures estimated for dedicated-purpose pool pumps. DOE concluded that for the representative equipment capacities being considered, a given DPPP wet end could be paired with a range of motors of various efficiencies and speed configurations without significant changes to the per-unit costs associated with manufacturing the wet end. In other words, a motor swap results in negligible incremental MPC to the non-motor components of the dedicated-purpose pool pump. Thus, DOE concluded that the incremental MPC of the motor swap design options (improved motor efficiency and ability to operate at reduced speeds) may be considered equivalent to the incremental MPC of the motor component being swapped.

Consequently, DOE broke the equipment MPCs for pool filter pumps and pressure cleaner booster pumps into two categories—motor costs and non-motor costs—and estimated the MPC of each separately. However, DOE did not break out the motor costs of the integral cartridge and integral sand filter pool pump classes because no motor design options were considered for these equipment classes.

b. Pool Filter Pump and Pressure Cleaner Booster Pump Motor Costs

DOE quantified pump motor MPCs at each efficiency level, for each representative unit. These MPCs represent the cost incurred by DPPP manufacturers to either purchase the motors or assemble them in house.

DOE estimated motor costs using two data sources: (1) Estimates provided by manufacturers, and (2) publicly available motor catalogs. DOE presented initial motor cost estimates to the DPPP Working Group and received feedback from the group. (Docket No. EERE–2015–BT–0008–0094, March 21 DPPP Working Group Meeting, at pp. 108–122) Hayward commented that the motor MPCs that DOE initially presented for variable-speed pump motors were extremely low, and Hayward asked DOE to ensure that these MPC figures include the cost of all three components (the motor, the motor drive, and the user interface) that are required to replace a single-speed or two-speed motor. (Docket No. EERE–2015–BT–0008–0100, May 18 DPPP Working Group Meeting, at pp. 130–131) DOE's contractor subsequently received new motor cost data and revised the MPC assumptions for variable-speed motors based on those numbers.

The revised motor component costs presented in Table IV–15 represent aggregate cost estimates for the dedicated-purpose pool pump industry,

and do not represent the costs incurred by any one pump manufacturer. The costs in Table IV–15 include all of the costs incurred to deliver finished motor components that are ready for assembly into a pump.⁶⁹ For variable-speed motors, the listed costs include the cost of controls (which include a motor driver and a user interface), as variable-speed motors require this equipment to operate. (Docket No. EERE–2015–BT–STD–0008–0079, April 19 DPPP Working Group Meeting, at pp. 207–208)

As discussed in section IV.A.5.b, variable-speed motors are not currently available in capacities smaller than 1.65 thp. Initially, DOE assumed that motor manufacturers would begin to offer variable-speed motors smaller than 1.65-thp, and DOE estimated the costs of these smaller motors by extrapolating the costs of larger variable-speed motors that are currently available. (Docket No.

EERE–2015–BT–STD–0008–0078, April 18 DPPP Working Group Meeting, at pp. 31–32) The DPPP Working Group recommended that DOE consider only motors that are currently available on the market. (EERE–2015–BT–STD–0008–0079, April 19 DPPP Working Group Meeting, at pp. 109–112) Specifically, the DPPP Working Group did not find it reasonable to assume that motor suppliers would develop smaller variable-speed motor that are not already available on the market. (Docket No. EERE–2015–BT–STD–0008–0079, April 19 DPPP Working Group Meeting, at pp. 109) Thus, DOE modeled a 1.65-thp variable-speed motor that would be the motor of choice for smaller representative units at efficiency levels that are defined by variable-speed motors.

DPPP Working Group members commented that smaller DPPP models may require additional design changes

to accommodate a 1.65-thp variable-speed motor. DOE requested comments on the product conversion costs that would be required to adapt smaller DPPP models to use 1.65-thp variable-speed motors. (Docket No. EERE–2015–BT–STD–0008–0079, April 19 DPPP Working Group Meeting, at pp. 108–113) DOE incorporated manufacturer feedback into the product conversion cost assumptions, which are discussed in section IV.J.2.c.

DOE presented the revised motor costs in Table IV–15 to the DPPP Working Group and the DPPP Working Group did not offer any comments in opposition. (Docket No. EERE–2015–BT–STD–0008–0100, May 18 DPPP Working Group Meeting, at pp. 115–116; Docket No. EERE–2015–BT–0008–0101, May 19 DPPP Working Group Meeting, at pp. 6–10)

TABLE IV–15—MPC OF DPPP MOTOR COMPONENTS *

Motor description	Representative units						
	Self-priming pool filter pump			Non-self-priming pool filter pump		Pressure cleaner booster pump (\$)	Water-fall pump (\$)
	0.44 hhp (\$)	0.95 hhp (\$)	1.88 hhp (\$)	0.09 hhp (\$)	0.52 hhp (\$)		
(Baseline) 1-speed low efficiency	55	66	142	24	46	53	58
1-speed, mid efficiency	68	85	177	30	50	63	69
1-speed, high efficiency	87	101	198	36	64	83	88
2-speed, low efficiency	90	102	226	** n/a	68	†† n/a	†† n/a
2-speed, mid efficiency	100	119	239	** n/a	82	†† n/a	†† n/a
2-speed, high efficiency	111	137	253	** n/a	96	†† n/a	†† n/a
Variable Speed	273	273	367	† n/a	273	273	†† n/a

* The integral cartridge filter pool pump and integral sand filter pool pump equipment classes are not included in this table because DOE did not separately consider the motor costs for these equipment classes.

** As discussed in section IV.A.6.b this analysis does not consider two-speed motor configurations for the 0.09-hhp non-self-priming pool filter pump representative unit. According to the test procedure final rule, this representative unit would always be subject to the single-speed test procedure because the half-speed flow rate for a 0.09-hhp pump would be 17.8 gpm, which is less than the test procedure minimum flow rate of 24.7 gpm.

† As discussed in section IV.A.6.b, this analysis does not consider variable-speed motor configurations for the 0.09-hhp non-self-priming pool filter pump representative unit.

†† Two-speed motors were not considered for waterfall pumps or pressure cleaner booster pumps, and variable-speed motors were not considered for waterfall pumps, because DOE assumes these pump varieties are always operated at a single-speed.

c. Pool Filter Pump and Pressure Cleaner Booster Pump Non-Motor Costs

The non-motor costs of manufacturing pool filter pumps and pressure cleaner booster pumps include the costs associated with manufacturing the wet end of the pump and the costs associated with assembling and packaging the pump. To determine the MPC of non-motor components, DOE developed a comprehensive spreadsheet model itemizing all component parts and their associated costs. The

spreadsheet model took inputs from virtual teardowns as well as data obtained through manufacturer interviews and independent research. For the virtual teardowns, DOE referenced catalogs of replacement pump parts and analyzed the materials and the manufacturing processes used to produce the various pump components. With this information, DOE calculated the amount a DPPP manufacturer would pay to produce each representative unit. Chapter 5 of the direct final rule TSD includes

further detail on the inputs and methods used to determine MPC, including material, labor, and overhead breakdowns.

Table IV–16 presents the non-motor MPCs associated with producing representative units in the pool filter pump and pressure cleaner booster pump equipment classes. DOE presented these costs to the DPPP Working Group (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 117–118) and received no objections.

⁶⁹ For manufacturers that purchase third-party motors, these costs include shipping and delivery costs, as well as the overhead associated with

ordering and inventory. For manufacturers that assemble motors in house, these costs include the

components, labor, and depreciation associated with motor assembly.

TABLE IV–16—NON-MOTOR MPC FOR POOL FILTER PUMP AND PRESSURE CLEANER BOOSTER PUMP CLASSES *

	Representative units					
	Self-priming pool filter pump			Non-self-priming pool filter pump		Pressure cleaner booster pump
	0.44 hhp	0.95 hhp	1.88 hhp	0.09 hhp	0.52 hhp	
Non-Motor Costs	\$47	\$47	\$50	\$23	\$24	\$35 \$42

* The integral cartridge filter pool pump and integral sand filter pool pump equipment classes are not included in this table because DOE did not separately consider the motor costs for these equipment classes.

DOE investigated the incremental MPC associated with manufacturing a pool filter pump with high hydraulic efficiency compared to a pool filter pump with low hydraulic efficiency. To do this, DOE identified several pairs of pool filter pumps that had identical capacities and motor efficiencies, but one pump had higher total efficiency than the other at maximum speed on curve C. DOE used a manufacturing cost model to individually model the MPCs of the higher efficiency wet end and the lower efficiency wet end. DOE determined that the MPC of producing a higher efficiency wet end would be approximately equal to the MPC of producing a low efficiency wet end. Thus, DOE concluded that there would be no incremental MPC associated with improving the hydraulic efficiency of a pool filter pump.⁷⁰ DOE presented this conclusion to the DPPP Working Group, which raised no objections. (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 117–118)

d. Cost Analysis of Integral Filter Pool Pump Equipment Classes

DOE did not break out the motor component costs for integral filter pool pump equipment classes estimating MPCs for that class. DOE first estimated the MPC of the three representative units associated with these classes at the baseline efficiency level. DOE then estimated the incremental cost of the sole design option (pool pump timer) considered for these classes.

Baseline MPCs of Integral Filter Pump Classes

DOE used several data sources to estimate the MPC of integral filter pumps at the baseline efficiency level:

- DOE received MPC estimates from manufacturers, including estimates of the MPC of integral filter pumps at the baseline level.
- DOE retrieved retail price data for integral filter pumps that are commercially available on the market. These retail prices represent the MPC of producing a unit plus the various markups and taxes that are applied

along the distribution chain.⁷¹ DOE aggregated retail price data for representative integral filter pump units and divided by a set of assumed markups to estimate the MPCs of representative units.

- DOE conducted a reverse-engineering teardown as a bottom-up approach to estimate the MPC of a representative unit. DOE purchased and disassembled an integral filter pump and created a manufacturing cost model to estimate the manufacturing costs associated with producing the pump at the same volumes as integral pump manufacturers.

DOE aggregated the cost data from these sources. Table IV–17 presents the estimated MPC for the three representative units of integral filter pool pumps. DOE presented the MPCs in Table IV–17 to the DPPP Working Group and the DPPP Working Group did not offer any opposition or additional comments. (Docket No. EERE–2015–BT–STD–0008–0094, March 21 DPPP Working Group Meeting, at pp. 132–133).

TABLE IV–17—MPCs FOR INTEGRAL FILTER PUMP EQUIPMENT CLASSES

	Representative equipment		
	Integral sand filter pool pump	Integral cartridge filter pool pump	
	0.03 hhp	0.02 hhp	0.18 hhp
Baseline MPC	\$57	\$17	\$92

Incremental Cost of Pool Pump Timer Design Option

The only design option considered for the integral cartridge filter pool pump and integral sand filter pool pump equipment classes is the addition of a pool pump timer. The DPPP Working Group recommended that the prescriptive standard for including a timer with integral filter pumps should

be fulfilled by a timer that is either integral to the pump or that is a separate component shipped with the pump. (Docket No. EERE–2015–BT–STD–0008–0082, Recommendation #2 at p. 2) Based on manufacturer interviews, DOE concluded that the incremental cost of adding a pool pump timer would be approximately the same for all three

representative units associated with the integral filter pump equipment classes.

DOE separately evaluated the costs of integrating a timer into an existing integral filter pump and the costs of including a timer with an existing pump. To estimate the cost of integrating a timer into an existing pump, DOE used MPC estimates provided by pump manufacturers.

⁷⁰ DOE notes that manufacturers would still likely incur costs for component design, prototyping, tooling, and testing. These costs are not included in the per-unit MPC figures described in this

section. Instead, these one-time conversion costs are discussed in the manufacturer impact analysis discussed in section IV.J of this direct final rule.

⁷¹ Markups are discussed in section IV.D of this notice and markup assumptions are presented in chapter 6 of the direct final rule TSD.

These data included manufacturer estimates of the incremental MPC of integrating a timer into existing integral pump products. To estimate the cost of including a timer with an existing pump, DOE conducted a retail price analysis of timers that are available off the shelf. DOE retrieved retail prices for off-the-shelf timers that would meet the criteria required for servicing an outdoor integral filter pump (e.g., timer is waterproof, timer is electrically

grounded, and is rated to an amperage greater than what the pump requires). DOE then derated the retail price to estimate the price of timers purchased in bulk.

DOE aggregated the cost data from these sources, and estimated that the industry average incremental cost of adding a pool pump timer to an integral filter pump is \$6.67 per unit. DOE presented this incremental cost to the DPPP Working Group and the DPPP Working Group did not oppose it or

offer additional comments. (Docket No. EERE-2015-BT-STD-0008-0094, March 21 DPPP Working Group Meeting, at pp. 132).

e. Cost-Efficiency Results

This subsection presents the cost-efficiency tables that result from the combination of motor and wet end costs at each efficiency level. Table IV-18 through Table IV-22 present results for each representative unit.

TABLE IV-18—MPCs FOR SELF-PRIMING POOL FILTER PUMP REPRESENTATIVE UNITS

Efficiency level	Representative unit capacity on system curve C		
	0.44 hhp (MPC \$)	0.95 hhp (MPC \$)	1.88 hhp (MPC \$)
0 (Baseline)	102	113	192
1	115	132	227
2	134	148	248
3	137	149	276
4	147	166	290
5	158	184	303
6	320	320	417
7 (Max Tech)	320	320	417

TABLE IV-19—MPCs FOR NON-SELF-PRIMING POOL FILTER PUMP REPRESENTATIVE UNITS

Efficiency level	Representative unit capacity on system curve C	
	0.09 hhp (MPC \$)	0.52 hhp (MPC \$)
0 (Baseline)	47	69
1	53	74
2	59	87
3	* n/a	91
4	* n/a	105
5	* n/a	119
6	* n/a	297
7 (Max Tech)	* n/a	297

*DOE did not analyze any efficiency levels above EL2 for the 0.09-hhp non-self-priming pool filter pump representative unit, as discussed in section IV.C.4.d.

TABLE IV-20—MPCs FOR PRESSURE CLEANER BOOSTER PUMP REPRESENTATIVE UNITS

Efficiency level	Representative unit capacity
	0.28 hhp at 10 gpm of flow (MPC \$)
0 (Baseline)	88
1	99
2	118
3	308
4 (Max Tech)	308

TABLE IV-21—MPCs FOR WATERFALL PUMP REPRESENTATIVE UNITS

Efficiency level	Representative unit capacity
	0.40 hhp at 17 feet of head (MPC \$)
0 (Baseline)	100
1	110
2	130
3 (Max Tech)	130

TABLE IV-22—MPCs FOR INTEGRAL FILTER PUMP REPRESENTATIVE UNITS

Efficiency level	Representative unit capacity on system curve C		
	Integral sand filter pool pump	Integral cartridge filter pool pump	
	0.03 hhp (MPC \$)	0.02 hh (MPC \$)	0.18 hhp (MPC \$)
0 (Baseline)	57	17	92
1 (With Timer)	64	23	99

f. MPC Cost Components

The MIA requires MPCs to be disaggregated the MPCs into material, labor, depreciation, and overhead costs. DOE estimated MPC breakdowns using the manufacturing cost model tool described in section IV.C.5.c, and the estimated MPC breakdowns during interviews with manufacturers. The MPC cost components are reported in the manufacturer impact analysis described in chapter 9 of the direct final rule TSD.

6. Other Analytical Outputs

As discussed previously in section III.C, the DOE test procedure specifies test points for the pool filter pump, waterfall pump, and pressure cleaner booster pump equipment classes covered by this direct final rule. For instance, the test points for self-priming and non-self-priming pool filter pumps are at specified pump speeds on system curve C, and the test point for pressure cleaner booster pumps is at 10 gpm of flow. In the field, the conditions in which these pumps operate will not exactly match the test points. For instance, some pumps may service pools with plumbing that approximates system curve A instead of curve C, and some variable-speed pumps will be programmed to operate at speeds that are higher or lower than the test point speeds specified in the DOE test procedure. These variations in installation conditions are modeled in the energy use analysis, which is discussed in section IV.D. To facilitate the energy use analysis, DOE estimated the power consumption of representative units across a variety of potential installation conditions.

For self-priming and non-self-priming pool filter pumps, DOE estimated the flow and energy factor of representative units operating on system curves A, B, and C. DOE developed these estimates using actual pump performance data on curves A, B, and C from the Pool Pump

Performance Database, combined with the motor substitution methodology described in section IV.C.4.c. For efficiency levels with single-speed motor configurations, DOE estimated flow and EF at 100-percent speed. For efficiency levels with two-speed motor configurations, DOE estimated flow and EF at 100 percent speed and at 50 percent speed. For efficiency levels with variable-speed motor configurations, DOE estimated flow and EF at 80 percent speed and at a low-speed test point of either 24.7 gpm or 31.1 gpm, depending on the pump capacity. For these variable-speed units, DOE also developed equations to estimate EF as a function of flow for variable-speed representative units operating at reduced speeds near the low-speed test point. DOE developed these equations using the pump affinity laws and the regressions of pump total efficiency versus pump speed described in section IV.C.4.c. Chapter 5 of the direct final rule TSD provides further details on these analytical outputs.

DOE also developed equations to estimate the power consumption as a function of flow for waterfall pumps and pressure cleaner booster pumps operating near the respective test points for those equipment classes. DOE developed these equations by aggregating pump test data that was submitted to DOE by manufacturers. The resulting equations estimate head and power consumption as a function of flow for waterfall pumps and pressure cleaner booster pumps at all efficiency levels. The distribution of field installations and their operating parameters are discussed further in the energy use analysis in section IV.E. Chapter 5 of the direct final rule TSD presents more details regarding these analytical outputs.

7. Manufacturer Selling Price

To account for manufacturers' non-production costs and profit margin, DOE

applied a non-production cost multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (MSP) is the price at which the manufacturer distributes a unit into commerce.

DOE developed an average manufacturer markup by examining the annual Securities and Exchange Commission (SEC) 10-K reports filed by publicly traded manufacturers primarily engaged in pool pump manufacturing and whose combined product range includes pool pumps. DOE adjusted these estimates based on feedback received during confidential manufacturer interviews. DOE estimated a manufacturer markup of 1.46 for self-priming and waterfall pool pumps, 1.35 for non-self-priming and pressure cleaner booster pool pumps, and 1.27 for integral cartridge filter and integral sand filter pool pumps.

D. Markups Analysis

The markups analysis develops appropriate markups in the distribution chain and sales taxes to convert the MSP estimates derived in the engineering analysis to consumer prices, which are then used in the LCC and PBP analyses. At each step in the distribution channel, companies mark up the price of the equipment to cover business costs and profit margin.

1. Dedicated-Purpose Pool Pump Markups

For this dedicated-purpose pool pump direct final rule, DOE identified two markets in which dedicated-purpose pool pumps pass from the manufacturer to residential and commercial consumers: (1) Replacement of a pool pump for an existing swimming pool; (2) installation of a pool pump in a new swimming pool.

Based on manufacturer interviews, the distribution channels for dedicated-purpose pool pumps were characterized as noted in Table IV-23.

TABLE IV–23—FRACTION OF DEDICATED-PURPOSE POOL PUMP DISTRIBUTION BY CHANNEL

Distribution channel	Fraction of dedicated-purpose pool pumps (%)
Replacement for an Existing Pool	
Manufacturer → Wholesaler → Pool Service Contractor → Consumer	75
Manufacturer → Pool Product Retailer → Consumer	20
New Installation for a New Pool	
Manufacturer → Pool Builder → Consumer	5

For all market participants except for manufacturers, DOE developed baseline and incremental markups. Baseline markups are applied to the price of equipment with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup, and is designed to maintain similar per-unit operating profit before and after new or amended standards.⁷²

To estimate baseline and incremental markups, DOE relied on several sources, including: (1) For pool wholesalers, SEC form 10–K from Pool Corp;⁷³ (2) for pool product retailers, SEC form 10–K from several major home improvement centers⁷⁴ and U.S. Census Bureau 2012 Annual Retail Trade Report,⁷⁵ and (3) for pool contractors and pool builders, U.S. Census Bureau 2012 Economic Census data⁷⁶ on the building construction industry.

2. Replacement Motor Markups

As discussed in section IV.F, in some cases, only the motor component in the

pool pump is replaced instead of the entire pool pump. DOE treated motor replacement as a repair of the pump. In this case, the replacement motor typically goes through different distribution channels than pool pumps. Based on inputs from motor manufacturers inputs, DOE considered three distribution channels to characterize how motors are distributed in the motor replacement market. Table IV–24 shows these distribution channels.

TABLE IV–24—FRACTION OF DEDICATED-PURPOSE POOL PUMP REPLACEMENT MOTOR DISTRIBUTION BY CHANNEL

Distribution channel	Fraction of pool pumps (%)
Via Motor Manufacturer	
(1) Motor Manufacturer → Wholesaler → Contractor → Consumer	25
(2) Motor Manufacturer → Wholesaler → Retailer → Consumer via Internet or direct sale at local stores	25
Via Pool Pump Manufacturer	
(3) Pump Manufacturer → Pump Product Retailer → Consumer	50

Due to limited available information, DOE assumed that the motor wholesaler markup in the second motor replacement channel via Internet and direct local store sales is the same as in the first motor replacement channel via contractor. To estimate baseline and incremental markups for each of the market participants (except for manufacturers) mentioned in Table

IV–24, DOE relied on several sources, including: (1) For motor wholesalers, U.S. Census Bureau 2012 Annual Wholesale Trade Report;⁷⁷ (2) for electrical contractors, *RSMeans* electrical cost data;⁷⁸ and (3) for motor retailers, U.S. Census Bureau 2012 Annual Retail Trade Report.⁷⁹

In addition to the markups, DOE obtained state and local taxes from data

provided by the Sales Tax Clearinghouse.⁸⁰ These data represent weighted average taxes that include county and city rates. DOE derived shipment-weighted average tax values for each region considered in the analysis.

Chapter 6 of the direct final rule TSD provides details on DOE's development of markups for pool pumps.

⁷² Because the projected price of standards-compliant equipment is typically higher than the price of baseline equipment, using the same markup for the incremental cost and the baseline cost would tend to result in higher per-unit operating profit. While such an outcome is possible, DOE maintains that in markets that are reasonably competitive it is unlikely that standards would lead to a sustainable increase in profitability in the long run.

⁷³ U.S. Securities and Exchange Commission. *SEC 10–K Reports* for Pool Corp (2010–2015). Available at www.sec.gov/ (Last accessed May 26, 2016.).

⁷⁴ U.S. Securities and Exchange Commission. *SEC 10–K Reports* for Home Depot, Lowe's, Wal-Mart and Costco. Available at www.sec.gov/ (Last accessed May 26, 2016.).

⁷⁵ U.S. Census Bureau, *2012 Annual Retail Trade Report*, available at www.census.gov/retail/index.html (last accessed Dec. 3, 2015).

⁷⁶ U.S. Census Bureau, *2012 Economic Census Data*, available at www.census.gov/econ/ (last accessed Dec. 3, 2015).

⁷⁷ U.S. Census Bureau, *2012 Annual Wholesale Trade Report*, available at www.census.gov/wholesale/index.html (last accessed Dec. 3, 2015).

⁷⁸ RSMeans. *Electrical Cost Data* 2015. 2014. RSMeans: Norwell, MA.

⁷⁹ U.S. Census Bureau, *2012 Annual Retail Trade Report*, available at www.census.gov/retail/index.html (last accessed April 28, 2016).

⁸⁰ Sales Tax Clearinghouse Inc., *State Sales Tax Rates Along with Combined Average City and County Rates* (2016), available at <http://theftc.com/STrates.stm> (last accessed April 18, 2016).

E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of pool pumps at different efficiencies in representative U.S. applications, and to assess the energy savings potential of increased dedicated-purpose pool pump efficiency. The energy use analysis estimates the range of energy use of dedicated-purpose pool pumps in the field (*i.e.*, as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of standards.

1. Dedicated-Purpose Pool Pump Consumer Samples

DOE created individual consumer samples for five dedicated-purpose pool

pump markets: (1) Single-family homes with a swimming pool; (2) indoor swimming pools in commercial applications; (3) single-family community swimming pools; (4) multi-family community swimming pools; and (5) outdoor swimming pools in commercial applications. DOE used the samples to determine dedicated-purpose pool pump annual energy consumption as well as for conducting the LCC and PBP analyses.

DOE used the Energy Information Administration's (EIA) 2009 Residential Energy Consumption Survey (RECS 2009) to establish a sample of single-family homes that have a swimming pool.⁸¹ For dedicated-purpose pool pumps used in indoor swimming pools in commercial applications, DOE developed a sample using the 2012 Commercial Building Energy Consumption Survey (CBECS 2012).⁸² RECS and CBECS include information such as the household or building

owner demographics and the location of the household or building.

Neither RECS nor CBECS provide data on community pools or outdoor swimming pools in commercial applications, so DOE created samples based on other available data. To develop samples for dedicated-purpose pool pumps in single or multi-family communities, DOE used a combination of RECS 2009, U.S. Census 2009 American Home Survey Data (2009 AHS),⁸³ and 2015 PK Data report.⁸⁴ To develop a sample for pool pumps in outdoor commercial swimming pools, DOE used a combination of CBECS 2012 and 2015 PK Data report.

Table IV–25 shows the estimated shares of the five dedicated-purpose pool pump markets in the existing stock based on the afore-mentioned sources. The vast majority of dedicated-purpose pool pumps are used for residential single-family swimming pools.

TABLE IV–25—FRACTION OF DEDICATED-PURPOSE POOL PUMPS BY DPPP MARKET

Pool type ID	Description	Fraction of pool pumps (%)
1	Residential Single Family Swimming Pools	95.1
2	Community Pools (Single Family)	0.8
3	Community Pools (Multi Family)	0.4
4	Commercial Indoor Pools	0.3
5	Commercial Outdoor Swimming Pools	3.4

Dedicated-purpose pool pumps can be installed with either above-ground or in-ground swimming pools. DOE established separate sets of consumer samples for in-ground pools and above-ground pools by adjusting the original sample weights based on the number of installed in-ground and above-ground pools in 2014 per state provided by APSP. (EERE–2015–BT–STD–0008–0010, No. 31 at pp. 14–15) The consumer samples for self-priming, auxiliary (waterfall) and pressure cleaner booster pumps are drawn from the in-ground pool samples; the consumer samples for non-self-priming and integral pumps are obtained from the above-ground pool samples.

See chapter 7 of the direct final rule TSD for more details about the creation of the consumer samples and the regional breakdowns.

2. Energy Use Estimation

DOE calculated the annual unit energy consumption (UEC) of pool pumps at the considered efficiency levels by multiplying the average daily UEC by the annual days of operation. For single-speed pool pumps, the daily UEC is simply the pool pump power multiplied by the daily operating hours. For two-speed and variable-speed pool pumps, the daily UEC is the sum of low-speed mode power multiplied by the low-speed daily operating hours and the high-speed mode power multiplied by the corresponding daily operating hours.

a. Power Inputs

Self-Priming and Non-Self-Priming Pumps

For self-priming and non-self-priming pool pumps, the power inputs are obtained by using flow (*Q*, in gallon/minute) divided by energy factor (in gallon/Wh). In the case of single-speed pumps, *Q* and *EF* are provided in the engineering analysis for each representative unit at each system curve (*A*, *B* or *C*).⁸⁵ In the case of two-speed pumps, *Q* and *EF* are provided for both low-speed and high-speed modes for each representative unit at each system curve. For variable-speed pumps, *Q* and *EF* are provided only for the high-speed mode, which, according to the DOE test procedure, corresponds to 80 percent of maximum speed; for the low-speed mode, *Q* is specific to each consumer

⁸¹ U.S. Department of Energy—Energy Information Administration. 2009 RECS Survey Data. (Last accessed July 27, 2016.) www.eia.gov/consumption/residential/data/2009/.

⁸² U.S. Department of Energy—Energy Information Administration. 2012 CBECS Survey Data. (Last accessed: July 27, 2016.) www.eia.gov/consumption/commercial/data/2012/index.cfm?view=microdata.

⁸³ U.S. Census Bureau. 2009 AHS survey data (Last accessed: July 27, 2016.) www.census.gov/programs-surveys/ahs/data/2009/ahs-2009-public-use-file-puf-/2009-ahs-national-puf-microdata.html.

⁸⁴ PK Data. 2015 Swimming Pool and Pool Heater Customized Report for LBNL. (Last accessed: April 30, 2016.) www.pkdata.com/current-reports.html.

⁸⁵ The requirements of a pool (or any water system), can be expressed in terms of a system curve. When a pump is tested on a system curve (such as curve C), any one of the measurements hydraulic power, *P* (hp), volumetric flow, *Q* (gpm) and total dynamic head, *H* (feet of water) can be used to calculate the other two measurements. See section IV.A.1 for further details.

and EF is provided as a function of Q. For each consumer in the sample, DOE specified the system curve used (A, B or C) by drawing from a probability distribution suggested by the DPPP Working Group. The suggested distribution was based on field testing and experience indicating that many pools are closer to curve C, but additional amenities such as a sand filter or a heater would bring a pump's performance to curve A. (EERE-2015-BT-STD-0008-0094, pp. 144-147) In the recommended distribution, 35 percent of the pool pumps follow curve A, 10 percent of the pool pumps follow curve B, and the remaining 55 percent follow curve C.

For variable-speed pumps, to define the consumer-specific low-speed flow, DOE used the pool size divided by the desired time per turnover, which was assumed by the DPPP Working Group to be 12 hours for residential applications, and 6 or 10 hours for commercial applications (EERE-2015-BT-STD-0008-0094 pp. 143-144). DOE developed a distribution for pool size based on information given in several references.^{86 87 88} The minimum of the pool size distribution for standard-size self-priming pool pumps and integral pool pumps was then decreased by the DPPP Working Group based on the existing small pools on the market, and the mode of the pool size distribution for standard-size non-self-priming pool pumps was increased based on the DPPP Working Group's decision.

(EERE-2015-BT-STD-0008-0094 pp. 163-171) The pool size distributions for integral pumps were later adjusted by the DPPP Working Group based on the suggested pool sizes for the integral pumps on the market. (EERE-2015-BT-STD-0008-0078 pp. 75-77) A minimum threshold of flow Q is considered according to the capacity of the pumps. The variable-speed EF can therefore be calculated, as it was provided in the engineering analysis as a function of Q for each representative unit on each system curve.

Pressure Cleaner Booster Pumps and Waterfall Pumps

The test procedure final rule established a test point at 10 gpm of flow for pressure cleaner booster pumps and a test point at 17 feet of head for waterfall pumps. DOE developed a distribution for each of these equipment classes, in coordination with the DPPP Working Group, from which a flow or head value, respectively is drawn for each sampled consumer. (Pressure cleaner booster pumps: EERE-2015-BT-STD-0008-0092 pp. 310; waterfall pumps: EERE-2015-BT-STD-0008-0094 pp. 149-150) For waterfall pumps, DOE used the pump curve $H = f(Q)$ provided in the engineering analysis for each representative unit to determine the flow Q associated with the selected head, from which the corresponding power can be calculated based on the power curve $P = f(Q)$, also provided by the engineering analysis. For single-speed pressure cleaner booster pumps,

DOE calculated the power directly from the power curve $P = f(Q)$ from the engineering analysis. For variable-speed pressure cleaner booster pumps, DOE estimated power consumption at reduced speed for consumers with sampled Q above 10 gpm.

Integral Pumps

For integral pumps, the power value was provided for each representative unit. DOE did not apply a distribution to this value given that integral pumps are designed to be used for specific pools, and therefore the power is not expected to vary widely.

b. Operating Hours

The following sub-sections describe DOE's methodology for calculating daily operating hours for each pump variety. For self-priming and non-self-priming pool filter pumps in residential applications, operating hours are calculated uniquely for each consumer based on pool size, number of turnovers per day (itself based on ambient conditions), and the pump flow rate. In commercial applications, DOE assumes these pumps operate 24 hours per day. For integral pumps, those without a timer operate 12 hours a day, while those with a timer have operating hours determined the same way as for pool filter pumps. For pressure cleaner booster pumps and waterfall pumps, operating hours are drawn from a distribution. Table IV-26 summarizes the results of these calculations.

TABLE IV-26—WEIGHTED AVERAGE DAILY OPERATING HOURS BY PUMP VARIETY

Pump variety	Weighted average daily operating hours *	
	Residential	Commercial
Standard-Size Self-Priming Pool Filter Pump	10	24
Small-Size Self-Priming Pool Filter Pump	7.7	.....
Standard-Size Non-Self-Priming Pool Filter Pump	6.2	.....
Extra-Small Non-Self-Priming Pool Filter Pump	3.3	.....
Waterfall Pump	2.0	12.0
Pressure Cleaner Booster Pump	2.5	2.5
Integral Cartridge Filter Pool Pump	5.0	.....
Integral Sand Filter Pool Pump	4.8	.....

* Only during the pool operating season.

Self-Priming and Non-Self-Priming Pool Filter Pumps

For self-priming and non-self-priming pool filter pumps in residential applications, the single-speed pump

daily run time is the product of the assigned pool size and the number of turnovers per day divided by pump flow rate. For two-speed and variable-speed pumps, DOE calculated run time at both

high speed and low speed. For high speed, DOE assumed a maximum of 2 hours a day based on the ENERGY

⁸⁶ CEE Residential Swimming Pool Initiative. (Last Accessed: July 28, 2016) http://library.cee1.org/sites/default/files/library/9986/cee_res_swimmingpoolinitiative_07dec2012_pdf_10557.pdf.

⁸⁷ California Energy Commission Pool Heater CASE. (Last Accessed: July 28, 2016) www.energy.ca.gov/appliances/2013rulemaking/documents/proposals/12-AAER-2F_Residential_Pool_Pumps_and_Replacement_Motors/California_IOUs_Response_to_the_Invitation_for_Standards_Proposals_for_Pool_Heaters_2013-07-29_TN-71754.pdf.

⁸⁸ Evaluation of potential best management practices—Pools, Spas, and Fountains 2010. (Last Accessed: July 28, 2016) <http://cuwcc.org/LinkClick.aspx?fileticket=3p3DgiY6ObY%3D>.

STAR calculator.⁸⁹ For low speed, DOE calculated the runtime in the same manner as for single-speed pumps and then subtracted two hours (for assumed high-speed operation).⁹⁰ In the two-speed analysis, DOE followed the recommendation of the DPPP Working Group based on the observations that some of the timer controls for two-speed pumps are not wired correctly, or some of the consumers never operate at low-speed. (EERE-2015-BT-STD-0008-0079 pp. 199-203) DOE assumed that 5 percent of the consumers either would not purchase or would not correctly operate the timer control to switch from high-speed mode (the default mode) to low-speed mode. For these consumers, high-speed runtime was calculated in the same manner as for single-speed pumps, and low-speed runtime was assumed to be zero.

For each equipment class, DOE developed distributions for the number of turnovers per day (*i.e.*, the number of times a pool's contents can be filtered through its filtration equipment in a 24-hour period). The number of turnovers per day is drawn from a probability distribution linked to the ambient condition of the sampled consumer (hot humid, warm or cold) and sanitary requirements, especially for the commercial pool samples. This distribution was adjusted and approved

by the DPPP Working Group based on the observation that some consumers do not follow the Centers for Disease Control and Prevention (CDC) recommendation⁹¹ and operate fewer turnovers than recommended. (EERE-2015-BT-STD-0008-0094 pp. 175-186)

For commercial applications, DOE assumed that single-speed pumps operate 24 hours a day. (EERE-2015-BT-STD-0008-0094 p. 151) For the two-speed and variable-speed pumps, based on the ENERGY STAR calculator, the high speed was assumed to operate 2 hours per day, while the low speed was assumed to operate the remaining 22 hours per day. (EERE-2015-BT-STD-0008-0094 pp. 172-185)

Pressure Cleaner Booster Pumps and Waterfall Pumps

For pressure cleaner booster pumps and waterfall pumps, DOE drew the operating hours from operating hours distributions suggested and approved by the DPPP Working Group. (EERE-2015-BT-STD-0008-0094 pp. 159-162)

Integral Pumps

For integral pumps, the DPPP Working Group suggested that 80 percent of the consumers use these pumps without a timer. (EERE-2015-BT-STD-0008-0094 p. 157) DOE assumed that integral pumps without a

timer operate 12 hours per day, based on the recommendation of the DPPP Working Group (EERE-2015-BT-STD-0008-0094 pp. 155-157). For those that have a timer, DOE calculated the operating hours the same way as for residential single-speed self-priming pool filter pumps.

c. Annual Days of Operation

DOE calculated the annual unit energy consumption (UEC) by multiplying the daily operating hours by the annual days of operation, which depends on the number of months of pool operation. For each consumer sample, DOE assigned different annual days of operation depending on the region in which the dedicated-purpose pool pump is installed. Table IV-27 provides the assumptions of pool pump operating season based on geographical locations. This assignment was based on DOE's Energy Saver Web site assumptions⁹² and PK Data⁹³ that include average pool season length (*i.e.*, operating months) by state, along with discussion of the geographic distribution of pool operating days by the DPPP Working Group, which suggested that although some of the regions had warm weather, the pool pumps should still be operating all year long. (EERE-2015-BT-STD-0008-0094 pp. 191-193)

TABLE IV-27—POOL PUMP OPERATING SEASON ASSUMPTION BY GEOGRAPHICAL LOCATION

Location (States or census divisions)	Average months of pool use	Pool use months
CT,ME,NH,RI,VT	4	5/1-8/31
MA	4	5/1-8/31
NY	4	5/1-8/31
NJ	4	5/1-8/31
PA	4	5/1-8/31
IL	4	5/1-8/31
IN,OH	4	5/1-8/31
MI	4	5/1-8/31
WI	4	6/1-9/30
IA,MN,ND,SD	4	6/1-9/30
KS,NE	4	6/1-9/30
MO	4	6/1-9/30
VA	7	4/1-10/31
DE,DC,MD	5	5/1-9/30
GA	7	4/1-10/31
NC,SC	7	4/1-10/31
FL	12	1/1-12/31
AL,KY,MS	12	1/1-12/31
TN	12	1/1-12/31
AR,LA,OK	12	1/1-12/31
TX	12	1/1-12/31
CO	4	5/1-8/31
ID,MT,UT,WY	4	5/1-8/31

⁸⁹ ENERGY STAR Pool Pump Calculator. (Last Accessed: July, 2016) www.energystar.gov/sites/default/files/asset/document/Pool%20Pump%20Calculator.xlsx.

⁹⁰ In cases where the calculation (product of pool volume times turns per day, divided by flow) results in less than 2 hours, the high speed run time

is reduced to that value, and low speed run time is assumed to be zero.

⁹¹ CDC suggests 4 turnovers per day for public aquatic facilities. (Last accessed: September 21, 2016) <http://www.cdc.gov/healthywater/pdf/swimming/pools/mahc/Complete-First-Edition-MAHC-Code.pdf>.

⁹² DOE Energy Saver. (Last Accessed: April 26, 2016) <http://energy.gov/energysaver/articles/heat-pump-swimming-pool-heaters>.

⁹³ PK Data. 2015 Swimming Pool and Pool Heater Customized Report for LBNL. (Last accessed: April 16, 2016) www.pkdata.com/current-reports.html.

TABLE IV–27—POOL PUMP OPERATING SEASON ASSUMPTION BY GEOGRAPHICAL LOCATION—Continued

Location (States or census divisions)	Average months of pool use	Pool use months
AZ	12	1/1–12/31
NV,NM	12	1/1–12/31
CA	12	1/1–12/31
OR,WA	3	6/1–8/31
AK	5	5/1–9/30
HI	12	1/1–12/31
WV	5	5/1–9/30
New England	4	5/1–8/31
Middle Atlantic	5	5/1–9/30
East North Central	5	5/1–9/30
West North Central	4	6/1–9/30
South Atlantic	12	1/1–12/31
East South Central	12	1/1–12/31
West South Central	12	1/1–12/31
Mountain	4	5/1–8/31
Pacific	12	1/1–12/31

Chapter 7 of the direct final rule TSD provides details on DOE's energy use analysis for pool pumps.

F. Life-Cycle Cost and Payback Period Analyses

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for dedicated-purpose pool pumps. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC (life-cycle cost) is the total consumer expense of equipment over the life of that equipment, consisting of total installed cost (MSP, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the equipment.
- The PBP is the estimated amount of time it takes consumers to recover the increased purchase cost (including installation) of more-efficient equipment through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended or new standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-standards case, which reflects the estimated efficiency distribution of pool pumps in the absence of energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline equipment.

For each considered efficiency level in each equipment class, DOE calculated the LCC and PBP for a nationally representative set of consumers. As stated previously, DOE developed consumer samples from the 2009 RECS and 2012 CBECS. For each consumer in the sample, DOE determined the energy consumption for the pool pump and the appropriate energy price. By developing a representative sample of consumers, the analysis captured the variability in energy consumption and energy prices associated with the use of pool pumps.

Inputs to the calculation of total installed cost include the cost of the equipment—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, equipment lifetimes, and discount rates. DOE created distributions of values for equipment lifetime, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC and PBP, which incorporates Crystal Ball™ (a commercially-available software program), relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and pool pump consumer samples. The model calculated the LCC and PBP for equipment at each efficiency level for 10,000 units per simulation run.

DOE calculated the LCC and PBP for all consumers of pool pumps as if each were to purchase a new product in the expected year of required compliance with new energy efficiency standards. As discussed in section III.B, the standards would apply to pool pumps manufactured 54 months years after the date on which new standards are published. At the time of the analysis for this rule, DOE estimated publication of this direct final rule in the second half of 2016. Therefore, for purposes of its analysis, DOE used 2021 as the year of compliance with any new standards for pool pumps.

Table IV–28 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the direct final rule TSD and its appendices.

TABLE IV–28—SUMMARY OF INPUTS AND METHODS FOR THE LCC AND PBP ANALYSIS *

Inputs	Source/method
Equipment Cost	Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate. Used historical data to derive a price scaling index to project equipment costs.

TABLE IV–28—SUMMARY OF INPUTS AND METHODS FOR THE LCC AND PBP ANALYSIS *—Continued

Inputs	Source/method
Installation Costs	Baseline installation cost determined with data from manufacturer interviews.
Annual Energy Use	The daily energy consumption multiplied by the number of operating days per year.
Energy Prices	Variability: Based on regional data and 2009 RECS and 2012 CBECS. Electricity: Based on EIA's Form 861 data for 2014. Variability: Regional energy prices determined for 30 regions for pool pumps in individual single-family homes and 9 census divisions for pool pumps in community and commercial pool pumps. Marginal prices used for electricity.
Energy Price Trends	Based on <i>AEO2016 No-CPP</i> case price projections.
Repair and Maintenance Costs	Consider only motor replacement as repair cost, which includes labor cost from RS Means and motor cost provided with MPC.
Equipment Lifetime	For residential applications, on average 7 years for self-priming and waterfall pumps, 5 years for non-self-priming and pressure cleaner booster pumps, and 4 years for integral pumps. For commercial applications, the residential equipment lifetime is adjusted according to the ratio of commercial to residential daily operating hours. Variability: Based on Weibull distribution.
Discount Rates	Residential: Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances. Commercial: Calculated as the weighted average cost of capital for entities purchasing pool pumps. Primary data source was Damodaran Online.
Compliance Date	2021.

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the direct final rule TSD.

1. Equipment Cost

To calculate consumer equipment costs, DOE multiplied the MPCs developed in the engineering analysis by the markups described above (along with sales taxes). DOE used different markups for baseline products and higher efficiency products, because DOE applies an incremental markup to the increase in MSP associated with higher efficiency products.

To project an equipment price trend for the direct final rule, DOE derived an inflation-adjusted index of the Producer Price Index (PPI) for pumps and pumping equipment over the period 1984–2015.⁹⁴ These data show a general price index increase from 1987 through 2009. Since 2009, there has been no clear trend in the price index. Given the relatively slow global economic activity in 2009 through 2015, the extent to which the future trend can be predicted based on the last two decades is uncertain and the observed data do not provide a firm basis for projecting future cost trends for pump equipment. Therefore, for single-speed and two-speed pumps, DOE used a constant price assumption as the default trend to project future pump prices in 2021. For variable-speed pool pumps, however, DOE assumed that the controls portion of the electrically commutated motor would be affected by price learning. DOE used PPI data on “Semiconductors and related device manufacturing” between 1967 and 2015 to estimate the

historic price trend of electronic components in the control.⁹⁵ The regression performed as an exponential trend line fit results in an R-square of 0.98, with an annual price decline rate of 6 percent.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE estimates all the installation costs associated with fitting a dedicated-purpose pool pump in a new housing unit (new owners), or as a replacement for an existing pool pump. To simplify the calculation, DOE only accounted for the difference of installation cost by efficiency levels. For two-speed pumps, DOE included the cost of a timer control and its installation where applicable, as recommended by the DPPP Working Group (EERE–2015–BT–STD–0008–0079 pp. 199–203). DOE used information obtained in the manufacturer interviews to calculate the supplemental installation labor costs for two-speed and variable-speed pumps.

See chapter 8 of the direct final rule TSD for more details on installation costs.

3. Annual Energy Consumption

For each sampled installation, DOE determined the energy consumption for a dedicated-purpose pool pump at different efficiency levels using the

approach described in section IV.E of this direct final rule.

4. Energy Prices

DOE used residential electricity prices for dedicated-purpose pool pumps in residential applications, and commercial electricity prices for dedicated-purpose pool pumps in commercial applications.

DOE derived average annual residential marginal electricity prices for 30 geographic regions and commercial marginal electricity prices for 9 census divisions using 2015 data from the EIA.⁹⁶

To estimate electricity prices in future years, DOE multiplied the average regional prices by annual energy price factors derived from the forecasts of annual average residential and commercial electricity price changes by region that are consistent with cases described on p. E–8 in *AEO 2016*.⁹⁷ *AEO*

⁹⁶ U.S. Department of Energy–Energy Information Administration, Form EIA–826 Database Monthly Electric Utility Sales and Revenue Data (2015) available at www.eia.doe.gov/cneaf/electricity/page/eia826.html.

⁹⁷ EIA, *Annual Energy Outlook 2016 with Projections to 2040*. Washington, DC. Available at www.eia.gov/forecasts/aeo/. The standards finalized in this rulemaking will take effect a few years prior to the 2022 commencement of the Clean Power Plan compliance requirements. As DOE has not modeled the effect of CPP during the 30 year analysis period of this rulemaking, there is some uncertainty as to the magnitude and overall effect of the energy efficiency standards. These energy efficiency standards are expected to put downward pressure on energy prices relative to the projections in the AEO 2016 case that incorporates the CPP. Consequently, DOE used the electricity price projections found in the AEO 2016 No-CPP case as

⁹⁴ Series ID PCU333911333911; www.bls.gov/ppi/.

⁹⁵ Semiconductors and related device manufacturing PPI series ID: PCU334413334413; www.bls.gov/ppi/.

2016 has an end year of 2040. To estimate price trends after 2040, DOE used the average annual rate of change in prices from 2030 to 2040.

5. Repair and Maintenance Costs

Repair costs are associated with repairing or replacing equipment components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the equipment. Typically, small incremental increases in equipment efficiency produce no, or only minor, changes in repair and maintenance costs compared to baseline efficiency equipment. DOE assumed that for maintenance costs, there is no change with efficiency level, and therefore DOE did not include those costs in the model.

The primary repair cost for dedicated-purpose pool pumps is motor replacement, and cost of a motor does vary by efficiency level. DOE estimated that such replacement occurs at the halfway point in a pump's lifetime, but only for those dedicated-purpose pool pumps whose lifetime exceeds the average lifetime for the relevant equipment class. The cost of the motor was determined in the engineering analysis and the markups analysis. DOE used 2015 RS Means, a well-known and respected construction cost estimation source, to estimate labor costs for pump motor replacement.⁹⁸ DOE accounted for the difference in labor hours depending on the dedicated-purpose pool pump horsepower, as well as regional differences in labor hourly costs.

Further detail regarding the repair costs developed for dedicated-purpose pool pumps can be found in chapter 8 of the direct final rule TSD.

6. Equipment Lifetime

DOE used dedicated-purpose pool pump lifetime estimates from manufacturer input and the DPPP Working Group's discussion (EERE-2015-BT-STD-0008-0094 pp. 209–223). The data allowed DOE to develop a survival function, which provides a distribution of lifetime ranging from a minimum of 2 or 3 years based on warranty covered period, to a maximum of 15 years, with a mean value of 7 years for self-priming and waterfall pumps, 5 years for non-self-priming and pressure cleaner booster pumps, and 4 years for integral pumps. These values are

these electricity price projections are expected to be lower, yielding more conservative estimates for consumer savings due to the energy efficiency standards.

⁹⁸ RS Means Company, Inc., *RS Means Electrical Cost Data 2015* (2015).

applicable to pumps in residential applications. For commercial applications, DOE scaled the lifetime to acknowledge the higher operating hours compared to residential applications, resulting in a reduced average lifetime.

7. Discount Rates

In calculating the LCC, DOE applies discount rates appropriate to consumers to estimate the present value of future operating costs. The discount rate used in the LCC analysis represents the rate from an individual consumer's perspective. DOE estimated a distribution of residential discount rates for dedicated-purpose pool pumps based on the opportunity cost of funds related to appliance energy cost savings and maintenance costs.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's Survey of Consumer Finances⁹⁹ (SCF) for 1995, 1998, 2001, 2004, 2007, 2010 and 2013. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 4.6 percent.

DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.¹⁰⁰ The LCC does not analyze the equipment purchase decision, so the implicit discount rate is not relevant in this model. The LCC estimates net present value over the lifetime of the equipment, so the appropriate discount rate will reflect the general opportunity cost of household funds, taking this

⁹⁹ Board of Governors of the Federal Reserve System. *Survey of Consumer Finances*. 1995, 1998, 2001, 2004, 2007, 2010, and 2013. (Last accessed December 15, 2015.) (www.federalreserve.gov/econresdata/scf/scfindex.htm).

¹⁰⁰ The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: Transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend.

time scale into account. Given the long time horizon modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

To establish commercial discount rates for the small fraction of applications where businesses purchase and use dedicated-purpose pool pumps, DOE estimated the weighted-average cost of capital using data from Damodaran Online.¹⁰¹ The weighted-average cost of capital is commonly used to estimate the present value of cash flows to be derived from a typical company project or investment. Most companies use both debt and equity capital to fund investments, so their cost of capital is the weighted average of the cost to the firm of equity and debt financing. DOE estimated the cost of equity using the capital asset pricing model, which assumes that the cost of equity for a particular company is proportional to the systematic risk faced by that company.

See chapter 8 of the direct final rule TSD for further details on the development of consumer discount rates.

8. Energy Efficiency Distribution in the No-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of equipment efficiencies under the no-standards case.

The estimated efficiency market shares for dedicated-purpose pool pumps for 2015 were based on manufacturer interviews. To project efficiencies to the compliance year, 2021, DOE shifted 1 percent per year of the market share in the single-speed efficiency levels to the variable-speed efficiency levels. (See section IV.H.1 for more detail.) For the equipment classes that don't have variable-speed efficiency levels (*i.e.*, waterfall pumps and integral

¹⁰¹ Damodaran Online, *Data Page: Costs of Capital by Industry Sector* (2016). (Last accessed April, 2016) <http://pages.stern.nyu.edu/~adamodar/>.

pumps), efficiency was held constant at 2015 levels based on the Working Group discussion. (EERE-2015-BT-STD-0008-0078 pp. 138-141)

Table IV-29 shows the efficiency distribution for the self-priming pool filter pump equipment class as an example. See chapter 8 of the direct final rule TSD for further information on

the derivation of the efficiency distributions, as well as the distributions for the remaining equipment classes.

TABLE IV-29—EFFICIENCY DISTRIBUTION IN THE NO-STANDARDS CASE FOR SELF-PRIMING POOL FILTER PUMPS IN 2021

Efficiency level	Description	National market share (%)
0 (Baseline)	Low efficiency single-speed motor; Low hydro efficiency	39
1	Medium efficiency single-speed motor; Low hydro efficiency	15
2	High efficiency single-speed motor; Low hydro efficiency	10
3	Low efficiency two-speed motor; Low hydro efficiency	2
4	Medium efficiency two-speed motor; Low hydro efficiency	2
5	High efficiency two-speed motor; Low hydro efficiency	2
6	Variable-speed motor; Low hydro efficiency (High speed is 80% of max)	11
7	Variable-speed motor; High hydro efficiency (High speed is 80% of max)	19

9. Payback Period Analysis

The payback period is the amount of time it takes the consumer to recover the additional installed cost of more-efficient equipment, compared to baseline equipment, through energy cost savings. Payback periods are expressed in years. Payback periods that exceed the life of the equipment mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the equipment and the change in the first-year annual operating expenditures relative to the baseline. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed.

As noted above, EPCA, as amended, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price forecast for the year in which compliance with the new standards would be required.

G. Shipments Analysis

DOE uses projections of annual equipment shipments to calculate the national impacts of potential or new amended energy conservation standards on energy use, emissions, NPV, and

future manufacturer cash flows. The shipments model takes an accounting approach, tracking market shares of each equipment class and the vintage of units in the stock. Stock accounting uses equipment shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

For the direct final rule, because there was no readily available data on dedicated-purpose pool pump shipments, DOE estimated shipments in 2015 using data collected from manufacturer interviews. Shipments were projected from 2015 throughout the end of the analysis period (2050) initially using growth rates obtained from manufacturer interviews, the Veris Consulting report, and several macroeconomic indicators. These rates were then reviewed by the DPPP Working Group, which recommended minor modifications to the growth rates¹⁰² (EERE-2015-BT-STD-0008-0078, pp. 106-120). The modified growth rates were also applied in reverse to determine historical shipments. DOE was then able to apply retirement functions derived from dedicated-purpose pool pump lifetime estimates to each vintage in historical shipments to calculate the existing stock. Shipments were divided into two market segments: Replacements and

new pool construction. The market segment associated with dedicated-purpose pool pump replacements was calculated such that the stock is maintained, using historical shipments, lifetime curves, and repair-replace decision making. The market segment for new pool construction pool pump installations is thus the difference between total shipments and replacement shipments.

Because the standards-case projections take into account the increase in purchase price and the decrease in operating costs associated with higher efficiency equipment, projected shipments for a standards case typically deviate from those for the no-standards case. Because purchase price tends to have a larger impact than operating cost on equipment purchase decisions, standards-case projections typically show a decrease in shipments relative to the no-standards case. For dedicated-purpose pool pumps, DOE modeled this impact in two ways. In the replacement segment, DOE implemented a repair-replace model in which under the standards case where the pool pump is more expensive, 60 percent of the time the pump is repaired (*i.e.*, motor replacement) rather than replaced, compared to only around 40 percent in the base case. (EERE-2015-BT-STD-0008-0100 pp. 173-175) In the new construction segment, DOE implemented a relative price elasticity. However, DOE determined that where the cost of the pool far exceeds the incremental cost of a more-efficient pump (*i.e.*, inground pool installations or, where timers are considered, larger inflatable/rigid steel-framed installations), shipments would not be affected by an increase in purchase price of the dedicated-purpose pool pump. Therefore, a relative price elasticity, which accounts for the total

¹⁰² The initial growth rates for Non-Self-Priming Pool Filter Pumps and Integral Cartridge Filter Pumps were -2.77% and -2.0%, respectively. These were adjusted due to Working Group recommendations to 3.08% (so that Non-Self-Priming Pool Filter Pumps matched the rate of Self-Priming Pool Filter Pumps) and 2.0% (so that Integral Cartridge Filter Pumps matched the rate of Integral Sand Filter Pumps).

installed cost of the pool including the pump, is only applied to non-self-priming pool filter pumps, smaller integral cartridge filter pool pumps, and smaller integral sand filter pool pumps, and is based on DPPP Working Group recommendations and data obtained from manufacturer interviews. The elasticity¹⁰³ implemented was 0.2. (EERE-2015-BT-STD-0008-0079 pp. 67–72, 138–139) See chapter 9 of the direct final rule TSD for more detail on the shipments model.

H. National Impact Analysis

The NIA assesses the national energy savings (NES) and the national net present value from a national perspective of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.¹⁰⁴ DOE calculates the NES and NPV for the potential standard levels considered

based on projections of annual equipment shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, equipment costs, and NPV of consumer benefits over the lifetime of pool pumps sold from 2021 through 2050.

DOE evaluated the impacts of new standards by comparing a case without such standards with standards-case projections. The no-standards case characterizes energy use and consumer costs for each equipment class in the absence of new energy conservation standards. For this projection, DOE considers trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-standards case with projections characterizing the market for

each equipment class if DOE adopted new standards at specific energy efficiency levels (*i.e.*, the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of equipment with efficiencies greater than the standard.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV–30 summarizes the inputs and methods DOE used for the NIA analysis for the direct final rule. Discussion of these inputs and methods follows the table. See chapter 10 of the direct final rule TSD for further details.

TABLE IV–30—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL IMPACT ANALYSIS

Inputs	Method
Shipments	Annual shipments from shipments model.
Compliance Date of Standard	2021.
Efficiency Trends	No-standards case: Future trend shifts 1% per year from single-speed efficiency levels to variable-speed efficiency levels.
Annual Energy Consumption per Unit	Standards cases: Roll-up in the compliance year. 1% shift also used.
Total Installed Cost per Unit	Annual weighted-average values are a function of energy use at each efficiency level.
Annual Energy Cost per Unit	Annual weighted-average values are a function of cost at each efficiency level.
Repair and Maintenance Cost per Unit	Incorporates projection of future equipment prices based on historical data.
Energy Prices	Annual weighted-average values as a function of the annual energy consumption per unit and energy prices.
Energy Site-to-Primary and FFC Conversion	Annual values increase with higher efficiency levels.
Discount Rate	<i>AEO2016 no-CPP case</i> price forecasts (to 2040) and extrapolation through 2050.
Present Year	A time-series conversion factor based on <i>AEO2016</i> .
	Three and seven percent.
	2016.

1. Equipment Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-standards case and each of the standards cases. Chapter 8 of the direct final rule TSD describes how DOE developed an energy efficiency distribution for the no-standards case for each of the considered equipment classes for the first year of anticipated compliance with an amended or new standard. To project the trend in efficiency absent standards for pool pumps over the entire shipments projection period, DOE shifted 1 percent per year of the market share in the single-speed efficiency levels to the variable-speed efficiency levels. For the equipment classes that do not have

variable-speed efficiency levels, efficiency was held constant at 2015 levels. The DPPP Working Group agreed with DOE's assumptions. (EERE-2015-BT-STD-0008-0078 pp. 138–141).

For the standards cases, DOE used a “roll-up” scenario to establish the shipment-weighted efficiency for the first year of compliance assumed for standards (2021). In this scenario, the market shares of equipment in the no-standards case that do not meet the standard under consideration would roll up” to meet the new standard level, and the market share of equipment above the standard would remain unchanged. In the standards cases, the efficiency after the compliance year increases at a rate similar to that of the no-standards case.

2. National Energy Savings

The national energy savings analysis involves a comparison of national energy consumption of the considered equipment between each potential standards case (TSL) and the case with no energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each equipment (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the

¹⁰³ Elasticity of -0.2 was only applied to approximately 40% of the integral cartridge filter and integral sand filter pump shipments, thus yielding an effective elasticity of -0.08 for these

two categories rather than -0.2 . This percentage represents the smallest and least expensive segment of this market, where an increase in pump price due to standards is significant relevant to the pool price.

¹⁰⁴ The NIA accounts for impacts in the 50 States and U.S. territories.

electricity consumption and savings to primary energy (*i.e.*, the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2016*.

Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

In 2011, in response to the recommendations of a committee on Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards appointed by the National Academy of Sciences, DOE announced its intention to use full-fuel-cycle (FFC) measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings.⁷⁶ 76 FR 51281 (August 18, 2011). After evaluating the approaches discussed in the August 18, 2011 document, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (NEMS) is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose.⁷⁷ 77 FR 49701 (August 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector¹⁰⁵ that EIA uses to prepare its *Annual Energy Outlook*. The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the direct final rule TSD.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are: (1) Total annual installed cost; (2) total annual operating costs (energy costs and repair and maintenance costs); and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each unit shipped during the projection period.

As previously noted in section IV.F.1, for single-speed and two-speed pumps,

DOE used a constant price assumption as the default price trend to project future pump prices for single-speed and two-speed pumps. For variable-speed pool pumps, however, DOE followed a suggestion from the Working Group and assumed that the controls portion of the electrically commutated motor would be affected by price learning,¹⁰⁶ and used an annual price decline rate of 6 percent. To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different product price forecasts on the consumer NPV for the considered TSLs for dedicated-purpose pool pumps. In addition to the default price trend, DOE considered two product price sensitivity cases: (1) A low price trend based on an exponential fit to the integral horsepower motors and generators PPI from 1991 to 2000 for equipment classes with integral sized motors (self-priming 1 hp and self-priming 3 hp), and an exponential fit to fractional horsepower motors PPI from 1967 to 2015 for equipment classes with fractional sized motors (small-size self-priming pool filter pumps, standard-size non-self-priming pool filter pumps, extra-small non-self-priming pool filter pumps, waterfall pumps, pressure cleaner booster pumps, integral sand filter pool pumps, and integral cartridge filter pool pumps); and (2) a high price trend based on an exponential fit to the integral horsepower motors and generators PPI from 1969 to 2015 for the equipment classes with integral sized motors, and an exponential fit to the fractional horsepower motors PPI from 2001 to 2015 for the equipment classes with fractional sized motors.¹⁰⁷ The derivation of these price trends and the results of these sensitivity cases are described in appendix 10C of the direct final rule TSD.

The operating cost savings are the sum of the differences in energy cost savings, maintenance, and repair costs, which are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional prices by annual energy price factors derived from the forecasts of annual average residential and commercial electricity price changes by region that are consistent with cases described on p.

E-8 in *AEO 2016*,¹⁰⁸ which has an end year of 2040. To estimate price trends after 2040, DOE used the average annual rate of change in prices from 2030 to 2040. As part of the NIA, DOE also analyzed scenarios that used lower and higher energy price trends. NIA results based on these cases are presented in appendix 10C of the DPPP direct final rule TSD.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this NOPR, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis.¹⁰⁹ The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the "social rate of time preference," which is the rate at which society discounts future consumption flows to their present value.

I. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard. The purpose of a subgroup analysis is to determine the extent of any such disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and BPB for those particular consumers from alternative standard

¹⁰⁸ The standards finalized in this rulemaking will take effect a few years prior to the 2022 commencement of the Clean Power Plan compliance requirements. As DOE has not modeled the effect of CPP during the 30 year analysis period of this rulemaking, there is some uncertainty as to the magnitude and overall effect of the energy efficiency standards. These energy efficiency standards are expected to put downward pressure on energy prices relative to the projections in the AEO 2016 case that incorporates the CPP. Consequently, DOE used the electricity price projections found in the AEO 2016 No-CPP case as these electricity price projections are expected to be lower, yielding more conservative estimates for consumer savings due to the energy efficiency standards.

¹⁰⁹ United States Office of Management and Budget. Circular A-4: Regulatory Analysis (September 17, 2003), section E. (Available at www.whitehouse.gov/omb/memoranda/m03-21.html).

¹⁰⁵ For more information on NEMS, refer to *The National Energy Modeling System: An Overview*, DOE/EIA-0581 (2009) (Oct. 2009) (Available at [www.eia.gov/forecasts/aeo/nems/overview/pdf/0581\(2009\).pdf](http://www.eia.gov/forecasts/aeo/nems/overview/pdf/0581(2009).pdf)).

¹⁰⁶ A member of the Working Group suggested adding price learning to the controls portion of variable-speed efficiency levels, similar to what was done in the Ceiling Fans Rulemaking (EERE-2015-BT-STD-0008-0079, pp. 95-96, and also EERE-2015-BT-STD-0008-0100, pp. 159-161).

¹⁰⁷ U.S. Census. Producer Price Index data. Available at www.bls.gov/ppi/

levels. For this direct final rule, DOE analyzed the impacts of the considered standard levels on senior-only households.¹¹⁰ The analysis used a subset of the RECS 2009 sample is comprised of households that meet the criteria for the subgroup. DOE used the LCC and PBP spreadsheet model to estimate the impacts of the considered efficiency levels on the subgroup. Chapter 11 in the direct final rule TSD describes the consumer subgroup analysis.

J. Manufacturer Impact Analysis

1. Overview

DOE conducted an MIA for dedicated-purpose pool pumps to estimate the financial impact of standards on manufacturers of dedicated-purpose pool pumps. The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA relies on the GRIM, an industry cash-flow model customized for the dedicated-purpose pool pumps covered in this rulemaking. The key GRIM inputs are data on the industry cost structure, MPCs, shipments, assumptions about manufacturer markups, and conversion costs. The key MIA output is INPV. DOE used the GRIM to calculate cash flows using standard accounting principles and to compare changes in INPV between the no-standards case and various TSLs (the standards cases). The difference in INPV between the no-standards case and the standards cases represents the financial impact of energy conservation standards on dedicated-purpose pool pump manufacturers. Different sets of assumptions (scenarios) produce different INPV results. The qualitative part of the MIA addresses factors such as manufacturing capacity; characteristics of, and impacts on, any particular subgroup of manufacturers, including small manufacturers; and impacts on competition.

DOE conducted the MIA for this rulemaking in three phases. In the first phase, DOE prepared an industry characterization based on the market and technology assessment and publicly available information. In the second phase, DOE estimated industry cash flows in the GRIM using industry financial parameters derived in the first phase and the shipments derived in the shipment analysis. In the third phase, DOE conducted interviews with dedicated-purpose pool pump manufacturers that account for the large majority of domestic DPPP sales covered

by this rulemaking. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics specific to each company, and obtained each manufacturer's view of the dedicated-purpose pool pump industry as a whole. The interviews provided information that DOE used to evaluate the impacts of amended standards on manufacturers' cash flows, manufacturing capacities, and direct domestic manufacturing employment levels. See section V.B.2.b of this direct final rule for the discussion on the estimated changes in the number of domestic employees involved in manufacturing dedicated-purpose pool pumps covered by energy conservation standards.

During the third phase, DOE used the results of the industry characterization analysis in the first phase and feedback from manufacturer interviews to group manufacturers that exhibit similar production and cost structure characteristics. DOE identified one manufacturer subgroup for a separate impact analysis: Small businesses. DOE determined that dedicated-purpose pool pump manufacturing falls under the North American Industry Classification System (NAICS) code 333911, pump and pumping equipment manufacturing. The U.S. Small Business Administration (SBA) defines a small business as having less than 750 total employees for manufacturing under this NAICS code. This threshold includes all employees in a business' parent company and any other subsidiaries. Based on this classification, DOE identified five domestic dedicated-purpose pool pump businesses that manufacture dedicated-purpose pool pumps in the United States and qualify as small businesses per the SBA threshold. DOE analyzed the impact on the small business subgroup in the complete MIA in the Regulatory Flexibility analysis, required by the Regulatory Flexibility Act, 5 U.S.C. 601, *et. seq.*, presented in section VII.B of this final rule.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to new standards that result in a higher or lower industry value. The GRIM uses an annual discounted cash-flow analysis that incorporates MPCs, manufacturer markups, shipments, and industry financial information as inputs. The GRIM models the changes in MPCs, the distribution of shipments, manufacturing investments, and manufacturer margins that could change as a result from new energy

conservation standards. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2016 (the reference year of the analysis) and continuing to 2050 (the terminal year of the analysis). DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. DOE used a real discount rate of 11.8 percent for all dedicated-purpose pool pump equipment classes. This discount rate is derived from industry financials and modified based on feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-standards case and each standards case. The difference in INPV between the no-standards case and the standards cases represents the financial impact of new energy conservation standards on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, results of the shipments analysis, and information gathered from industry stakeholders during the course of manufacturer interviews and subsequent working group meetings. The GRIM results are presented in section V.B.2. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the direct final rule TSD.

a. Manufacturer Production Costs

Manufacturing more efficient equipment is typically more expensive than manufacturing baseline equipment due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered equipment can affect the revenues, gross margins, and cash flow of the industry.

In the MIA, DOE used the MPCs calculated in the engineering analysis, as described in section IV.C.5 and further detailed in chapter 5 of the direct final rule TSD. DOE made several revisions to the MPCs based on feedback and data that was received during the working group meetings. The MIA used these MPCs as inputs to the MIA for the direct final rule.

b. Shipments Forecasts

The GRIM estimates manufacturer revenues based on (1) total unit shipment forecasts and the distribution of those shipments by efficiency level, (2) MPCs, and (3) manufacturer markups. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer

¹¹⁰ DOE did not evaluate low-income consumer subgroup impacts because the sample size of the subgroup is too small for meaningful analysis.

finances. For this analysis, the GRIM uses the annual shipment forecasts derived from the shipments analysis from 2016 to 2050. See section IV.G of this direct final rule for additional details.

c. Product and Capital Conversion Costs

Energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and equipment designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each equipment class. For the MIA, DOE classified these conversion costs into two major groups: (1) Product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research and development, testing, marketing, and other non-capitalized costs necessary to make product designs to comply with new energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

In general, DOE assumes all conversion-related investments occur between the year of publication of the direct final rule and the year by which manufacturers must comply with the new standards. DOE used inputs from manufacturer interviews and feedback from the working group meetings to evaluate the level of conversion costs manufacturers would likely incur to comply with new energy conservation standards. The majority of design options analyzed represent the implementation of more efficient motors, either single-speed, two-speed, or variable-speed. For standard-size self-priming, small-size self-priming, standard-size non-self-priming, waterfall, and pressure cleaner booster pool pumps, the max-tech efficiency level represents a hydraulic wet-end redesign. For extra-small non-self-priming pool filter pumps max-tech represents the implementation of a more efficient single-speed motor, and for integral cartridge-filter pool pumps and integral sand filter pool pumps DOE analyzed the incorporation of a timer as a design option.

Product conversion costs represent the majority of conversion costs for efficiency levels that represent a motor redesign and are estimated on a per model basis. DOE estimated product conversion costs of \$140,000, \$160,000, and \$500,000 per model to implement a single-speed, two-speed, or variable-

speed motor in a dedicated-purpose pool pump, respectively. DOE estimated the incorporation of a variable-speed motor to cost an additional \$100,000 for standard-size non-self-priming pool filter pumps, because there are currently no non-self-priming pool filter pumps on the market with variable-speed motors. The additional product conversion costs represent housing redesign costs to accommodate variable-speed motors.

In addition to motor redesign costs and testing and certification costs, DOE estimated the per-model cost for new tooling and machinery that would be needed as a result of new standards. DOE approximated capital conversion costs of \$100,000 per wet-end when incorporating single-speed, two-speed, or variable-speed motors in dedicated-purpose pool pumps. These estimates are based on comments from manufacturers made during working group meetings that a motor change could alter the dimensions of a dedicated-purpose pool pump and require investments in packaging machines and other equipment. The working group offered no objections to this estimate. (Docket No. EERE-2015-BT-STD-0008-0079, April 19 DPPP Working Group Meeting, at p. 105)

Max-tech represents a hydraulic wet-end redesign for all equipment classes except for extra-small non-self-priming pool filter pumps, integral cartridge filter pumps, and integral sand filter pumps. DOE estimated product conversion costs for a hydraulic redesign at \$500,000 per wet-end, in addition to the previously discussed \$500,000 per model to incorporate a variable-speed motor. The hydraulic redesign costs represent research and development costs associated with optimizing the impeller and the volute for efficiency. For capital conversion costs, at max-tech, DOE estimated \$1.5 million per wet-end for self-priming and waterfall pumps, \$750,000 per wet-end for non-self-priming pool filter pumps, and \$375,000 per wet-end for pressure cleaner booster pumps. These estimates vary based on the type of tooling and machinery that is used to manufacture pumps in different equipment classes.

Max-tech for extra-small non-self-priming pool filter pumps represents the incorporation of a more efficient single-speed motor. DOE used the conversion cost estimates previously described to implement a single-speed motor.

After gathering per-model and per-wet-end conversion cost estimates, DOE analyzed self-priming pool filter pump equipment offerings to estimate the number of dedicated-purpose pool pumps that would be redesigned at each

efficiency level. DOE used catalogs from the three largest dedicated-purpose pool pump manufacturers that have approximately 75 percent of all self-priming pool filter pump models in the market based on DOE's product database. DOE first listed all self-priming pool filter pumps of the three manufacturers and estimated their efficiency based on descriptions found in catalogs. All analyzed manufacturer catalogs list the number of speeds (*i.e.*, single-speed, two-speed, multi-speed, or variable-speed) and the catalogs provided an estimate of their efficiency (*i.e.*, single-speed standard efficiency compared to single-speed energy efficient).

After DOE estimated the efficiency of each dedicated-purpose pool pump, DOE grouped pumps together for each manufacturer based on their performance characteristics, including: The pump wet-ends, port size, voltage, total horsepower, and pump performance curve (*i.e.*, head vs. flow curve). This allowed DOE to make a mapping with pump characteristics on one axis and pump efficiency level on the other axis. DOE used this mapping to estimate the number of dedicated-purpose pool pumps that would be redesigned if a standard were set at each efficiency level. DOE assumed that:

- Pumps with the same performance characteristics, but a different efficiency, can replace each other.
- There can be no gaps in equipment offerings. At least one pump has to meet the efficiency at each performance characteristic.
- A redesigned single- or two-speed pump can only replace one other pump.
- A variable-speed pump can replace multiple single and two-speed pumps with the same wet-end, port size, voltage, and similar total horsepower.

These assumptions were discussed during the working group meetings and allowed DOE to estimate the number of self-priming pool filter pumps needed to be redesigned at each efficiency level for each manufacturer. (Docket No. EERE-2015-BT-STD-0008-0100, May 18 DPPP Working Group Meeting, at p. 23-24) To estimate the total number of industry redesigns DOE divided the number of redesigns per efficiency level by the percent of models that belongs to the three largest manufacturers.

DOE did not have reliable performance data for non-self-priming, waterfall, and pressure cleaner booster pumps. Therefore, DOE used the shipments distribution to estimate the number of pumps that do not meet each efficiency level. In the absence of data, DOE assumed manufacturers would redesign 25 percent of non-compliant

non-self-priming models. DOE presented this number to the working group, which included manufacturers of such equipment. However the working group offered no suggestions on how to change the number. Therefore DOE continued using the assumption that manufacturers would redesign 25 percent of non-compliant non-self-priming models. (Docket No. EERE-2015-BT-STD-0008-0079, April 19 DPPP Working Group Meeting, at p. 64) Further, DOE assumed that all non-compliant pressure cleaner booster and waterfall models would be redesigned due to the limited number of models in the market.

The design option analyzed for integral cartridge filter and integral sand filter pool pumps represents the incorporation of a timer. Based on confidential interviews with manufacturers that represent the majority of the market, DOE estimates that the R&D required to design a pump with a timer requires a full month of work for three engineers, and involves testing and certification costs. DOE estimated that the per model product conversion costs associated with adding a timer are \$50,000 for integral cartridge filter pumps and \$60,000 for integral sand filter pumps. DOE used specification sheets to determine the number of integral cartridge filter pumps and integral sand filter pumps that do not have a timer and multiplied this by the per model product conversion cost to calculate industry product conversion costs.

In addition, manufacturers that own tooling and machinery may incur capital conversion costs to replace molding machines and tooling. DOE estimated that the capital conversion costs associated with these activities would be \$220,000 per manufacturer. DOE multiplied this by the number of manufacturers that own tooling and machinery, to calculate industry capital conversion costs. DOE presented these conversion cost estimates to the DPPP working group.

In responses, Hayward stated that the product conversion costs [for integral pumps] are probably nominally low. (Docket No. EERE-2015-BT-STD-0008-0079, April 19 DPPP Working Group Meeting, at p. 130) However, Hayward is not a manufacturer of integral cartridge filter and integral sand filter pool pumps and did not provide specific recommendations to alter the estimates. In addition the numbers presented during the working group reflect input from manufacturers that represent the majority of the market. Therefore, DOE used the product

conversion costs estimates presented during the working group.

Testing and Certification Costs

DOE also estimated the magnitude of the aggregate industry compliance testing costs needed to conform to new energy conservation standards. Although compliance testing costs are a subset of product conversion costs, DOE estimated these costs separately. DOE pursued this approach because no energy conservation standards currently exist for dedicated-purpose pool pumps; as such, all basic models will be required to be tested and certified to comply with new energy conservation standards regardless of the level of such a standard. As a result, the industry-wide magnitude of these compliance testing costs will be constant, regardless of the selected standard level.

DOE notes that new energy conservation standards will require every model offered for sale to be tested according to the sampling plan proposed in the test procedure final rule. This sampling plan specifies that a minimum of two units must be tested to certify a basic model as compliant. DOE estimated the industry-wide magnitude of compliance testing by multiplying the estimated number of models currently in each equipment class by the cost to test each model. DOE used product specification sheets and information from manufacturer interviews to estimate the total number of models in each equipment class. DOE estimated testing and certification costs based on input from third-party test labs and manufacturers to be \$11,000 per model, which applies to all self-priming, all non-self-priming, pressure cleaner booster and waterfall pumps.

d. Markup Scenarios

As discussed in section IV.C.5, the MPCs for dedicated-purpose pool pumps are the manufacturers' production costs for those units. These costs include materials, labor, depreciation, and overhead, which are collectively referred to as the cost of goods sold. The MSP is the price received by DPPP manufacturers from the first sale, typically to a wholesaler or a retailer, regardless of the downstream distribution channel through which the dedicated-purpose pool pumps are ultimately sold. The MSP is not the same as the cost the end user pays for the dedicated-purpose pool pump, because there are typically multiple sales along the distribution chain and various markups applied to each sale. The MSP equals the MPC multiplied by the manufacturer markup. The manufacturer markup covers all the

dedicated-purpose pool pump manufacturer's non-production costs (*i.e.*, selling, general, and administrative expenses; research and development; interest) as well as profit. Total industry revenue for DPPP manufacturers equals the MSPs at each efficiency level multiplied by the number of shipments at that efficiency level.

Modifying these manufacturer markups in the standards cases yields a different set of impacts on DPPP manufacturers than in the no-standards case. For the MIA, DOE modeled three standards case markup scenarios for dedicated-purpose pool pumps to represent the uncertainty regarding the potential impacts on prices and profitability for DPPP manufacturers following the implementation of standards. The three scenarios are: (1) A preservation of gross margin markup scenario, or flat markup; (2) a preservation of operating profit markup scenario; and (3) a two-tiered markup scenario. Each scenario leads to different manufacturer markup values, which, when applied to the inputted MPCs, result in varying revenue and cash-flow impacts on DPPP manufacturers.

Under the preservation of gross margin percentage scenario, DOE applied a single uniform "gross margin percentage" markup across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within an equipment class. DOE used manufacturer interviews, and publicly available financial information for manufacturers to estimate the preservation of gross margin markup for each equipment class. DOE estimated a manufacturer markup of 1.46 for all self-priming and waterfall pumps, 1.35 for all non-self-priming and pressure cleaner booster pumps, and 1.27 for integral cartridge filter and integral sand filter pool pumps. DOE presented these manufacturer markups to the working group and did not receive any objection. (Docket No. EERE-2015-BT-STD-0008-0079, April 19 DPPP Working Group Meeting, at p. 92-99)

The preservation of operating profit markup scenario assumes that manufacturers are not able to yield additional operating profit from higher production costs and the investments that are required to comply with new DPPP energy conservation standards. Instead this scenario assumes that manufacturers are only able to maintain the no-standards case total operating profit in absolute dollars in the standards cases, despite higher product costs and investment.

DOE implemented the two-tiered markup scenario because multiple manufacturers stated in interviews that they offer tiers of product lines that are differentiated, in part, by efficiency level. Specifically, manufacturers stated that they earn lower markups on self-priming pool filter pumps that have variable-speed functionality, compared to self-priming pool filter pumps with single or two-speed functionality. As higher standards push more consumers to purchase variable-speed motors, manufacturers lose sales of higher margin single- and two-speed motor dedicated-purpose pool pumps. Therefore, average manufacturer markups decrease.

A comparison of industry financial impacts under the three markup scenarios is presented in section V.B.2.a of this direct final rule.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO₂, NO_x, SO₂, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH₄ and N₂O, as well as the reductions to emissions of all species due to “upstream” activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion. The associated emissions are referred to as upstream emissions.

The analysis of power sector emissions uses marginal emissions factors that were derived from data in *AEO2016*, as described in section IV.M. The methodology is described in chapter 13 and chapter 15 of the DPPP direct final rule TSD.

Combustion emissions of CH₄ and N₂O are estimated using emissions intensity factors published by the EPA: Greenhouse Gases HG Emissions Factors Hub.¹¹¹ The FFC upstream emissions are estimated based on the methodology described in chapter 15 of the DPPP direct final rule TSD. The upstream emissions include both emissions from fuel combustion during extraction, processing, and transportation of fuel, and “fugitive” emissions (direct leakage to the atmosphere) of CH₄ and CO₂.

The emissions intensity factors are expressed in terms of physical units per megawatt-hour (MWh) or million Btu

(MMBtu) of site energy savings. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

For CH₄ and N₂O, DOE calculated emissions reduction in tons and also in terms of units of CO₂-equivalent (CO₂eq). Emissions of CH₄ and N₂O are often converted to CO₂eq by multiplying each ton of gas by the gas’ global warming potential (GWP) over a 100-year time horizon. Based on the Fifth Assessment Report of the Intergovernmental Panel on Climate Change,¹¹² DOE used GWP values of 28 for CH₄ and 265 for N₂O.

The *AEO* incorporates the projected impacts of existing air quality regulations on emissions. *AEO2016* generally represents current legislation and environmental regulations, including recent government actions, for which implementing regulations were available as of the end of February 2016. DOE’s estimation of impacts accounts for the presence of the emissions control programs discussed in the following paragraphs.

SO₂ emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO₂ for affected EGUs in the 48 contiguous States and the District of Columbia (DC). (42 U.S.C. 7651 *et seq.*) SO₂ emissions from 28 eastern States and DC were also limited under the Clean Air Interstate Rule (CAIR). 70 FR 25162 (May 12, 2005). CAIR created an allowance-based trading program that operates along with the Title IV program. In 2008, CAIR was remanded to EPA by the U.S. Court of Appeals for the District of Columbia Circuit, but it remained in effect.¹¹³ In 2011, EPA issued a replacement for CAIR, the Cross-State Air Pollution Rule (CSAPR). 76 FR 48208 (Aug. 8, 2011). On August 21, 2012, the D.C. Circuit issued a decision to vacate CSAPR,¹¹⁴ and the court ordered EPA to continue administering CAIR. On April 29, 2014, the U.S. Supreme Court reversed the judgment of the D.C. Circuit and remanded the case for further

proceedings consistent with the Supreme Court’s opinion.¹¹⁵ On October 23, 2014, the D.C. Circuit lifted the stay of CSAPR.¹¹⁶ Pursuant to this action, CSAPR went into effect (and CAIR ceased to be in effect) as of January 1, 2015.¹¹⁷ *AEO2016* incorporates implementation of CSAPR.

The attainment of emissions caps is typically flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO₂ emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO₂ emissions by any regulated EGU. In past years, DOE recognized that there was uncertainty about the effects of efficiency standards on SO₂ emissions covered by the existing cap-and-trade system, but it concluded that negligible reductions in power sector SO₂ emissions would occur as a result of standards.

Beginning in 2016, however, SO₂ emissions will fall as a result of the Mercury and Air Toxics Standards (MATS) for power plants. 77 FR 9304 (Feb. 16, 2012). In the MATS final rule, EPA established a standard for hydrogen chloride as a surrogate for acid gas hazardous air pollutants (HAP), and also established a standard for SO₂ (a non-HAP acid gas) as an alternative equivalent surrogate standard for acid gas HAP. The same controls are used to reduce HAP and non-HAP acid gas; thus, SO₂ emissions will be reduced as a result of the control technologies installed on coal-fired power plants to comply with the MATS requirements for acid gas. *AEO2016* assumes that, in order to continue operating, coal plants must have either flue gas desulfurization or dry sorbent injection systems installed by 2016. Both technologies, which are used to reduce acid gas emissions, also reduce SO₂ emissions. Under the MATS, emissions will be far below the cap established by

¹¹⁵ See *EPA v. EME Homer City Generation*, 134 S. Ct. 1584, 1610 (U.S. 2014). The Supreme Court held in part that EPA’s methodology for quantifying emissions that must be eliminated in certain States due to their impacts in other downwind States was based on a permissible, workable, and equitable interpretation of the Clean Air Act provision that provides statutory authority for CSAPR.

¹¹⁶ See *EME Homer City Generation, L.P. v. EPA*, Order (D.C. Cir. filed October 23, 2014) (No. 11–1302).

¹¹⁷ On July 28, 2015, the D.C. Circuit issued its opinion regarding the remaining issues raised with respect to CSAPR that were remanded by the Supreme Court. The D.C. Circuit largely upheld CSAPR, but remanded to EPA without *vacatur* certain States’ emission budgets for reconsideration. *EME Homer City Generation, LP v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

¹¹¹ Available at www.epa.gov/climateleadership/center-corporate-climate-leadership-ghg-emission-factors-hub.

¹¹² IPCC (2013). *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.). Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. Chapter 8.

¹¹³ See *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), modified on rehearing, 550 F.3d 1176 (D.C. Cir. 2008).

¹¹⁴ See *EME Homer City Generation, LP v. EPA*, 696 F.3d 7.

CSAPR, so it is unlikely that excess SO₂ emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO₂ emissions by any regulated EGU.¹¹⁸ Therefore, DOE believes that energy conservation standards that decrease electricity generation will generally reduce SO₂ emissions in 2016 and beyond.

CSAPR established a cap on NO_x emissions in 28 eastern States and the District of Columbia. Energy conservation standards are expected to have little effect on NO_x emissions in those States covered by CSAPR because excess NO_x emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_x emissions from other facilities. However, standards would be expected to reduce NO_x emissions in the States not affected by the caps, so DOE estimated NO_x emissions reductions from the standards considered in this direct final rule for these States.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would likely reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO2016*, which incorporates the MATS.

The *AEO2016* Reference case (and some other cases) assumes implementation of the Clean Power Plan (CPP), which is the EPA program to regulate CO₂ emissions at existing fossil-fired electric power plants.¹¹⁹ DOE used

the *AEO2016* No-CPP case as a basis for developing emissions factors for the electric power sector to be consistent with its use of the No-CPP case in the NIA.¹²⁰

L. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this rule, DOE considered the estimated monetary benefits from the reduced emissions of CO₂, CH₄, N₂O and NO_x that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this direct final rule.

1. Social Cost of Carbon

The SC-CO₂ is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SC-CO₂ are provided in dollars per metric ton of CO₂. A domestic SC-CO₂ value is meant to reflect the value of damages in the United States resulting from a unit change in CO₂ emissions, while a global SC-CO₂ value is meant to reflect the value of damages worldwide.

Under section 1(b)(6) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), agencies must, to the extent permitted by law, "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

Units" (Washington, DC: October 23, 2015). <https://www.federalregister.gov/articles/2015/10/23/2015-22842/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating>.

¹²⁰ As DOE has not modeled the effect of CPP during the 30 year analysis period of this rulemaking, there is some uncertainty as to the magnitude and overall effect of the energy efficiency standards. With respect to estimated CO₂ and NO_x emissions reductions and their associated monetized benefits, if implemented the CPP would result in an overall decrease in CO₂ emissions from electric generating units (EGUs), and would thus likely reduce some of the estimated CO₂ reductions associated with this rulemaking.

The purpose of the SC-CO₂ estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO₂ emissions into cost-benefit analyses of regulatory actions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed these SC-CO₂ estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SC-CO₂ values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SC-CO₂ estimates used in the rulemaking process.

a. Monetizing Carbon Dioxide Emissions

When attempting to assess the incremental economic impacts of CO₂ emissions, the analyst faces a number of challenges. A report from the National Research Council¹²¹ points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) future emissions of GHGs, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise questions of science, economics, and ethics and should be viewed as provisional.

Despite the limits of both quantification and monetization, SC-CO₂ estimates can be useful in estimating the social benefits of reducing CO₂ emissions. Although any numerical estimate of the benefits of reducing carbon dioxide emissions is subject to some uncertainty, that does not relieve DOE of its obligation to attempt to factor those benefits into its cost-benefit analysis. Moreover, the interagency working group (IWG) SC-CO₂ estimates are well supported by the existing scientific and economic

¹²¹ National Research Council. *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use*. 2009. National Academies Press: Washington, DC.

¹¹⁸ DOE notes that on June 29, 2015, the U.S. Supreme Court ruled that the EPA erred when the agency concluded that cost did not need to be considered in the finding that regulation of hazardous air pollutants from coal- and oil-fired electric utility steam generating units (EGUs) is appropriate and necessary under section 112 of the Clean Air Act (CAA). *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Supreme Court did not vacate the MATS rule, and DOE has tentatively determined that the Court's decision on the MATS rule does not change the assumptions regarding the impact of energy conservation standards on SO₂ emissions. Further, the Court's decision does not change the impact of the energy conservation standards on mercury emissions. The EPA, in response to the U.S. Supreme Court's direction, has now considered cost in evaluating whether it is appropriate and necessary to regulate coal- and oil-fired EGUs under the CAA. EPA concluded in its final supplemental finding that a consideration of cost does not alter the EPA's previous determination that regulation of hazardous air pollutants, including mercury, from coal- and oil-fired EGUs, is appropriate and necessary. 79 FR 24420 (April 25, 2016). The MATS rule remains in effect, but litigation is pending in the D.C. Circuit Court of Appeals over EPA's final supplemental finding MATS rule.

¹¹⁹ U.S. Environmental Protection Agency, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating

literature. As a result, DOE has relied on the IWG SC-CO₂ estimates in quantifying the social benefits of reducing CO₂ emissions. DOE estimates the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SC-CO₂ values appropriate for that year. The NPV of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years.

It is important to emphasize that the current SC-CO₂ values reflect the IWG's best assessment, based on current data, of the societal effect of CO₂ emissions. The IWG is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across Federal agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO₂ emissions. The interagency group did not

undertake any original analysis. Instead, it combined SC-CO₂ estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim values that represented the first sustained interagency effort within the U.S. government to develop an SC-CO₂ estimate for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules issued by DOE and other agencies.

b. Current Approach

After the release of the interim values, the IWG reconvened on a regular basis to generate improved SC-CO₂ estimates. Specially, the IWG considered public comments and further explored the technical literature in relevant fields. It relied on three integrated assessment models commonly used to estimate the SC-CO₂: The FUND, DICE, and PAGE models. These models are frequently cited in the peer-reviewed literature and were used in the last assessment of the Intergovernmental Panel on Climate Change (IPCC). Each model was given equal weight in the SC-CO₂ values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models, while respecting the different

approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: Climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for climate sensitivity was specified as an input into all three models. In addition, the IWG used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

In 2010, the IWG selected four sets of SC-CO₂ values for use in regulatory analyses. Three sets of values are based on the average SC-CO₂ from the three integrated assessment models, at discount rates of 2.5, 3, and 5 percent. The fourth set, which represents the 95th percentile SC-CO₂ estimate across all three models at a 3-percent discount rate, was included to represent higher-than-expected impacts from climate change further out in the tails of the SC-CO₂ distribution. The values grow in real terms over time. Additionally, the IWG determined that a range of values from 7 percent to 23 percent should be used to adjust the global SC-CO₂ to calculate domestic effects,¹²² although preference is given to consideration of the global benefits of reducing CO₂ emissions. Table IV–31 presents the values in the 2010 IWG report.¹²³

TABLE IV–31—ANNUAL SCC VALUES FROM 2010 IWG REPORT
[2007\$ per metric ton CO₂]

Year	Discount rate and statistic			
	5%	3%	2.5%	3%
	Average	Average	Average	95th Percentile
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

In 2013 the IWG released an update (which was revised in July 2015) that contained SC-CO₂ values that were

generated using the most recent versions of the three integrated assessment models that have been published in the peer-reviewed literature.¹²⁴ DOE used

¹²² It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no *a priori* reason why domestic benefits should be a constant fraction of net global damages over time.

¹²³ United States Government–Interagency Working Group on Social Cost of Carbon. *Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*. February 2010. <https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf>.

¹²⁴ United States Government–Interagency Working Group on Social Cost of Carbon. *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis*

these values for this direct final rule. Table IV–32 shows the four sets of SC-CO₂ estimates from the 2013 interagency update (revised July 2015) in 5-year increments from 2010 through 2050.

The full set of annual SC-CO₂ estimates from 2010 through 2050 is reported in appendix 14A of the direct final rule TSD. The central value that emerges is the average SC-CO₂ across models at the

3-percent discount rate. However, for purposes of capturing the uncertainties involved in regulatory impact analysis, the IWG emphasizes the importance of including all four sets of SC-CO₂ values.

TABLE IV–32—ANNUAL SC-CO₂ VALUES FROM 2013 IWG UPDATE (REVISED JULY 2015)
[2007\$ per metric ton CO₂]

Year	Discount rate and statistic			
	5%	3%	2.5%	3%
	Average	Average	Average	95th Percentile
2010	10	31	50	86
2015	11	36	56	105
2020	12	42	62	123
2025	14	46	68	138
2030	16	50	73	152
2035	18	55	78	168
2040	21	60	84	183
2045	23	64	89	197
2050	26	69	95	212

It is important to recognize that a number of key uncertainties remain, and that current SC-CO₂ estimates should be treated as provisional and revisable because they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report mentioned previously points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of analytical challenges that are being addressed by the research community, including research programs housed in many of the Federal agencies participating in the interagency process to estimate the SC-CO₂. The interagency group intends to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling.¹²⁵

DOE converted the values from the 2013 interagency report (revised July 2015) to 2015\$ using the implicit price deflator for gross domestic product (GDP) from the Bureau of Economic Analysis. For each of the four sets of SC-

CO₂ cases, the values for emissions in 2020 are \$13.5, \$47.4, \$69.9, and \$139 per metric ton avoided (values expressed in 2015\$). DOE derived values after 2050 based on the trend in 2010–2050 in each of the four cases in the interagency update.

DOE multiplied the CO₂ emissions reduction estimated for each year by the SC-CO₂ value for that year in each of the four cases. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC-CO₂ values in each case.

2. Social Cost of Methane and Nitrous Oxide

While carbon dioxide is the most prevalent greenhouse gas emitted into the atmosphere, other GHGs are also important contributors. These include methane and nitrous oxide. Global warming potential values (GWPs) are often used to convert emissions of non-CO₂ GHGs to CO₂-equivalents to facilitate comparison of policies and inventories involving different GHGs. While GWPs allow for some useful comparisons across gases on a physical basis, using the social cost of carbon to value the damages associated with

changes in CO₂-equivalent emissions is not optimal. This is because non-CO₂ GHGs differ not just in their potential to absorb infrared radiation over a given time frame, but also in the temporal pathway of their impact on radiative forcing, which is relevant for estimating their social cost but not reflected in the GWP. Physical impacts other than temperature change also vary across gases in ways that are not captured by GWP.

In light of these limitations and the paucity of peer-reviewed estimates of the social cost of non-CO₂ gases in the literature, the 2010 SCC Technical Support Document did not include an estimate of the social cost of non-CO₂ GHGs and did not endorse the use of GWP to approximate the value of non-CO₂ emission changes in regulatory analysis. Instead, the IWG noted that more work was needed to link non-CO₂ GHG emission changes to economic impacts.

Since that time, new estimates of the social cost of non-CO₂ GHG emissions have been developed in the scientific literature, and a recent study by Marten *et al.* (2015) provided the first set of published estimates for the social cost of CH₄ and N₂O emissions that are consistent with the methodology and

Under Executive Order 12866. May 2013. Revised July 2015. <https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-td-final-july-2015.pdf>. In 2015, the IWG asked the National Academies of Science, Engineering and Medicine (NAS) to review the latest research on modeling the economic aspects of climate change to inform future revisions of the SC-CO₂. The NAS Committee on the Social Cost of Carbon issued an interim report in January 2016 that recommended against a near-term update of the SC-CO₂ estimates, but included recommendations for enhancing the presentation

and discussion of uncertainty around the current estimates. A new Technical Support Document, released by the IWG in August 2016, responds to these recommendations (https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-td-final_clean_8_26_16.pdf). The NAS Committee's final report, expected in early 2017, will provide longer term recommendations for a more comprehensive update.

¹²⁵ In November 2013, OMB announced a new opportunity for public comment on the interagency

technical support document underlying the revised SCC estimates. 78 FR 70586. In July 2015 OMB published a detailed summary and formal response to the many comments that were received: This is available at <https://www.whitehouse.gov/blog/2015/07/02/estimating-benefits-carbon-dioxide-emissions-reductions>. It also stated its intention to seek independent expert advice on opportunities to improve the estimates, including many of the approaches suggested by commenters.

modeling assumptions underlying the IWG SC-CO₂ estimates.¹²⁶ Specifically, Marten *et al.* used the same set of three integrated assessment models, five socioeconomic and emissions scenarios, equilibrium climate sensitivity distribution, three constant discount rates, and the aggregation approach used by the IWG to develop the SC-CO₂ estimates. An addendum to the IWG's Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866 summarizes the Marten *et al.* methodology and presents the SC-CH₄ and SC-N₂O estimates from that study as a way for agencies to incorporate the social benefits of reducing CH₄ and N₂O emissions into benefit-cost analyses of

regulatory actions that have small, or "marginal," impacts on cumulative global emissions.¹²⁷

The methodology and estimates described in the addendum have undergone multiple stages of peer review and their use in regulatory analysis has been subject to public comment. The estimates are presented with an acknowledgement of the limitations and uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts, just as the IWG has committed to do for the SC-CO₂. The OMB has determined that the use of the Marten *et al.* estimates in regulatory analysis is consistent with

the requirements of OMB's Information Quality Guidelines Bulletin for Peer Review and OMB Circular A-4.

The SC-CH₄ and SC-N₂O estimates are presented in Table IV-33. Following the same approach as with the SC-CO₂, values for 2010, 2020, 2030, 2040, and 2050 are calculated by combining all outputs from all scenarios and models for a given discount rate. Values for the years in between are calculated using linear interpolation. The full set of annual SC-CH₄ and SC-N₂O estimates between 2010 and 2050 is reported in appendix 14-A of the direct final rule TSD. DOE derived values after 2050 based on the trend in 2010-2050 in each of the four cases in the IWG addendum.

TABLE IV-33—ANNUAL SC-CH₄ AND SC-N₂O ESTIMATES FROM 2016 IWG ADDENDUM
[2007\$ per metric ton]

Year	SC-CH ₄				SC-N ₂ O			
	Discount rate and statistic				Discount rate and statistic			
	5%	3%	2.5%	3%	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile	Average	Average	Average	95th percentile
2010	370	870	1,200	2,400	3,400	12,000	18,000	31,000
2015	450	1,000	1,400	2,800	4,000	13,000	20,000	35,000
2020	540	1,200	1,600	3,200	4,700	15,000	22,000	39,000
2025	650	1,400	1,800	3,700	5,500	17,000	24,000	44,000
2030	760	1,600	2,000	4,200	6,300	19,000	27,000	49,000
2035	900	1,800	2,300	4,900	7,400	21,000	29,000	55,000
2040	1,000	2,000	2,600	5,500	8,400	23,000	32,000	60,000
2045	1,200	2,300	2,800	6,100	9,500	25,000	34,000	66,000
2050	1,300	2,500	3,100	6,700	11,000	27,000	37,000	72,000

DOE multiplied the CH₄ and N₂O emissions reduction estimated for each year by the SC-CH₄ and SC-N₂O estimates for that year in each of the four cases. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC-CH₄ and SC-N₂O estimates in each case.

3. Social Cost of Other Air Pollutants

As noted previously, DOE estimated how the considered energy conservation standards would decrease power sector NO_x emissions in those 22 States not

affected by CSAPR. Unlike greenhouse gas emissions, the social cost of other air pollution emissions depends upon the location of those emissions (and conversely, the social benefit of emissions reductions depends on the location of those reductions), making monetization more complicated.

DOE estimated the monetized value of NO_x emissions reductions from electricity generation using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA's Office of Air Quality Planning and Standards.¹²⁸ The report

includes high and low values for NO_x (as PM_{2.5}) for 2020, 2025, and 2030 using discount rates of 3 percent and 7 percent; these values are presented in appendix 14B of the direct final rule TSD. DOE primarily relied on the low estimates to be conservative.¹²⁹ DOE developed values specific to the sector for dedicated-purpose pool pumps using a method described in appendix 14B of the direct final rule TSD. For this analysis DOE used linear interpolation to define values for the years between 2020 and 2025 and between 2025 and 2030; for years beyond 2030 the value is held constant.

¹²⁶ Marten, A.L., Kopits, E.A., Griffiths, C.W., Newbold, S.C., and A. Wolverson. 2015. Incremental CH₄ and N₂O Mitigation Benefits Consistent with the U.S. Government's SC-CO₂ Estimates. *Climate Policy*. 15(2): 272-298 (published online, 2014).

¹²⁷ United States Government-Interagency Working Group on Social Cost of Greenhouse Gases. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016. <https://www.whitehouse.gov/sites/>

[default/files/omb/infocore/august_2016_sc_ch4_sc_n2o_addendum_final_8_26_16.pdf](https://www.whitehouse.gov/sites/default/files/omb/infocore/august_2016_sc_ch4_sc_n2o_addendum_final_8_26_16.pdf).

¹²⁸ Available at www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis. See Tables 4A-3, 4A-4, and 4A-5 in the report. *The U.S. Supreme Court has stayed the rule implementing the Clean Power Plan until the current litigation against it concludes. Chamber of Commerce, et al. v. EPA, et al., Order in Pending Case, 577 U.S. ____ (2016). However, the benefit-per-ton estimates established in the Regulatory Impact Analysis for the Clean Power Plan are based on scientific studies that remain valid irrespective of the legal status of the Clean Power Plan.*

¹²⁹ For the monetized NO_x benefits associated with PM_{2.5}, the related benefits are primarily based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009), which is the lower of the two EPA central tendencies. Using the lower value is more conservative when making the policy decision concerning whether a particular standard level is economically justified. If the benefit-per-ton estimates were based on the Six Cities study (Lepule *et al.* 2012), the values would be nearly two-and-a-half times larger. (See chapter 14 of the direct final rule TSD for citations for the studies mentioned above.)

DOE multiplied the emissions reduction (in tons) in each year by the associated \$/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

DOE is evaluating appropriate monetization of reduction in other emissions in energy conservation standards rulemakings. DOE has not included monetization of those emissions in the current analysis.

M. Utility Impact Analysis

The utility impact analysis estimates several effects on the electric power generation industry that would result from the adoption of new or amended energy conservation standards. The utility impact analysis estimates the changes in installed electrical capacity and generation that would result for each TSL. The analysis is based on published output from the NEMS associated with *AEO2016*. NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption and emissions consistent with the projections described on page E–8 of *AEO 2016* and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the direct final rule TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity, and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new or amended energy conservation standards.

N. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts from new conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of

more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by: (1) Reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's Bureau of Labor Statistics (BLS).¹³⁰ BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.¹³¹ There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.*, the utility sector) to more labor-intensive sectors (*e.g.*, the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this direct final rule using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (ImSET).¹³²

¹³⁰ Data on industry employment, hours, labor compensation, value of production, and the implicit price deflator for output for these industries are available upon request by calling the Division of Industry Productivity Studies (202–691–5618) or by sending a request by email to dipsweb@bls.gov.

¹³¹ See Bureau of Economic Analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, U.S. Department of Commerce (1992).

¹³² J. Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz (2015). ImSET 4.0: Impact of Sector Energy Technologies Model Description and

ImSET is a special-purpose version of the “U.S. Benchmark National Input-Output” (I–O) model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and understands the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2028), where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the direct final rule TSD.

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for dedicated-purpose pool pumps. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for dedicated-purpose pool pumps, and the standards levels that DOE is adopting in this direct final rule. Additional details regarding DOE's analyses are contained in the direct final rule TSD supporting this document.

A. Trial Standard Levels

DOE analyzed the benefits and burdens of five TSLs for dedicated-purpose pool pumps. These TSLs were developed by combining specific efficiency levels for each of the equipment classes analyzed by DOE. DOE presents the results for the TSLs in this direct final rule. The results for all efficiency levels that DOE analyzed are in the direct final rule TSD.

Table V–1 presents the TSLs and the corresponding efficiency levels that DOE identified for potential amended energy conservation standards for dedicated-purpose pool pumps. TSL 5 represents the maximum technologically feasible energy efficiency for all equipment classes. TSL 4 represents the combination of highest

efficiency levels without hydraulic improvements (variable speed for relevant equipment classes). TSL 3 represents the standard levels recommended by the DPPP Working

Group. (EERE-2015-BT-STD-0008, No. 82 Recommendation #1 at p. 1-2) TSL 2 represents the efficiency levels with the highest NPV based on dual speed for relevant equipment classes, and in other

classes the same efficiency level as in TSL 1. TSL 1 represents the efficiency levels with the highest NPV based on single-speed technology and no hydraulic improvements.

TABLE V-1—TRIAL STANDARD LEVELS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class	Trial standard level				
	1	2	3	4	5
	Efficiency level				
Standard-Size Self-Priming Pool Filter Pump	2	5	6	6	7
Small-Size Self-Priming Pool Filter Pump	2	5	2	6	7
Standard-Size Non-Self-Priming Pool Filter Pump	1	4	1	6	7
Extra-Small Non-Self-Priming Pool filter Pump	1	1	1	2	2
Waterfall Pump	1	1	0	2	3
Pressure Cleaner Booster Pump	1	1	1	3	4
Integral Cartridge Filter Pool Pump	0	0	1	0	0
Integral Sand Filter Pool Pump	0	0	1	0	0

DOE only considers an efficiency level above the baseline for integral cartridge filter and integral sand filter pumps in TSL3, the recommended TSL, because DOE is only able to adopt prescriptive standards and performance standards for the same equipment through use of a direct final rule based on consensus recommendations. (42 U.S.C. 6295(p)(4)(A) and 6316(a))

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on consumers of pool pumps by looking at the effects potential standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected

consumer subgroups. These analyses are discussed below.

a. Life-Cycle Cost and Payback Period

In general, higher efficiency equipment affects consumers in two ways: (1) Purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.*, equipment price plus installation costs), and operating costs (*i.e.*, annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses equipment lifetime and a discount rate. Chapter 8 of the direct final rule TSD provides detailed information on the LCC and PBP analyses.

Table V-2 through Table V-17 show the LCC and PBP results for the TSLs considered for each equipment class. In

the first of each pair of tables, the simple payback is measured relative to the baseline equipment. In the second of each pair of tables, the impacts are measured relative to the efficiency distribution in the no-standards case in the compliance year (see Section IV.F.8 of this document). Because some consumers purchase equipment with higher efficiency in the no-standards case, the average savings are less than the difference between the average LCC of the baseline equipment and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase equipment with efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

TABLE V-2—AVERAGE LCC AND PBP RESULTS FOR STANDARD-SIZE SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
—	Baseline	481	774	4,565	5,046	n/a	6.7
1	2	576	605	3,640	4,216	0.6	6.7
2	5	823	315	2,082	2,906	0.7	6.7
3,4	6	853	223	1,644	2,497	0.7	6.8
5	7	853	181	1,402	2,255	0.6	6.8

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-3—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR STANDARD-SIZE SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1	2	669	1
2	5	1,779	5
3,4	6	2,140	10
5	7	2,085	8

* The savings represent the average LCC for affected consumers.

TABLE V-4—AVERAGE LCC AND PBP RESULTS FOR SMALL-SIZE SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
—	Baseline	320	282	1,743	2,063	n/a	6.8
1,3	2	386	200	1,294	1,679	0.8	6.8
2	5	588	146	1,004	1,593	2.0	6.8
4	6	720	94	826	1,546	2.1	6.8
5	7	720	77	723	1,443	1.9	6.8

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-5—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR SMALL-SIZE SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,3	2	295	4
2	5	322	27
4	6	360	29
5	7	414	26

* The savings represent the average LCC for affected consumers.

TABLE V-6—AVERAGE LCC AND PBP RESULTS FOR STANDARD-SIZE NON-SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
—	Baseline	199	225	1,055	1,254	n/a	4.7
1,3	1	208	177	858	1,066	0.2	4.7
2	4	411	131	684	1,095	2.3	4.7
4	6	576	64	541	1,117	2.3	4.8
5	7	576	45	458	1,034	2.1	4.8

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-7—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR STANDARD-SIZE NON-SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,3	1	191	0
2	4	35	58
4	6	10	51
5	7	93	47

* The savings represent the average LCC for affected consumers.

TABLE V-8—AVERAGE LCC AND PBP RESULTS FOR EXTRA-SMALL NON-SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
—	Baseline	135	57	305	440	n/a	4.7
1,2,3	1	146	45	259	405	0.9	4.7
4,5	2	158	43	255	413	1.6	4.7

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-9—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR EXTRA-SMALL NON-SELF-PRIMING POOL FILTER PUMP

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,2,3	1	36	4
4,5	2	10	39

* The savings represent the average LCC for affected consumers.

TABLE V-10—AVERAGE LCC AND PBP RESULTS FOR WATERFALL PUMPS

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
—	Baseline	313	73	500	813	n/a	6.6
1,2	1	335	67	481	816	4.5	6.6
3	0	313	73	500	813	n/a	6.6
4	2	375	60	459	834	5.4	6.6
5	3	375	54	429	803	3.7	6.6

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-11—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR WATERFALL PUMPS

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,2	1	-3	50

TABLE V-11—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR WATERFALL PUMPS—Continued

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
3	0	n/a	n/a
4	2	-20	70
5	3	13	55

* The savings represent the average LCC for affected consumers.

TABLE V-12—AVERAGE LCC AND PBP RESULTS FOR PRESSURE CLEANER BOOSTER PUMPS

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
—	Baseline	255	173	858	1,113	n/a	4.8
1,2,3	1	276	140	726	1,001	0.6	4.8
4	3	631	110	758	1,390	6.0	4.8
5	4	631	99	711	1,343	5.1	4.8

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-13—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR PRESSURE CLEANER BOOSTER PUMPS

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,2,3	1	111	0
4	3	-372	69
5	4	-313	68

* The savings represent the average LCC for affected consumers.

TABLE V-14—AVERAGE LCC AND PBP RESULTS FOR INTEGRAL CARTRIDGE FILTER POOL PUMP

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1,2,4,5	0	98	65	234	332	n/a	3.8
3	1	110	26	93	203	0.4	3.8

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-15—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR INTEGRAL CARTRIDGE FILTER POOL PUMP

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,2,4,5	0	n/a	n/a

TABLE V-15—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR INTEGRAL CARTRIDGE FILTER POOL PUMP—Continued

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
3	1	128	3

* The savings represent the average LCC for affected consumers.

TABLE V-16—AVERAGE LCC AND PBP RESULTS FOR INTEGRAL SAND FILTER POOL PUMP

TSL	Efficiency level	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1,2,4,5	0	154	39	133	287	n/a	3.8
3	1	166	14	48	214	0.5	3.8

Note: The results for each TSL are calculated assuming that all consumers use equipment at that efficiency level. The PBP is measured relative to the baseline equipment.

TABLE V-17—AVERAGE LCC SAVINGS RELATIVE TO THE NO-STANDARDS CASE FOR INTEGRAL SAND FILTER POOL PUMP

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2015\$)	Percent of consumers that experience net cost (%)
1,2,4,5	0	n/a	n/a
3	1	73	3

* The savings represent the average LCC for affected consumers.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on senior-only households. Table V-18 through Table V-25 compare the average LCC savings

and PBP at each efficiency level for the consumer subgroups, along with the average LCC savings for the entire consumer sample. In most cases, the average LCC savings and PBP for senior-only households at the considered

efficiency levels are not substantially different from the average for all households. Chapter 11 of the direct final rule TSD presents the complete LCC and PBP results for the subgroup analysis.

TABLE V-18—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR STANDARD-SIZE SELF-PRIMING POOL FILTER PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1	741	651	0.6	0.6
2	1,902	1,664	0.7	0.8
3,4	2,344	2,054	0.7	0.7
5	2,282	2,004	0.6	0.7

TABLE V-19—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR SMALL-SIZE SELF-PRIMING POOL FILTER PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,3	336	295	0.7	0.8
2	377	322	1.8	2.0
4	446	360	1.9	2.1
5	501	414	1.8	1.9

TABLE V-20—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR STANDARD-SIZE NON-SELF-PRIMING POOL FILTER PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,3	217	191	0.2	0.2
2	62	35	1.9	2.3
4	86	10	2.0	2.3
5	182	93	1.8	2.1

TABLE V-21—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR EXTRA-SMALL NON-SELF-PRIMING POOL FILTER PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,2,3	42	36	0.8	0.9
4,5	15	10	1.4	1.6

TABLE V-22—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR WATERFALL PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,2	0	– 4	4.1	4.7
3	n/a	n/a	n/a	n/a
4	– 14	– 22	4.9	5.6
5	21	9	3.4	3.8

TABLE V-23—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR PRESSURE CLEANER BOOSTER PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,2,3	134	112	0.5	0.6
4	– 353	– 372	5.2	6.0
5	– 287	– 312	4.4	5.1

TABLE V-24—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR INTEGRAL CARTRIDGE FILTER POOL PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,2,4,5	n/a	n/a	n/a	n/a
3	161	128	0.3	0.4

TABLE V-25—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUP AND ALL HOUSEHOLDS FOR INTEGRAL SAND FILTER POOL PUMP

TSL	Average life-cycle cost savings (2015\$)		Simple payback period (years)	
	Senior-only households	All households	Senior-only households	All households
1,2,4,5	n/a	n/a	n/a	n/a
3	92	73	0.4	0.5

c. Rebuttable Presumption Payback

As discussed in section III.G.3, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values, and as required by EPCA, based

the energy use calculation from the DOE test procedures for dedicated-purpose pool pumps. In contrast, the PBPs presented in section V.B.1.a were calculated using distributions that reflect the range of energy use in the field.

Table V-26 presents the rebuttable-presumption payback periods for the considered TSLs for dedicated-purpose pool pumps. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this rule are

economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i) and 6316(a), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

TABLE V-26—REBUTTABLE-PRESUMPTION PAYBACK PERIODS

Equipment class	TSL				
	1	2	3	4	5
	(Years)				
Self-Priming, Standard Size	0.5	0.8	0.8	0.8	0.8
Self-Priming, Small Size	0.9	2.1	0.9	2.4	2.1
Non-Self-Priming, Standard Size	0.2	2.4	0.2	2.8	2.5
Non-Self-Priming, Extra-Small	1.0	1.0	1.0	1.8	1.8
Waterfall	3.9	3.9	n/a	4.7	3.2
Pressure Cleaner Booster	0.6	0.6	0.6	7.8	6.5
Integral Cartridge	n/a	n/a	0.3	n/a	n/a
Integral Sand	n/a	n/a	0.5	n/a	n/a

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new energy conservation standards on manufacturers of dedicated-purpose pool pumps. The next section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the direct final rule TSD explains the analysis in further detail.

a. Industry Cash-Flow Analysis Results

In this section, DOE provides results from the GRIM, which examines changes to the industry that would result from the analyzed standards. Table V-27 through Table V-29 illustrate the estimated financial impacts (represented by changes in INPV) of analyzed energy conservation standards on manufacturers of dedicated-purpose pool pumps, as well as the conversion costs that DOE

estimates DPPP manufacturers would incur at each TSL.

As discussed in section IV.J.2.d, DOE modeled three different manufacturer markup scenarios to evaluate a range of cash flow impacts on the DPPP industry: (1) The preservation of gross margin markup scenario, (2) the preservation of operating profit markup scenario, and (3) a two-tiered markup scenario. To assess the upper (less severe) bound on the range of potential impacts on DPPP manufacturers, DOE

modeled a preservation of gross margin markup scenario. This scenario assumes that in the standards cases, manufacturers would be able to pass along the higher production costs required for more efficient products to their consumers. Specifically, the industry would be able to maintain its no-standards case gross margin (as a percentage of revenue) for each equipment class despite the higher production costs in the standards cases.

To assess the lower (more severe) bound on the range of potential impacts on DPPP manufacturers, DOE modeled two additional manufacturer markup scenarios; a preservation of operating profit markup scenario and a two-tiered markup scenario. In the preservation of operating profit markup scenario manufacturers are not able to yield additional operating profit from higher production costs and the investments that are required to comply with new DPPP energy conservation standards, but instead are only able to maintain the same per-unit operating profit in the standards cases that was earned in the no-standards case. This scenario represents a potential lower bound on the range of impacts on manufacturers

because manufacturers are only able to maintain the operating profit, in dollars, that they would have earned in the no-standards case despite higher production costs and investments. Manufacturers must, therefore, reduce margins as a result of this manufacturer markup scenario, which reduces profitability.

DOE also modeled a two-tiered markup scenario as a potential lower (more severe) bound on the range of potential impacts on DPPP manufacturers. In this manufacturer markup scenario, manufacturers have two tiers of markups that are differentiated, in part, by efficiency level. Several manufacturers suggested that new standards would lead to a reduction in overall markups and could reduce their overall profitability. During manufacturer interviews, manufacturers stated that they have lower margins on self-priming pool filter pumps that use a variable-speed motor. DOE used this information to estimate manufacturer markups for self-priming pool filter pumps under a two-tiered pricing strategy in the no-standards case. In the standards cases, DOE modeled the situation in which standards result in

more variable-speed self-priming pool filter pumps being purchased by consumers. Since these products are modeled to have a lower manufacturer markup than the single- and two-speed self-priming pool filter pumps, the overall manufacturer markup declines and results in a lower overall manufacturer markup and reduction in profitability.

Each of the modeled scenarios results in a unique set of cash-flows and corresponding industry values at each TSL. In the following discussion, the INPV results refer to the difference in industry value between the no-standards case and each standards case resulting from the sum of discounted cash-flows from 2016 (the reference year) through 2050 (the end of the analysis period). To provide perspective on the short-run cash-flow impact, DOE includes in the discussion of results a comparison of free cash flow between the no-standards case and the standards case at each TSL in the year before new standards take effect.

Table V-27 through Table V-29 show the MIA results for each TSL using the manufacturer markup scenarios previously described.

TABLE V-27—MANUFACTURER IMPACT ANALYSIS FOR DEDICATED-PURPOSE POOL PUMPS UNDER THE PRESERVATION OF GROSS MARGIN MARKUP SCENARIO *

	Units	No-standards case	Trial standard level				
			1	2	3	4	5
INPV	2015(\$ MM)	212.8	209.0	197.8	219.8	195.9	110.5
Change in INPV	2015(\$ MM)		(3.7)	(15.0)	7.0	(16.9)	(102.3)
Change in INPV	%		(1.8)	(7.1)	3.3	(7.9)	(48.1)
Product Conversion Costs	2015(\$ MM)		11.7	29.8	30.8	61.7	116.3
Capital Conversion Costs	2015(\$ MM)		3.5	6.0	4.8	6.7	83.3
Total Investment Required	2015(\$ MM)		15.2	35.8	35.6	68.4	199.5

* INPV results do not trend monotonically due to the efficiency level composition. The efficiency levels for each TSL are depicted in Table V-1 in section V.A.

TABLE V-28—MANUFACTURER IMPACT ANALYSIS FOR DEDICATED-PURPOSE POOL PUMPS UNDER THE PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	No-standards case	Trial standard level				
			1	2	3	4	5
INPV	2015(\$ MM)	212.8	201.0	178.8	166.5	126.2	36.8
Change in INPV	2015(\$ MM)		(11.7)	(34.0)	(46.3)	(86.6)	(176.0)
Change in INPV	%		(5.5)	(16.0)	(21.8)	(40.7)	(82.7)
Product Conversion Costs	2015(\$ MM)		11.7	29.8	30.8	61.7	116.3
Capital Conversion Costs	2015(\$ MM)		3.5	6.0	4.8	6.7	83.3
Total Investment Required	2015(\$ MM)		15.2	35.8	35.6	68.4	199.5

TABLE V-29—MANUFACTURER IMPACT ANALYSIS FOR DEDICATED-PURPOSE POOL PUMPS UNDER THE TWO-TIERED MARKUP SCENARIO

	Units	No-standards case	Trial standard level				
			1	2	3	4	5
INPV	2015(\$ MM)	212.8	210.9	200.2	182.6	144.9	59.3

TABLE V-29—MANUFACTURER IMPACT ANALYSIS FOR DEDICATED-PURPOSE POOL PUMPS UNDER THE TWO-TIERED MARKUP SCENARIO—Continued

	Units	No-standards case	Trial standard level				
			1	2	3	4	5
Change in INPV	2015(\$ MM)	.....	(1.9)	(12.6)	(30.2)	(67.8)	(153.5)
Change in INPV .....	%	.....	(0.9)	(5.9)	(14.2)	(31.9)	(72.1)
Product Conversion Costs	2015(\$ MM)	.....	11.7	29.8	30.8	61.7	116.3
Capital Conversion Costs	2015(\$ MM)	.....	3.5	6.0	4.8	6.7	83.3
Total Investment Required	2015(\$ MM)	.....	15.2	35.8	35.6	68.4	199.5

At TSL 1, DOE estimates impacts on INPV range from –\$11.7 million to –\$1.9 million, or a change in INPV of –5.5 percent to –0.9 percent. At TSL 1, industry free cash-flow is expected to decrease by \$5.3 million to \$13.2 million, compared to the no-standards case value of \$18.5 million in 2020, the year leading up to the standards.

DOE estimates that 46 percent of all self-priming shipments, 67 percent of extra-small non-self-priming shipments, 71 percent of standard-size non-self-priming shipments, 87 percent of pressure cleaner booster shipments, 30 percent of waterfall shipments, 100 percent of integral cartridge filter shipments, and 100 percent of integral sand filter DPPP shipments would already meet or exceed the efficiency levels required at TSL 1 in the standards year. To bring non-compliant equipment into compliance, DOE expects DPPP manufacturers to incur \$11.7 million in product conversion costs for redesign and testing. In addition, DOE estimates manufacturers will incur \$3.5 million in capital conversion costs at TSL 1.

At TSL 1, the shipment-weighted average MPC for all dedicated-purpose pool pumps increases by 6.1 percent relative to the no-standards case shipment-weighted average MPC for all dedicated-purpose pool pumps in 2021, the year of compliance for new DPPP energy conservation standards. In the preservation of gross margin markup scenario, manufacturers are able to fully pass on this cost increase to consumers. The increase in shipment-weighted average MPC for all dedicated-purpose pool pumps is outweighed by the \$15.2 million in conversion costs, causing a slightly negative change in INPV at TSL 1 under the preservation of gross margin markup scenario.

Under the preservation of operating profit markup scenario, manufacturers earn the same operating profit as would be earned in the no-standards case, but manufacturers do not earn additional profit from their investments. The average manufacturer markup for both the preservation of operating profit and two-tiered markup scenarios is

calculated by averaging the DPPP industry manufacturer markup, for all DPPP equipment classes in aggregate, from the year of compliance (2021) until the terminal year (2050). In this preservation of operating profit markup scenario, the 6.1 percent increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps results in a slight reduction in average manufacturer markup, from 1.413 in the no-standards case to 1.409 at TSL 1. The slight reduction in average manufacturer markup and \$15.2 million in conversion costs causes a negative change in INPV at TSL 1 under the preservation of operating profit markup scenario.

Under the two-tiered markup scenario, where manufacturers earn lower markups for more efficient products, the average manufacturer markup increases from 1.409 in the no-standards case to 1.412 at TSL 1. The increase in the average manufacturer markup and the increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps are outweighed by the \$15.2 million in conversion costs, causing a slightly negative change in INPV at TSL 1 under the two-tiered markup scenario.

At TSL 2, DOE estimates impacts on INPV range from –\$34.0 million to –\$12.6 million, or a change in INPV of –16.0 percent to –5.9 percent. At TSL 2, industry free cash-flow is expected to decrease by \$11.9 million to \$6.6 million, compared to the no-standards case value of \$18.5 million in 2020, the year leading up to the standards.

DOE estimates that 32 percent of all self-priming shipments, 67 percent of extra-small non-self-priming shipments, 7 percent of standard-size non-self-priming shipments, 87 percent of pressure cleaner booster shipments, 30 percent of waterfall shipments, 100 percent of integral cartridge filter shipments, and 100 percent of integral sand filter pool pump shipments would already meet or exceed the efficiency levels required at TSL 2 in the standards year. To bring non-compliant equipment into compliance, DOE expects dedicated-purpose pool pump

manufacturers to incur \$29.8 million in product conversion costs for redesign and testing. In addition, DOE estimates manufacturers will incur \$6.0 million in capital conversion costs associated with TSL 2, to make investments in tooling and machinery required to incorporate the design options analyzed at TSL 2.

At TSL 2, the shipment-weighted average MPC for all dedicated-purpose pool pumps decreases by 3.4 percent relative to the no-standards case shipment-weighted average MPC for all dedicated-purpose pool pumps in 2021. At TSL 2, consumers will repair existing self-priming and non-self-priming pool pumps instead of replacing the entire pump, which reduces shipments in the standards year by 0.5 million compared to the no-standards case shipments. In the preservation of gross margin markup scenario, the decrease in the shipment-weighted average MPC for all dedicated-purpose pool pumps, the reduction in shipments, and the \$35.8 million in conversion costs, causes a negative change in INPV at TSL 2 under the preservation of gross margin markup scenario.

Under the preservation of operating profit markup scenario, the 3.4 percent decrease in the shipment-weighted average MPC for all dedicated-purpose pool pumps results in a reduction in average manufacturer markup, from 1.413 in the no-standards case to 1.399 at TSL 2. The reduction in average manufacturer markup, the reduction in shipments, and the \$35.8 million in conversion costs causes a negative change in INPV at TSL 2 under the preservation of operating profit markup scenario.

Under the two-tiered markup scenario, where manufacturers earn lower markups for more efficient products, the average manufacturer markup slightly increases from 1.409 in the no-standards case to 1.412 at TSL 2. The increase in the average manufacturer markup is outweighed by the reduction in shipments, and the \$35.8 million in conversion costs, causing a negative change in INPV at

TSL 2 under the two-tiered markup scenario.

At TSL 3, DOE estimates impacts on INPV range from $-\$46.3$ million to $\$7.0$ million, or a change in INPV of -21.8 percent to 3.3 percent. At TSL 3, industry free cash flow is expected to decrease by $\$11.9$ million to $\$6.6$ million, compared to the no-standards case value of $\$18.5$ million in 2020, the year leading up to the standards.

DOE estimates that 46 percent of small-size self-priming shipments, 30 percent of standard-size self-priming shipments, 67 percent of extra-small non-self-priming shipments, 71 percent of standard-size non-self-priming shipments, 87 percent of pressure cleaner booster shipments, 100 percent of waterfall shipments, 20 percent of integral cartridge filter shipments, and 20 percent of integral sand filter pool pump shipments would already meet or exceed the efficiency levels required at TSL 3 in the standards year. To bring non-compliant equipment into compliance, DOE expects DPPP manufacturers to incur $\$30.8$ million in product conversion costs for redesign and testing. In addition, DOE estimates manufacturers will incur $\$4.8$ million in capital conversion costs to make changes to machinery and tooling.

At TSL 3, the shipment-weighted average MPC for all dedicated-purpose pool pumps increases by 10.5 percent relative to the no-standards case shipment-weighted average MPC for all dedicated-purpose pool pumps in 2021. At TSL 3 consumers repair existing self-priming pool filter pumps instead of replacing the entire pump, which reduces shipments in the standards year by 0.3 million compared to the no-standards case shipments. In the preservation of gross margin markup scenario, the increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps outweighs the reduction in shipments in the standards year, and the $\$35.6$ million in conversion costs, which causes a slightly positive change in INPV at TSL 3 under the preservation of gross margin markup scenario.

Under the preservation of operating profit markup scenario, the 10.5 percent increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps results in a reduction in average manufacturer markup, from 1.413 in the no-standards case to 1.380 at TSL 3. The reduction in average manufacturer markup, the reduction in shipments, and $\$35.6$ million in conversion costs causes a negative change in INPV at TSL 3 under the preservation of operating profit markup scenario.

Under the two-tiered markup scenario, where manufacturers earn lower markups for more efficient products, the average manufacturer markup decreases from 1.409 in the no-standards case to 1.389 at TSL 3. The decrease in the average manufacturer markup, the reduction in shipments, and the $\$35.6$ million in conversion costs cause a negative change in INPV at TSL 3 under the two-tiered markup scenario.

At TSL 4, DOE estimates impacts on INPV range from $-\$86.6$ million to $-\$16.9$ million, or a change in INPV of -40.7 percent to -7.9 percent. At TSL 4, industry free cash-flow is expected to decrease by $\$23.1$ million to $-\$4.6$ million, compared to the no-standards case value of $\$18.5$ million in 2020, the year leading up to the standards.

DOE estimates that 30 percent of all self-priming shipments, 33 percent of extra-small non-self-priming shipments, 6 percent of standard-size non-self-priming shipments, 6 percent of pressure cleaner booster shipments, 10 percent of waterfall shipments, 100 percent of integral cartridge filter shipments and 100 percent of integral sand filter pool pump shipments would already meet or exceed the efficiency levels required at TSL 4 in the standards year. To bring non-compliant equipment into compliance, DOE expects DPPP manufacturers to incur $\$61.7$ million in product conversion costs for redesign and testing. In addition, DOE estimates manufacturers will incur $\$6.7$ million in capital conversion costs associated with TSL 4 to make changes to machinery and tooling.

At TSL 4, the shipment-weighted average MPC for all dedicated-purpose pool pumps increases by 39.4 percent relative to the no-standards case shipment-weighted average MPC for all dedicated-purpose pool pumps in 2021. At TSL 4, consumers repair existing self-priming, non-self-priming, and pressure cleaner booster pumps instead of replacing the entire pump, which reduces total shipments in the standards year by 0.6 million units compared to the no-standards case shipments. In the preservation of gross margin markup scenario, the increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps is outweighed by the reduction in shipments and the $\$68.4$ million in conversion costs, which causes a negative change in INPV at TSL 4 under the preservation of gross margin markup scenario.

Under the preservation of operating profit markup scenario, the 39.4 percent increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps results in a reduction in

average manufacturer markup, from 1.413 in the no-standards case to 1.367 at TSL 4. The reduction in average manufacturer markup, the reduction in shipments, and $\$68.4$ million in conversion costs causes a significantly negative change in INPV at TSL 4 under the preservation of operating profit markup scenario.

Under the two-tiered markup scenario, where manufacturers earn lower markups for more efficient products, the average manufacturer markup decreases from 1.409 in the no-standards case to 1.376 at TSL 4. The decrease in the average manufacturer markup, the reduction in shipments, and the $\$68.4$ million in conversion costs cause a significantly negative change in INPV at TSL 4 under the two-tiered markup scenario.

At TSL 5, DOE estimates impacts on INPV range from $-\$176.0$ million to $-\$102.3$ million, or a change in INPV of -82.7 percent to -48.1 percent. At TSL 5, industry free cash flow is expected to decrease by $\$79.3$ million to $-\$60.9$ million, compared to the no-standards case value of $\$18.5$ million in 2020, the year leading up to the standards.

DOE estimates that 19 percent of all self-priming shipments, 33 percent of extra-small non-self-priming shipments, 3 percent of standard-size non-self-priming shipments, 3 percent of pressure cleaner booster shipments, 0 percent of waterfall shipments, 100 percent of integral cartridge filter shipments and 100 percent of integral sand filter pool pump shipments would already meet the efficiency levels required at TSL 5 in the standards year. To bring non-compliant equipment into compliance, DOE expects dedicated-purpose pool pump manufacturers to incur $\$116.3$ million in product conversion costs for redesign and testing. In addition, DOE estimates manufacturers will incur $\$83.3$ million in capital conversion costs associated with TSL 5 to make changes to machinery and tooling.

At TSL 5, the shipment-weighted average MPC for all dedicated-purpose pool pumps increases by 39.4 percent relative to the no-standards case shipment-weighted average MPC for all dedicated-purpose pool pumps in 2021. At TSL 5, consumers repair existing self-priming, non-self-priming, and pressure cleaner booster pumps instead of replacing the entire pump, which reduces total shipments in the standards year by 0.6 million units compared to the no-standards case shipments. In the preservation of gross margin markup scenario, the increase in the shipment-weighted average MPC for all dedicated-

purpose pool pumps is outweighed by the reduction in shipments and the \$199.5 million in conversion costs, which causes a significantly negative change in INPV at TSL 5 under the preservation of gross margin markup scenario.

Under the preservation of operating profit markup scenario, the 39.4 percent increase in the shipment-weighted average MPC for all dedicated-purpose pool pumps results in a reduction in average manufacturer markup, from 1.413 in the no-standards case to 1.363 at TSL 5. The reduction in average manufacturer markup, the reduction in shipments, and \$199.5 million in conversion costs causes a significantly negative change in INPV at TSL 5 under the preservation of operating profit markup scenario.

Under the two-tiered markup scenario, where manufacturers earn lower markups for more efficient products, the average manufacturer markup decreases from 1.409 in the no-standards case to 1.375 at TSL 5. The decrease in the average manufacturer markup, the reduction in shipments, and the \$199.5 million in conversion costs cause a negative change in INPV at TSL 5 under the two-tiered markup scenario.

b. Impacts on Direct Employment

To quantitatively assess the impacts of new energy conservation standards on direct employment, DOE used the GRIM to estimate the domestic labor expenditures and number of employees in the no-standards case and at each TSL from 2016 through 2050. DOE used statistical data from the U.S. Census Bureau's 2014 *Annual Survey of Manufacturers (ASM)* and the results of the engineering analysis to calculate industry-wide labor expenditures and domestic employment levels. Labor expenditures related to equipment manufacturing depend on the labor intensity of the equipment, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in each year are calculated by multiplying the MPCs by the labor percentage of MPCs.

The total labor expenditures in the GRIM were then converted to domestic production employment levels by dividing production labor expenditures by the annual payment per production worker (production worker hours multiplied by the labor rate found in the *ASM*). The estimates of production workers in this section cover workers, including line supervisors, who are directly involved in fabricating and

assembling equipment within the original equipment manufacturer facility. Workers performing services that are closely associated with production operations, such as materials handling tasks using forklifts, are also included as production labor. DOE's production worker estimates only account for workers who manufacture the specific equipment covered by this rulemaking.

DOE calculated the total direct employment associated with the covered equipment by multiplying the number of production workers by the ratio of "number of employees" to "production workers average per year" calculated using the employment data in the 2014 *ASM*. Using the GRIM, DOE estimates there would be 101 domestic production workers for original equipment manufacturers in 2021 in the absence of new energy conservation standards. Using *ASM* data, DOE estimated 175 full-time employees work directly on the covered equipment. Table V-30 shows the range of the impacts of energy conservation standards on U.S. production on dedicated-purpose pool pumps. Additional detail on the analysis of direct employment can be found in chapter 12 of the direct final rule TSD.

TABLE V-30—TOTAL NUMBER OF DOMESTIC DEDICATED-PURPOSE POOL PUMP WORKERS IN 2021

	No-standards case	Trial standard level				
		1	2	3	4	5
Domestic Production Workers in 2021 (without changes in production locations)	101	101	80	94	78	78
Total Number of Domestic Employees in 2021	175	175	139	163	135	135
Potential Changes in Domestic Production Workers in 2021		(10)–0	(25)–(21)	(51)–(7)	(51)–(23)	(51)–(23)

The employment impacts shown in Table V-30 represent the potential employment changes that could result following the compliance date for dedicated-purpose pool pumps. The upper end of the results in the table (less severe) estimates the decline in employment due to the decrease in the number of DPPP's sold in 2021, as more customers repair their dedicated-purpose pool pumps instead of replacing them as they would in the no-standards case. This case assumes that manufacturers would continue to produce the same scope of covered equipment within the United States. The lower end of the range (more severe) represents the maximum potential decrease to employment due to production moving to lower labor-cost countries, in addition to the decrease in the number of DPPP's sold in 2021.

DOE estimated the lower end of the range based on manufacturer interviews. Manufacturers could move production abroad depending on the requirements of a standard for self-priming pool filter pumps. Based on the complexity of the motor technology used in dedicated-purpose pool pumps, either single-speed, two-speed, or variable-speed, DOE estimated that the number of domestic production workers could be reduced by 10 percent if standards were set at TSL 1 (represented by a single-speed motor for self-priming pool filter pumps), 25 percent if standards were set at TSL 2 (represented by a two-speed motor for self-priming pool filter pumps), and 50 percent if standards were set at TSL 3, TSL 4, or TSL 5 (represented by a variable-speed motor for self-priming pool filter pumps).

The direct employment impacts shown are independent of the

employment impacts from the broader U.S. economy, which are documented in the employment impact analysis found in chapter 16 of the direct final rule TSD.

c. Impacts on Manufacturing Capacity

DOE did not identify any significant capacity constraints for the design options being evaluated for this rulemaking. 46 percent of small-size self-priming, 30 percent of standard-size self-priming, 67 percent of extra-small non-self-priming, 71 percent of standard-size non-self-priming, 87 percent of pressure cleaner booster, 100 percent of waterfall, 20 percent of integral cartridge filter, and 20 percent of integral sand filter pool pump shipments already meet or exceed the adopted standard levels. In addition, the design options being evaluated are

widely available as products that are on the market today.

DOE believes there is a sufficient supply of variable-speed motors to be used in all standard-size self-priming pool filter pumps in 2021. Variable speed motors are used a wide variety of equipment, and dedicated-purpose pool pumps only represent a small fraction all the equipment that use variable speed motors. As such existing production lines can cope with the change in equipment offerings, and DOE does not expect the industry to experience capacity constraints due to the increase in demand of variable speed motors or for any other reason directly resulting from new energy conservation standards.

d. Impacts on Subgroups of Manufacturers

As discussed in section IV.J.1, using average cost assumptions to develop an industry cash-flow estimate may not be adequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche manufacturers, and manufacturers exhibiting a cost structure substantially different from the industry average could be affected disproportionately. DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics. Consequently, DOE identified small

business manufacturers as a subgroup for a separate impact analysis.

For the small business subgroup analysis, DOE applied the small business size standards published by the SBA to determine whether a company is considered a small business. The size standards are codified at 13 CFR part 121. To be categorized as a small business under NAICS code 333911, "Pump and Pumping Equipment Manufacturing," a DPPP manufacturer and its affiliates may employ a maximum of 750 employees. The 750-employee threshold includes all employees in a business' parent company and any other subsidiaries. Based on this classification, DOE identified five manufacturers that qualify as domestic small businesses. The small business subgroup analysis is discussed in section VII.B of this document and in chapter 12 of the direct final rule TSD.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves considering the cumulative impact of multiple DOE standards and the product-specific regulatory actions of other Federal agencies that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have

serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing equipment. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

Some DPPP manufacturers also make other products or equipment that could be subject to energy conservation standards set by DOE. DOE looks at these regulations that could affect DPPP manufacturers that will take effect approximately 3 years before or after the estimated 2021 compliance date or during the compliance period of the new energy conservation standards for DPPPs.

The compliance dates and expected industry conversion costs of relevant energy conservation standards are indicated in Table V–31. Also, included in the table are Federal regulations that have compliance dates beyond the three years before or after the DPPP compliance date.

TABLE V–31—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING DEDICATED-PURPOSE POOL PUMP MANUFACTURERS

Federal energy conservation standard	Number of manufacturers *	Number of manufacturers from today's rule **	Approximate standards year	Industry conversion costs (Millions \$)	Industry conversion costs/revenue ***
Small, Large, and Very Large Commercial Package Air Conditioning and Heating Equipment 81 FR 2420 (January 15, 2016)	13	1	2018	520.8 (2014\$)	4.9%.
Commercial Packaged Boilers 81 FR 15836 (March 24, 2016) †	45	1	2019	27.5 (2014\$)	2.3%.
Commercial Water Heaters 81 FR 34440 (May 31, 2016) †	25	1	2019	29.8 (2014\$)	3.0%.
Commercial Warm Air Furnaces 81 FR 2420 (January 15, 2016)	13	1	2019	7.5 to 22.2 (2014\$)	1.7%–5.2%.
Furnace Fans 79 FR 3813 (July 3, 2014) ...	38	1	2019	40.6 (2013\$)	1.6%.
Commercial Compressors 81 FR 40197 (June 21, 2016) †	40	1	2019	99.0–125.1 (2014\$)	3.1%–3.9%.
Commercial and Industrial Pumps 80 FR 17826 (January 26, 2016)	86	5	2020	81.2 (2014\$)	5.6%.
Residential Boilers 81 FR 2320 (January 15, 2016)	36	2	2021	2.5 (2014\$)	<1%.
Residential Furnace 80 FR 13120 (March 12, 2015) †	14	1	2021	55.0 (2013\$)	<1%.
Direct Heating Equipment and Residential Water Heaters 75 FR 20112 (April 16, 2010) ††	39	1	2015	17.5 (2009\$)	4.9%.
Residential Central Air Conditioners and Heat Pumps 76 FR 37408 (June 27, 2011) ††	39	4	2015	44.0 (2009\$)	0.1%.

TABLE V-31—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING DEDICATED-PURPOSE POOL PUMP MANUFACTURERS—Continued

Federal energy conservation standard	Number of manufacturers *	Number of manufacturers from today's rule **	Approximate standards year	Industry conversion costs (Millions \$)	Industry conversion costs/revenue ***
External Power Supplies 79 FR 7846 (February 10, 2014) ††	243	1	2016	43.4 (2012\$)	2.3%.
Walk-in Cooler and Walk-in Freezer Components 79 FR 32049 (June 3, 2014) ††	63	1	2017	33.6 (2012\$)	2.7%.

* This column presents the total number of manufacturers identified in the energy conservation standard rule contributing to cumulative regulatory burden.

** This column presents the number of manufacturers producing dedicated-purpose pool pumps that are also listed as manufacturers in the energy conservation standard contributing to cumulative regulatory burden.

*** This column presents conversion costs as a percentage of cumulative revenue for the industry during the conversion period. The conversion period is the timeframe over which manufacturers must make conversion cost investments and lasts from the announcement year of the final rule to the standards year of the final rule. This period typically ranges from 3 to 5 years, depending on the energy conservation standard.

† The final rule for this energy conservation standard has not been published. The compliance date and analysis of conversion costs have not been finalized at this time. If a value is provided for total industry conversion expense, this value represents an estimate from the NOPR or SNOPR.

†† Consistent with Chapter 12 of the TSD, DOE has assessed whether this rule will have significant impacts on manufacturers that are also subject to significant impacts from other EPCA rules with compliance dates within three years of this rule's compliance date. However, DOE recognizes that a manufacturer incurs costs during some period before a compliance date as it prepares to comply, such as by revising product designs and manufacturing processes, testing products, and preparing certifications. As such, to illustrate a broader set of rules that may also create additional burden on manufacturers, DOE has included another rule with compliance dates that fall within six years of the compliance date of this rule by expanding the timeframe of potential cumulative regulatory burden. Note that the inclusion of any given rule in this Table does not indicate that DOE considers the rule to contribute significantly to cumulative impact. DOE has chosen to broaden its list of rules in order to provide additional information about its rulemaking activities. DOE will continue to evaluate its approach to assessing cumulative regulatory burden for use in future rulemakings to ensure that it is effectively capturing the overlapping impacts of its regulations. DOE plans to seek public comment on the approaches it has used here (*i.e.*, both the 3 and 6 year timeframes from the compliance date) in order to better understand at what point in the compliance cycle manufacturers most experience the effects of cumulative and overlapping burden from the regulation of multiple products.

In addition to the Federal energy conservation standards listed in Table V-31, there are appliance standards in progress that do not yet have a proposed rule or final rule. The compliance date, manufacturer lists, and analysis of conversion costs are not available at this time. These appliance standards include pool heaters 80 FR 15922 (March 17, 2015), circulator pumps 80 FR 51483, (August 25, 2015), central air conditioners, and commercial and industrial fans and blowers.

During the working group negotiations manufacturers did not indicate that cumulative regulatory burden was a concern. In the DPPP Working Group meeting on April 19, 2016, DOE presented initial cumulative regulatory burden findings and provided interested parties the opportunity to comment. Interested parties did not identify any additional federal regulations. (Docket No. EERE-2015-BT-STD-0008-0079, April 19

DPPP Working Group Meeting, at p. 136) DOE identified one manufacturer that was affected by more federal regulations than other DPPP manufacturers.

DOE discusses these and other requirements and includes the full details of the cumulative regulatory burden analysis in chapter 12 of the direct final rule TSD. DOE will continue to evaluate its approach to assessing cumulative regulatory burden for use in future rulemakings to ensure that it is effectively capturing the overlapping impacts of its regulations. DOE plans to seek public comment on the approaches it has used here (*i.e.*, both the 3 and 6 year timeframes from the compliance date) in order to better understand at what point in the compliance cycle manufacturers most experience the effects of cumulative and overlapping burden from the regulation of multiple product classes.

3. National Impact Analysis

This section presents DOE's estimates of the national energy savings and the NPV of consumer benefits that would result from each of the TSLs considered as potential amended standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential standards for dedicated-purpose pool pumps, DOE compared their energy consumption under the no-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of equipment purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2021–2050). Table V-32 presents DOE's projections of the national energy savings for each TSL considered for pool pumps. The savings were calculated using the approach described in section IV.H.2 of this document.

TABLE V-32—CUMULATIVE NATIONAL ENERGY SAVINGS FOR POOL PUMPS; 30 YEARS OF SHIPMENTS [2021–2050]

	Trial standard level				
	1	2	3	4	5
	Quads				
Primary energy	0.75	2.9	3.6	3.9	4.4
FFC energy	0.79	3.0	3.8	4.1	4.6

OMB Circular A-4¹³³ requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A-4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using nine, rather than 30, years of

product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.¹³⁴ The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to dedicated-purpose pool pumps. Thus,

such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V-33. The impacts are counted over the lifetime of pool pumps purchased in 2021–2029.

TABLE V-33—CUMULATIVE NATIONAL ENERGY SAVINGS FOR POOL PUMPS; 9 YEARS OF SHIPMENTS
[2021–2029]

	Trial standard level				
	1	2	3	4	5
	Quads				
Primary energy	0.24	0.76	0.95	1.0	1.1
FFC energy	0.25	0.80	1.0	1.0	1.2

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for

consumers that would result from the TSLs considered for pool pumps. In accordance with OMB's guidelines on regulatory analysis,¹³⁵ DOE calculated NPV using both a 7-percent and a 3-

percent real discount rate. Table V-34 shows the consumer NPV results with impacts counted over the lifetime of equipment purchased in 2021–2050.

TABLE V-34—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR POOL PUMPS; 30 YEARS OF SHIPMENTS
[2021–2050]

Discount rate	Trial standard level (billion 2015\$)				
	1	2	3	4	5
3 percent	5.1	17	24	21	25
7 percent	2.5	8.1	11	10	12

The NPV results based on the aforementioned 9-year analytical period are presented in Table V-35. The impacts are counted over the lifetime of

equipment purchased in 2021–2029. As mentioned previously, such results are presented for informational purposes only and are not indicative of any

change in DOE's analytical methodology or decision criteria.

TABLE V-35—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR POOL PUMPS; 9 YEARS OF SHIPMENTS
[2021–2029]

Discount rate	Trial standard level (billion 2015\$)				
	1	2	3	4	5
3 percent	2.1	6.4	8.5	7.7	8.8
7 percent	1.3	4.2	5.6	5.0	5.7

The above results reflect the use of a default price trend to estimate the change in price for dedicated-purpose

pool pumps over the analysis period (see section IV.F.1 of this document). DOE also conducted a sensitivity

analysis that considered one scenario with a low price trend and one scenario with a high price trend. The results of

¹³³ U.S. Office of Management and Budget. *Circular A-4: Regulatory Analysis*. September 17, 2003. www.whitehouse.gov/omb/circulars_a004_a-4/.

¹³⁴ Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain equipment, a 3-year period after any new standard is promulgated before

compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6 year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis

period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some equipment, the compliance period is 5 years rather than 3 years.

¹³⁵ U.S. Office of Management and Budget. *Circular A-4: Regulatory Analysis*. September 17, 2003. www.whitehouse.gov/omb/circulars_a004_a-4/.

these alternative cases are presented in appendix 10C of the direct final rule TSD. In the high price case, the NPV of consumer benefits is lower than in the default case. In the low price case, the NPV of consumer benefits is higher than in the default case.

c. Indirect Impacts on Employment

DOE expects that energy conservation standards for dedicated-purpose pool pumps would reduce energy expenditures for consumers of those equipment, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term timeframes (2021–2026), where these uncertainties are reduced.

The results suggest that the adopted standards would be likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the direct final rule TSD

presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Equipment

As discussed in section IV.B.2 of this direct final rule, DOE has concluded that the standards adopted in this direct final rule would not lessen the utility or performance of the pool pumps under consideration in this rulemaking. Manufacturers of these equipment currently offer units that meet or exceed the adopted standards.

5. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a proposed standard. (42 U.S.C. 6313(a)(6)(B)(ii)(V)) Specifically, it instructs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard. DOE is simultaneously publishing a NOPR containing proposed energy conservation standards identical to those set forth in this direct final rule and has transmitted a copy of the rule and the accompanying TSD to the Attorney General, requesting that the DOJ provide its determination on this issue. DOE will consider DOJ's comments on the direct final rule in determining whether to proceed with

finalizing its standards. DOE will also publish and respond to the DOJ's comments in the **Federal Register** in a separate document.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, chapter 15 in the direct final rule TSD presents the estimated reduction in generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from potential energy conservation standards for dedicated-purpose pool pumps is expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V–36 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The emissions were calculated using the multipliers discussed in section IV.K. DOE reports annual emissions reductions for each TSL in chapter 13 of the direct final rule TSD.

TABLE V–36—CUMULATIVE EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

	Trial standard level				
	1	2	3	4	5
Power Sector Emissions					
CO ₂ (million metric tons)	40	152	192	205	233
SO ₂ (thousand tons)	30	115	145	155	176
NO _x (thousand tons)	22	82	103	110	125
Hg (tons)	0.10	0.39	0.50	0.53	0.60
CH ₄ (thousand tons)	4.2	16	20	22	25
N ₂ O (thousand tons)	0.61	2.3	2.9	3.1	3.5
Upstream Emissions					
CO ₂ (million metric tons)	2.2	8.3	11	11	13
SO ₂ (thousand tons)	0.26	0.99	1.2	1.3	1.5
NO _x (thousand tons)	32	122	154	165	188
Hg (tons)	0.00	0.00	0.00	0.00	0.00
CH ₄ (thousand tons)	196	749	948	1,013	1,155
N ₂ O (thousand tons)	0.01	0.06	0.07	0.07	0.08
Total FFC Emissions					
CO ₂ (million metric tons)	42	160	202	216	246
SO ₂ (thousand tons)	31	116	147	156	178
NO _x (thousand tons)	53	203	257	275	313
Hg (tons)	0.10	0.39	0.50	0.53	0.60
CH ₄ (thousand tons)	200	765	968	1,035	1,179

TABLE V-36—CUMULATIVE EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050—Continued

	Trial standard level				
	1	2	3	4	5
N ₂ O (thousand tons)	0.62	2.3	3.0	3.2	3.6

As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO₂ that DOE estimated for each of the considered TSLs for dedicated-purpose pool pumps. As discussed in section IV.L of this document, DOE used the most recent values for the SC-CO₂ developed by the interagency working group. The four sets of SC-CO₂ values

correspond to the average values from distributions that use a 5-percent discount rate, a 3-percent discount rate, and a 2.5-percent discount rate, and the 95th-percentile values from a distribution that uses a 3-percent discount rate. The actual SC-CO₂ values used for emissions in each year are presented in appendix 14A of the direct final rule TSD.

Table V-37 presents the global value of the CO₂ emissions reduction at each TSL. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values; these results are presented in chapter 14 of the direct final rule TSD. Table V-38 presents the annualized values for CO₂ emissions reduction at each TSL.

TABLE V-37—ESTIMATES OF PRESENT VALUE OF CO₂ EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	SCC case			
	5% Discount rate, average	3% Discount rate, average	2.5% Discount rate, average	3% Discount rate, 95th percentile
Billion 2015\$				
Total FFC Emissions				
1	327	1,442	2,269	4,388
2	1,207	5,385	8,496	16,402
3	1,524	6,804	10,734	20,724
4	1,624	7,256	11,450	22,104
5	1,841	8,242	13,011	25,113

TABLE V-38—ANNUALIZED VALUE OF CO₂ EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	SCC case			
	5% Discount rate, average	3% Discount rate, average	2.5% Discount rate, average	3% Discount rate, 95th percentile
Million 2015\$				
Total FFC Emissions				
1	26	83	120	252
2	95	309	448	942
3	121	391	566	1,190
4	128	417	604	1,269
5	146	473	686	1,442

As discussed in section IV.L.2, DOE estimated monetary benefits likely to result from the reduced emissions of methane and N₂O that DOE estimated for each of the considered TSLs for dedicated-purpose pool pumps. DOE

used the recent values for the SC-CH₄ and SC-N₂O developed by the interagency working group. Table V-39 presents the value of the CH₄ emissions reduction at each TSL, and Table V-40 presents the value of the N₂O emissions

reduction at each TSL. The annualized values for CH₄ and N₂O emissions reductions at each TSL are presented in Table V-40 and Table V-42, respectively.

TABLE V-39—PRESENT VALUE OF METHANE EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	SC-CH ₄ case			
	5% Discount rate, average	3% Discount rate, average	2.5% Discount rate, average	3% Discount rate, 95th percentile
	Billion 2015\$			
1	69	206	289	549
2	256	782	1,100	2,082
3	324	989	1,392	2,632
4	346	1,057	1,487	2,812
5	393	1,203	1,694	3,202

TABLE V-40—ANNUALIZED VALUE OF METHANE EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	SC-CH ₄ case			
	5% Discount rate, average	3% Discount rate, average	2.5% Discount rate, average	3% Discount rate, 95th percentile
	Million 2015\$			
1	5.4	12	15	32
2	20	45	58	120
3	26	57	73	151
4	27	61	78	161
5	31	69	89	184

TABLE V-41—PRESENT VALUE OF NITROUS OXIDE EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	SC-N ₂ O case			
	5% Discount rate, average	3% Discount rate, average	2.5% Discount rate, average	3% Discount rate, 95th percentile
	Billion 2015\$			
1	1.8	7.2	11	19
2	6.5	27	42	72
3	8.3	34	54	91
4	8.8	36	57	97
5	10	41	65	110

TABLE V-42—ANNUALIZED VALUE OF NITROUS OXIDE EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	SC-N ₂ O case			
	5% Discount rate, average	3% Discount rate, average	2.5% Discount rate, average	3% Discount rate, 95th percentile
	Million 2015\$			
1	0.14	0.41	0.60	1.1
2	0.52	1.6	2.2	4.1
3	0.65	2.0	2.8	5.2
4	0.70	2.1	3.0	5.6
5	0.79	2.4	3.4	6.3

DOE is well aware that scientific and economic knowledge about the contribution of CO₂ and other GHG emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed on reduced GHG emissions

in this rulemaking is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO₂ and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public

record for this and other rulemakings, as well as other methodological assumptions and issues. Consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this rule the most recent values resulting from the interagency review

process. DOE notes, however, that the adopted standards would be economically justified, as defined under EPCA, even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the economic benefits

associated with NO_x emissions reductions anticipated to result from the considered TSLs for dedicated-purpose pool pumps. The dollar-per-ton values that DOE used are discussed in section IV.L of this document. Table V-43 presents the present value for NO_x emissions reduction for each TSL

calculated using 7-percent and 3-percent discount rates. This table presents results that use the low benefit-per-ton values, which reflect DOE's primary estimate. Results that reflect the range of NO_x benefit-per-ton values are presented in Table V-45.

TABLE V-43—ESTIMATES OF PRESENT VALUE OF NO_x EMISSIONS REDUCTION FOR POOL PUMPS SHIPPED IN 2021–2050

TSL	3% Discount rate	7% Discount rate
	Billion 2015\$	
1	103	47
2	378	167
3	477	210
4	508	222
5	575	250

Note: Results are based on the low benefit-per-ton values.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII) and 6316(a)) No

other factors were considered in this analysis.

8. Summary of National Economic Impacts

Table V-44 presents the NPV values that result from adding the estimates of

the potential economic benefits resulting from reduced GHG and NO_x emissions to the NPV of consumer savings calculated for each TSL considered in this rulemaking≤

TABLE V-44—CONSUMER NPV COMBINED WITH PRESENT VALUE OF BENEFITS FROM EMISSIONS REDUCTIONS

TSL	Consumer NPV and low NO _x values at 3% discount rate added with:			
	GHG 5% discount rate, average case	GHG 3% discount rate, average case	GHG 2.5% discount rate, average case	GHG 3% discount rate, 95th percentile case
	Billion 2015\$			
1	5.6	6.8	7.7	10
2	19	23	27	36
3	26	32	36	48
4	24	30	35	47
5	28	35	41	54
TSL	Consumer NPV and low NO _x values at 7% discount rate added with:			
	GHG 5% discount rate, average case	GHG 3% discount rate, average case	GHG 2.5% discount rate, average case	GHG 3% discount rate, 95th percentile case
	Billion 2015\$			
1	2.9	4.2	5.1	7.5
2	9.7	14	18	27
3	13	19	24	35
4	12	19	23	35
5	14	22	27	41

Note: The GHG benefits include the estimated benefits for reductions in CO₂, CH₄, and N₂O emissions using the four sets of SC-CO₂, SC-CH₄, and SC-N₂O values developed by the interagency working group. See section IV.L.

The national operating cost savings are domestic U.S. monetary savings that occur as a result of purchasing the covered equipment, and are measured for the lifetime of equipment shipped in 2021–2050. The benefits associated with reduced GHG emissions achieved as a

result of the adopted standards are also calculated based on the lifetime of dedicated-purpose pool pumps shipped in 2021–2050. However, the CO₂ reduction is a benefit that accrues globally because CO₂ emissions have a very long residence time in the

atmosphere, the SC-CO₂ values for future emissions reflect climate-related impacts that continue through 2300.

C. Conclusion

When considering new energy conservation standards, the standards

that DOE adopts for any type (or class) of covered equipment must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 6316(a)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i) and 6316(a)) The new standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B) and 6316(a))

For this direct final rule, DOE considered the impacts of potential standards for pool pumps at each TSL, beginning with the maximum

technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified, as defined under EPCA, and saves a significant amount of energy.

To aid the reader, as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be

disproportionately affected by a national standard and impacts on employment.

1. Benefits and Burdens of TSLs Considered for Dedicated-Purpose Pool Pumps

Table V–45 and Table V–46 summarize the quantitative impacts estimated for each TSL for pool pumps. The national impacts are measured over the lifetime of dedicated-purpose pool pumps purchased in the 30-year period that begins in the anticipated year of compliance with new standards (2021–2050). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section V.A of this direct final rule.

TABLE V–45—SUMMARY OF ANALYTICAL RESULTS FOR POOL PUMPS TSLs: NATIONAL IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Cumulative FFC National Energy Savings (quads)					
	0.79	3.0	3.8	4.1	4.6.
NPV of Consumer Costs and Benefits (billion 2015\$)					
3% discount rate	5.1	17	24	21	25.
7% discount rate	2.5	8.1	11	10	12.
Cumulative FFC Emissions Reduction					
CO ₂ (million metric tons)	42	160	202	216	246.
SO ₂ (thousand tons)	31	116	147	156	178.
NO _x (thousand tons)	53	203	257	275	313.
Hg (tons)	0.10	0.39	0.50	0.53	0.60.
CH ₄ (thousand tons)	200	765	968	1,035	1,179.
N ₂ O (thousand tons)	0.62	2.3	3.0	3.2	3.6.
Value of Emissions Reduction					
CO ₂ (billion 2015\$) *	0.327 to 4.388	1.207 to 16.402 ..	1.524 to 20.724 ..	1.624 to 22.104 ..	1.841 to 25.113.
CH ₄ (billion 2015\$)	0.069 to 0.549	0.256 to 2.082	0.324 to 2.632	0.346 to 2.812	0.393 to 3.202.
N ₂ O (billion 2015\$)	0.002 to 0.019	0.007 to 0.072	0.008 to 0.091	0.009 to 0.097	0.010 to 0.110.
NO _x —3% discount rate (billion 2015\$)	0.103 to 0.231	0.378 to 0.851	0.477 to 1.075	0.508 to 1.144	0.575 to 1.297.
NO _x —7% discount rate (billion 2015\$)	0.047 to 0.106	0.167 to 0.377	0.210 to 0.475	0.222 to 0.503	0.25 to 0.566.

Parentheses indicate negative (–) values.

* Range of the economic value of CO₂ reductions is based on estimates of the global benefit of reduced CO₂ emissions.

TABLE V–46—SUMMARY OF ANALYTICAL RESULTS FOR POOL PUMPS TSLs: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1 *	TSL 2 *	TSL 3 *	TSL 4 *	TSL 5 *
Manufacturer Impacts					
Industry NPV (million 2015\$) (No-standards case INPV = \$212.8)	201.0–210.9	178.8–200.2	166.5–219.8	126.2–195.9	36.8–110.5
Industry NPV (% change)	(5.5)–(0.9)	(16.0)–(5.9)	(21.8)–3.3	(40.7)–(7.9)	(82.7)–(48.1)
Consumer Average LCC Savings (2015\$)					
Standard-Size Self-Priming Pool Filter Pump	669	1,779	2,140	2,140	2,085
Small-Size Self-Priming Pool Filter Pump	295	322	295	360	414
Standard-Size Non-Self-Priming Pool Filter Pump	191	35	191	10	93
Extra-Small Non-Self-Priming Pool Filter Pump	36	36	36	10	10
Waterfall Pump	(3)	(3)	n/a	(20)	13
Pressure Cleaner Booster Pump	111	111	111	(372)	(313)
Integral Cartridge Filter Pump	n/a	n/a	128	n/a	n/a

TABLE V-46—SUMMARY OF ANALYTICAL RESULTS FOR POOL PUMPS TSLs: MANUFACTURER AND CONSUMER IMPACTS—Continued

Category	TSL 1 *	TSL 2 *	TSL 3 *	TSL 4 *	TSL 5 *
Integral Sand Filter Pump	n/a	n/a	73	n/a	n/a
Consumer Simple PBP (years)					
Standard-Size Self-Priming Pool Filter Pump	0.6	0.7	0.7	0.7	0.6
Small-Size Self-Priming Pool Filter Pump	0.8	2.0	0.8	2.1	1.9
Standard-Size Non-Self-Priming Pool Filter Pump	0.2	2.3	0.2	2.3	2.1
Extra-Small Non-Self-Priming Pool Filter Pump	0.9	0.9	0.9	1.6	1.6
Waterfall Pumps	4.5	4.5	n/a	5.4	3.7
Pressure Cleaner Booster Pumps	0.6	0.6	0.6	6.0	5.1
Integral Cartridge Filter Pump	n/a	n/a	0.4	n/a	n/a
Integral Sand Filter Pump	n/a	n/a	0.5	n/a	n/a
Percent of Consumers That Experience a Net Cost (%)					
Standard-Size Self-Priming Pool Filter Pump	1	5	10	10	8
Small-Size Self-Priming Pool Filter Pump	4	27	4	29	26
Standard-Size Non-Self-Priming Pool Filter Pump	0	58	0	51	47
Extra-Small Non-Self-Priming Pool Filter Pump	4	4	4	39	39
Waterfall Pumps	50	50	n/a	70	55
Pressure Cleaner Booster Pumps	0	0	0	69	68
Integral Cartridge Filter Pump	n/a	n/a	3	n/a	n/a
Integral Sand Filter Pump	n/a	n/a	3	n/a	n/a

* Parentheses indicate negative (–) values.

DOE first considered TSL 5, which represents the max-tech efficiency levels. TSL 5 would save an estimated 4.6 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be \$12 billion using a discount rate of 7 percent, and \$25 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 246 Mt of CO₂; 178 thousand tons of SO₂; 313 thousand tons of NO_x; 0.60 tons of Hg; 1,179 thousand tons of CH₄; and 3.6 thousand tons of N₂O. The estimated monetary value of the GHG emissions reduction at TSL 5 ranges from \$1.8 billion to \$25 billion for CO₂, from \$393 million to 3,202 million for CH₄, and from \$10 million to \$110 million for N₂O. The estimated monetary value of the NO_x emissions reduction at TSL 5 is \$250 million using a 7-percent discount rate and \$575 million using a 3-percent discount rate.

At TSL 5, the average LCC impact is a savings that ranges from \$10 for extra-small non-self-priming pumps, to \$2,085 for standard-size self-priming pump, except for pressure cleaner booster pumps, which have a savings of negative \$313. The simple payback period ranges from 0.6 years for standard-size self-priming pumps to 5.1 years for pressure cleaner booster pumps. The fraction of consumers experiencing a net LCC cost ranges from eight percent for standard-size self-priming pumps to 68 percent for pressure cleaner booster pumps.

At TSL 5, the projected change in INPV ranges from a decrease of \$176.0 million to a decrease of \$102.3 million, which correspond to decreases of 82.7 percent and 48.1 percent, respectively. DOE estimates that industry must invest \$199.5 million to comply with standards set at TSL 5. Manufacturers would need to redesign a significant portion of the equipment they offer, including hydraulic redesigns to convert the vast majority of their standard-size self-priming pool filter pumps.

The Secretary concludes that at TSL 5 for dedicated-purpose pool pumps, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on some consumers, and the significant impacts on manufacturers, including the large conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has concluded that TSL 5 is not economically justified.

DOE then considered TSL 4, which represents efficiency levels based on variable speed technology for most equipment classes. TSL 4 would save an estimated 4.1 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be \$10 billion using a discount rate of 7 percent, and \$21 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 216 Mt of CO₂, 156

thousand tons of SO₂, 275 thousand tons of NO_x, 0.53 tons of Hg, 1,035 thousand tons of CH₄, and 3.2 thousand tons of N₂O. The estimated monetary value of the GHG emissions reduction at TSL 4 ranges from \$1.6 billion to \$22 billion for CO₂, from \$346 million to \$2,812 million for CH₄, and from \$8.8 million to \$97 million for N₂O. The estimated monetary value of the NO_x emissions reduction at TSL 4 is \$222 million using a 7-percent discount rate and \$508 million using a 3-percent discount rate.

At TSL 4, the average LCC impact is a savings that ranges from \$10 for extra-small non-self-priming pumps, to \$2,140 for standard-size self-priming pumps, except for pressure cleaner booster pumps, which have a savings of negative \$372, and waterfall pumps, which have a savings of negative \$20. The simple payback period ranges from 0.7 years for standard-size self-priming pumps to 6.0 years for pressure cleaner booster pumps. The fraction of consumers experiencing a net LCC cost ranges from 10 percent for standard-size self-priming pumps to 70 percent for waterfall pumps.

At TSL 4, the projected change in INPV ranges from a decrease of \$86.6 million to a decrease of \$16.9 million, which correspond to decreases of 40.7 percent and 7.9 percent, respectively. DOE estimates that industry must invest \$68.4 million to comply with standards set at TSL 4.

The Secretary concludes that at TSL 4 for dedicated-purpose pool pumps,

the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions, would be outweighed by the economic burden on some consumers, and the significant impacts on manufacturers, including the large conversion costs and profit margin impacts that could result in a large reduction in INPV.

Consequently, the Secretary has concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, the recommended TSL, which would save an estimated 3.8 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be \$11 billion using a discount rate of 7 percent, and \$24 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 202 Mt of CO₂; 147 thousand tons of SO₂; 257 thousand tons of NO_x, 0.50 tons of Hg, 968 thousand tons of CH₄; and 3.0 thousand tons of N₂O. The estimated monetary value of the GHG emissions reduction at TSL 3 ranges from \$1.5 billion to \$21 billion for CO₂, from \$324 million to

\$2,632 million for CH₄, and from \$8.3 million to \$91 million for N₂O. The estimated monetary value of the NO_x emissions reduction at TSL 3 is \$210 million using a 7-percent discount rate and \$477 million using a 3-percent discount rate.

At TSL 3, the average LCC impact is a savings that ranges from \$36 for extra-small non-self-priming pool filter pumps to \$2,140 for standard-size self-priming pumps. The simple payback period ranges from 0.2 years for standard-size non-self-priming pool filter pumps to 0.8 years for extra-small non-self-priming pool filter pumps. The fraction of consumers experiencing a net LCC cost ranges from zero percent for standard-size non-self-priming pumps and pressure cleaner booster pumps to 10 percent for standard-size self-priming pumps.

At TSL 3, the projected change in INPV ranges from a decrease of \$46.3 million to an increase of \$7.0 million, which represents a decrease of 21.8 percent to an increase of 3.3 percent, respectively. DOE estimates that industry must invest \$35.6 million to comply with standards set at TSL 3.

After considering the analysis and weighing the benefits and burdens, the Secretary has concluded that, at TSL 3 for dedicated-purpose pool pumps, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings, would outweigh the potential negative impacts on manufacturers. Accordingly, the Secretary has concluded that TSL 3 would offer the maximum improvement in efficiency that is technologically feasible and economically justified, as defined under EPCA, and would result in the significant conservation of energy.

Therefore, based on the above considerations, as well as those discussed in section III.A, DOE adopts the energy conservation standards for pool pumps at TSL 3. The new performance-based energy conservation standards for pool pumps, which are expressed as kgal/kWh, are shown in Table V-47. The new prescriptive energy conservation standards for pool pumps are shown in Table V-48.

TABLE V-47—ADOPTED PERFORMANCE-BASED ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class			Minimum allowable WEF score [kgal/kwh]
Dedicated-purpose pool pump variety	hhp applicability *	Motor phase	
Self-priming pool filter pumps	0.711 hp ≤ hhp < 2.5 hp	Single	− 2.30 * ln (hhp) + 6.59.
Self-priming pool filter pumps	hhp < 0.711 hp	Single	5.55, for hhp ≤ 0.13 hp − 1.30 * ln (hhp) + 2.90, for hhp > 0.13 hp.
Non-self-priming pool filter pumps**.	hhp < 2.5 hp	Any	4.60, for hhp ≤ 0.13 hp − 0.85 * ln (hhp) + 2.87, for hhp > 0.13 hp.
Pressure cleaner booster pumps ...	Any	Any	0.42.

* All instances of hhp refer to rated hydraulic horsepower as determined in accordance with the DOE test procedure at 10 CFR 431.464 and applicable sampling plans.

** Because DOE selected the same efficiency level for both extra-small and standard-size non-self-priming pool filter pumps, the two equipment classes were ultimately merged into one.

TABLE V-48—ADOPTED PRESCRIPTIVE ENERGY CONSERVATION STANDARDS FOR DEDICATED-PURPOSE POOL PUMPS

Equipment class			Prescriptive standard
Dedicated-purpose pool pump variety	hhp applicability *	Motor phase	
Integral sand filter pool pump	Any	Any	Must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.
Integral cartridge filter pool pump ..	Any	Any	Must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.

2. Annualized Benefits and Costs of the Adopted Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national

economic value (expressed in 2015\$) of the benefits from operating equipment that meet the adopted standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and

(2) the annualized monetary value of the benefits of GHG and NO_x emission reductions.

Table V-49 shows the annualized values for dedicated-purpose pool pumps under TSL 3, expressed in

2015\$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for benefits and costs other than GHG reduction (for which DOE used average social costs with a 3-percent discount rate),¹³⁶ the estimated cost of the standards in this rule is \$138 million per year in increased equipment costs,

while the estimated annual benefits are \$1.3 billion in reduced equipment operating costs, \$449 million in GHG reductions, and \$22 million in reduced NO_x emissions. In this case, the net benefit amounts to \$1.7 billion per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the adopted standards for dedicated-

purpose pool pumps is \$149 million per year in increased equipment costs, while the estimated annual benefits are \$1.5 billion in reduced operating costs, \$449 million in CO₂ reductions, and \$27 million in reduced NO_x emissions. In this case, the net benefit amounts to \$1.8 billion per year.

TABLE V-49—ANNUALIZED BENEFITS AND COSTS OF ADOPTED STANDARDS (TSL 3) FOR DEDICATED-PURPOSE POOL PUMPS

	Discount rate (%)	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
Million 2015\$/year				
Benefits				
Consumer Operating Cost Savings	7	1,340	1,221	1,467
	3	1,516	1,367	1,678
GHG Reduction (using avg. social costs at 5% discount rate)**	5	147	129	164
GHG Reduction (using avg. social costs at 3% discount rate)**	3	449	392	504
GHG Reduction (using avg. social costs at 2.5% discount rate)**	2.5	642	560	721.
GHG Reduction (using 95th percentile social costs at 3% discount rate)**	3	1,346	1,175	1,510.
NO _x Reduction †	7%	22	20	55.
	3%	27	24	70.
Total Benefits ‡	7% plus GHG range ..	1,509 to 2,708	1,369 to 2,416	1,686 to 3,032.
	7%	1,811	1,633	2,026.
	3% plus GHG range ..	1,690 to 2,890	1,520 to 2,566	1,912 to 3,258.
	3%	1,993	1,783	2,252.
Costs *				
Consumer Incremental Equipment Costs	7%	138	124	151.
	3%	149	133	164.
Manufacturer Conversion Costs ††	7%	3	3	3.
	3%	2	2	2.
Net Benefits				
Total ‡	7% plus GHG range ..	1,371 to 2,570	1,245 to 2,292	1,535 to 2,881.
	7%	1,673	1,509	1,875.
	3% plus GHG range ..	1,542 to 2,741	1,387 to 2,433	1,748 to 3,094.
	3%	1,844	1,651	2,088.

* This table presents the annualized costs and benefits associated with pool pumps shipped in 2021–2050. These results include benefits to consumers which accrue after 2050 from the pool pumps purchased from 2021–2050. The incremental equipment costs include incremental equipment cost as well as installation costs. The costs account for the incremental variable and fixed costs incurred by manufacturers due to the adopted standards, some of which may be incurred in preparation for the rule. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices and real GDP from the *AEQ2016 No-CPP* case, a Low Economic Growth case, and a High Economic Growth case, respectively. In addition, incremental product costs reflect the default price trend in the Primary Estimate, a high price trend in the Low Benefits Estimate, and a low price trend in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F.1. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

** The interagency group selected four sets of SC-CO₂, SC-CH₄, and SC-N₂O values for use in regulatory analyses. Three sets of values are based on the average social costs from the integrated assessment models, at discount rates of 5 percent, 3 percent, and 2.5 percent. The fourth set, which represents the 95th percentile of the social cost distributions calculated using a 3-percent discount rate, is included to represent higher-than-expected impacts from climate change further out in the tails of the social cost distributions. The social cost values are emission year specific. The GHG reduction benefits are global benefits due to actions that occur nationally. See section IV.L for more details.

† DOE estimated the monetized value of NO_x emissions reductions associated with electricity savings using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.) See section IV.L.3 for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used national benefit-per-ton estimates for NO_x emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). For the High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.* 2011); these are nearly two-and-a-half times larger than those from the ACS study.

¹³⁶ DOE used average social costs with a 3-percent discount rate these values are considered as the "central" estimates by the interagency group.

‡ Total Benefits for both the 3-percent and 7-percent cases are presented using the average social costs with 3-percent discount rate. In the rows labeled “7% plus GHG range” and “3% plus GHG range,” the operating cost and NO_x benefits are calculated using the labeled discount rate, and those values are added to the full range of social cost values.

†† Manufacturers are estimated to incur \$35.6 million in conversion costs between 2017 and 2020.

VI. Other Prescriptive Requirements

As part of the DPPP Working Group’s extended charter, the DPPP Working Group considered requirements for pumps distributed in commerce with freeze protection controls. (Docket No. EERE–2013–BT–NOC–0005, No. 71 at pp. 20–52) Freeze protection controls, as defined in the test procedure final rule, are controls that, at certain ambient temperature, turn on the dedicated-purpose pool pump to circulate water for a period of time to prevent the pool and water in plumbing from freezing. As the control schemes for freeze protection vary widely between manufacturers, the resultant energy consumption associated with such control can also vary depending on control settings and climate. To ensure freeze protection controls on dedicated-purpose pool pumps only operate when necessary and do not result in unnecessary energy use, the DPPP Working Group discussed two different approaches for regulating freeze protection controls: (1) Regulation by incorporating freeze protection into the WEF metric, and (2) regulation with a prescriptive standard. Several DPPP Working Group members commented that regulation by prescriptive standard would be the simplest approach, since it would not involve revision of the WEF metric that the DPPP Working Group previously recommended. The DPPP Working Group reached consensus that freeze protection should be regulated by prescriptive standard. (Docket No. EERE–2015–BT–STD–0008–0079, April 19 DPPP Working Group Meeting, at pp. 148)

The CA IOUs suggested that the prescriptive standard prescribe the default settings for trigger temperature, run time, and operation speed that would be pre-programmed into freeze-protection-enabled dedicated-purpose pool pumps at the time of shipment. The CA IOUs commented that models with default settings of 42 degrees Fahrenheit, 12 hours of run time, and high-speed operation result in unnecessary energy use. The CA IOUs proposed that freeze-protection-enabled pumps either ship with freeze protection disabled or ship with default settings with maximums of 39 degrees Fahrenheit, 30 minutes of run time, and a half-speed operation. Hayward and Pentair commented that the suggested default settings were too restrictive and may cause end users to experience

frozen piping. Pentair proposed default freeze protection settings with a trigger temperature of 40 degrees Fahrenheit and a run time of one hour. The DPPP Working Group agreed to these amended settings. (Docket No. EERE–2015–BT–STD–0008–0101, May 19 DPPP Working Group Meeting, at pp. 93–104)

Ultimately, the DPPP Working Group recommended establishing prescriptive requirements for dedicated-purpose pool pumps that are distributed in commerce with freeze protection controls. Specifically, the DPPP Working Group made the following recommendation, which it purports to maintain end-user utility while also reducing energy consumption:

All dedicated-purpose pool pumps distributed in commerce with freeze protection controls must be shipped either with freeze protection disabled, or with the following default, user-adjustable settings: (1) The *default* dry-bulb air temperature setting is no greater than 40 °F; and (2) the *default* run time setting shall be no greater than 1 hour (before the temperature is rechecked); and (3) the *default* motor speed shall not be more than half of the maximum available speed. *Id.* (Docket No. EERE–2015–BT–STD–0008, No. 82, Recommendation #6A at p. 4). DOE agrees with the DPPP Working Group’s reasoning, and given the considerations discussed in section III.A, DOE adopts the recommended prescriptive standard for dedicated-purpose pool pumps distributed in commerce with freeze protection controls.

VII. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Section 1(b)(1) of Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that the adopted standards for dedicated-purpose pool pumps are intended to address are as follows:

(1) Insufficient information and the high costs of gathering and analyzing relevant information leads some consumers to miss opportunities to

make cost-effective investments in energy efficiency.

In some cases the benefits of more efficient equipment are not realized due to misaligned incentives between purchasers and users. An example of such a case is when the equipment purchase decision is made by a building contractor or building owner who does not pay the energy costs.

There are external benefits resulting from improved energy efficiency of products and equipment that are not captured by the users of such equipment. These benefits include externalities related to public health, environmental protection and national energy security that are not reflected in energy prices, such as reduced emissions of air pollutants and greenhouse gases that impact human health and global warming. DOE attempts to qualify some of the external benefits through use of social cost of carbon values.

The Administrator of the Office of Information and Regulatory Affairs (OIRA) in the OMB has determined that the regulatory action in this direct final rule is a significant regulatory action under section (3)(f) of Executive Order 12866. Accordingly, pursuant to section 6(a)(3)(B) of the Order, DOE has provided to OIRA: (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and (ii) an assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate. DOE has included these documents in the rulemaking record.

In addition, the Administrator of OIRA has determined that the regulatory action is an “economically” significant regulatory action under section (3)(f)(1) of Executive Order 12866. Accordingly, pursuant to section 6(a)(3)(C) of the Order, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable

to the identified potential alternatives. These assessments can be found in the direct final rule TSD.

DOE also has reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011. 76 FR 3281, Jan. 21, 2011. E.O. 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in E.O. 12866. To the extent permitted by law, agencies are required by E.O. 13563 to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, OIRA has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. In response to this guidance, DOE will conduct a retrospective review of the seven EPCA statutory factors that DOE evaluated to determine that the energy conservation standards in this direct final rule were economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)(VII)) and 6316(a)). For example, DOE's review will seek to verify the projected manufacturer impacts following compliance with the rule by comparing the estimated product conversion costs and industry net present value to the actual costs. Other parts of the review will cover the estimated impacts on consumers by assessing the accuracy of the assumed pool pump operating hours in order to

update, as necessary, the estimated consumer energy savings, lifecycle savings, and payback period estimates associated with this direct final rule. DOE's review will investigate any potential utility or consumer welfare impacts that may not have been quantified in the engineering cost analysis. DOE's research will cover publicly available information, but will also consist of a survey of manufacturers and pool owners to assess the agency's assumptions. DOE will conduct this retrospective review of this direct final rulemaking prior to issuing any future revised energy efficiency standards for this product category.

For the reasons stated in the preamble, this direct final rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (<http://energy.gov/gc/office-general-counsel>). DOE has prepared the following IRFA for the equipment that are the subject of this rulemaking.

1. Description of Reasons Why Action Is Being Considered

Currently, no Federal energy conservation standards exist for dedicated-purpose pool pumps. DOE excluded this category of pumps from its recent consensus-based energy conservation standard final rule for general pumps. 81 FR 4368 (January 26, 2016). That final rule, which was the product of a pumps working group that had been created through the ASRAC, examined a variety of pump categories. While dedicated-purpose pool pumps were one of the pump categories that were considered during the working

group's discussions, the working group ultimately recommended that DOE initiate a separate rulemaking for dedicated-purpose pool pumps. (Docket No. EERE-2013-BT-NOC-0039, No. 0092 at p. 2)

2. Objectives of, and Legal Basis for, the Rule

Title III, Part C¹³⁷ of the Energy Policy and Conservation Act of 1975 (EPCA), (42 U.S.C. 6311–6317, as codified) established the Energy Conservation Program for Certain Industrial Equipment, a program covering certain industrial equipment.¹³⁸ "Pumps" are listed as a type of covered industrial equipment. (42 U.S.C. 6311(1)(A))

While pumps are listed as a type of covered equipment, EPCA does not define the term "pump." To address this, in January 2016, DOE published a test procedure final rule (January 2016 general pumps test procedure final rule) that established a definition for the term "pump." 81 FR 4086, 4147 (January 25, 2016). Dedicated-purpose pool pumps meet the definition of "pump" and are therefore a category of pump.

3. Description and Estimate of the Number of Small Entities Affected

a. Methodology for Estimating the Number of Small Entities

For manufacturers of dedicated-purpose pool pumps, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as "small businesses" for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of this rule. The size standards are codified at 13 CFR part 121. The standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at: www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

DPPP manufacturing is classified under NAICS 333911, pump and pumping equipment manufacturing. The SBA sets a threshold of 750 employees or fewer for an entity to be considered a small business for this category.

DOE reviewed the potential standard levels considered in this direct final rule under the provisions of the Regulatory

¹³⁷ For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

¹³⁸ All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015).

Flexibility Act and the procedures and policies published on February 19, 2003. During its market survey, DOE used publicly available information, such as databases from the CEC, APSP, and ENERY STAR; individual company Web sites; and market research tools (e.g., Hoover's reports) to create a list of companies that manufacture dedicated-purpose pool pumps covered by this direct final rule. During manufacturer interviews, DOE also asked stakeholders and industry representatives if they were aware of any additional small manufacturers. DOE then reviewed the list of companies manufacturing equipment covered by this direct final rule, used publicly available data sources (e.g., Hoovers,¹³⁹ Cortera,¹⁴⁰ LinkedIn,¹⁴¹ etc.), and direct contact with various companies to determine if they met the SBA's definition of a small business manufacturer. DOE screened out companies that do not offer equipment affected by this direct final rule, do not meet the definition of a "small business," are foreign owned and operated, or do not manufacture dedicated-purpose pool pumps in the United States.

DOE identified 21 manufacturers of dedicated-purpose pool pumps products affected by this rulemaking. Of these, DOE identified five as domestic small businesses.

b. Manufacturer Participation

DOE contacted the five identified small businesses and invited them to take part in a manufacturer impact analysis interview. Of the small businesses contacted, DOE was able to discuss potential standards with one. DOE also obtained information about small businesses and potential impacts on small businesses while interviewing large manufacturers.

c. Dedicated-Purpose Pool Pump Industry Structure and Nature of Competition

Self-priming pool filter pumps account for approximately 65 percent of manufacturer revenues in the dedicated-purpose pool pump industry. Three manufacturers have approximately 75 percent of all self-priming pool filter pump models in the market, which accounts for approximately 90 percent of shipments. None of these three major manufacturers are small businesses. Besides the three major manufacturers, DOE identified twelve other manufacturers that make self-priming

pool filter pumps, including all five small businesses.

The same three manufacturers that control the majority of the self-priming pool filter pump market also control the majority of the standard-size non-self-priming pool filter pump, pressure cleaner booster pump, and waterfall pump market. Manufacturer revenues for these equipment classes are substantially smaller than revenues for the self-priming pool filter pump equipment classes. One small business only makes standard-size self-priming pool filter pumps; three small businesses make small-size self-priming, standard-size self-priming pool filter pumps, and standard-size non-self-priming pool filter pumps; and one small business makes small-size self-priming, standard-size self-priming, standard-size non-self-priming, and pressure cleaner booster pumps.

The large majority of integral cartridge filter pool pumps, integral sand filter pool pumps, and extra-small non-self-priming pool filter pumps market is controlled by manufacturers that focus on seasonal pools, such as inflatable or collapsible frame pools. These manufacturers typically design dedicated-purpose pool pumps and have them manufactured overseas. DOE did not identify any small businesses that manufacture integral cartridge-filter pool pumps and integral sand filter pool pumps, since this equipment is imported from China.

4. Description of Compliance Requirements

As previously stated, DOE identified five small DPPP manufacturers. The small manufacturers make small-size self-priming, standard-size self-priming, standard-size non-self-priming, and pressure cleaner booster pumps. Accordingly, this analysis of small business impacts focuses exclusively on these equipment classes.

To evaluate impacts facing manufacturers of dedicated-purpose pool pumps, DOE estimated both the capital conversion costs (i.e., investments in property, plant, and equipment) and product conversion costs (i.e., expenditures on R&D, testing, marketing, and other non-depreciable expense) manufacturers would incur to bring their manufacturing facilities and product designs into compliance with adopted standards. As outlined in section IV.C and in chapter 5 of the direct final rule TSD, the design options analyzed to comply with the adopted energy conservation standards include changing the motor to either variable-speed for standard-size self-priming pool filter pumps, or a more efficient

single-speed motor for small-size self-priming, non-self-priming, and pressure cleaner booster pumps. DOE estimated per-model and per-wet-end redesign costs to determine product and capital conversion costs.

DOE used manufacturer specification sheets and product catalogs to estimate the number of models that each small business needs to redesign to comply with the adopted standards. DOE then multiplied this number by the per model redesign costs. This methodology is outlined in more detail in section IV.J.2.c.

The largest burden small businesses face is to bring standard-size self-priming pool filter pumps into compliance with the adopted standard. All five small businesses manufacture standard-size self-priming pool filter pumps and all of them make at least one compliant variable-speed pool filter pump. These small manufacturers could decide to ramp up the production of their already-compliant models and discontinue their non-compliant equipment. However, this could cause gaps in equipment offerings for manufacturers. Therefore, it is likely that manufacturers will redesign some non-compliant pumps to fill potential gaps in their equipment offerings. As described in section IV.J.2.c, DOE assumed that one variable-speed pool filter pump can replace multiple single- and two-speed pool filter pumps. Using this assumption DOE estimated that small businesses will incur \$5.3 million in conversion costs to bring non-compliant standard-size self-priming pool filter pumps into compliance.

Four small businesses make small-size self-priming pool filter pumps. The adopted efficiency level for this equipment class analyzes the incorporation of a more efficient single-speed motor. All four manufacturers make multiple single-speed models and some might need to be redesigned to maintain a complete product offering. DOE expected that two small businesses will not incur any conversion costs, and the other two small businesses will incur a combined total of \$0.6 million in conversion costs to bring non-compliant small-size self-priming pool filter pumps into compliance.

DOE identified four small businesses that make standard-size non-self-priming pool filter pumps. The adopted efficiency level for this equipment class can be achieved through the incorporation of a more efficient single-speed motor. Two manufacturers offer all non-self-priming pool filter pumps in both single- and two-speed configurations. DOE estimated that these manufacturers will not incur any

¹³⁹ www.hoovers.com.

¹⁴⁰ www.cortera.com.

¹⁴¹ www.linkedin.com.

conversion costs, because they could discontinue non-compliant single-speed dedicated-purpose pool pumps and still continue to have the same product offering with their two-speed dedicated-purpose pool pumps. The two other manufacturers have a greater number of single-speed than two-speed non-self-priming pool filter pumps and DOE expected these manufacturers will redesign some dedicated-purpose pool pumps to maintain a complete product offering. In total, small manufacturers of non-self-priming pool filter pumps are estimated to redesign two standard-size non-self-priming pool filter pumps and incur \$0.7 million in conversion costs to bring non-compliant equipment into compliance.

Only one pressure cleaner booster pump model is offered in the market by small businesses. DOE did not have performance data for this pump; however, based on the no-standards case shipments distribution, 87 percent of pressure cleaner booster shipments already meet or exceed the adopted standard. Therefore, DOE expected that this model does not have to be redesigned under the adopted standard.

DOE estimates that the five small business will incur a total of \$6.6 million in conversion costs to bring non-complaint standard-size self-priming, small-size self-priming, standard-size non-self-priming, and pressure cleaner booster pool pumps into compliance. Using publicly available data, DOE estimates the average annual revenue of the five small manufacturers to be \$53.6 million.¹⁴² DOE expects small manufacturers will be able to spread their conversion costs over the four-and-a-half year and a half year compliance period between the expected publication of a final rule (2016) and the expected compliance year (2021). Given these assumptions, DOE estimates that conversion costs are 0.55 percent of total small business four-and-a-half year revenue. While the standards creates additional business risk for these small businesses, DOE's calculations show that the conversion costs associated with this increase in efficiency are moderate.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being considered today.

6. Significant Alternatives Considered and Steps Taken To Minimize Significant Economic Impacts on Small Entities

The discussion in the previous section analyzes impacts on small businesses that would result from adoption of this direct final rule, represented by TSL 3. In reviewing alternatives to the adopted rule, DOE examined energy conservation standards set at lower efficiency levels. While TSL 1 and TSL 2 would reduce the impacts on small business manufacturers, it would come at the expense of a reduction in energy savings and NPV benefits to consumers. TSL 1 achieves 79 percent lower energy savings and 77 percent less NPV benefits discounted at 7 percent to consumers compared to the energy savings and NPV benefits at TSL 3. TSL 2 achieves 21 percent lower energy savings and 26 percent less NPV benefits discounted at 7 percent to consumers compared to the energy savings and NPV benefits at TSL 3.

Establishing standards at TSL 3 balances the benefits of the energy savings and benefits to consumers at TSL 3 with the potential more significant burdens placed on DPPP manufacturers, including small business manufacturers. Accordingly, DOE is choosing not to adopt one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis, included in chapter 17 of the direct final rule TSD.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed \$8 million may apply for an exemption from all or part of the energy conservation standards for a period not longer than 24 months after the effective date of a final rule establishing the standards. Additionally, Section 504 of the Department of Energy Organization Act, 42 U.S.C. 7194, provides authority for the Secretary to adjust a rule issued under EPCA in order to prevent "special hardship, inequity, or unfair distribution of burdens" that may be imposed on that manufacturer as a result of such rule. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

C. Review Under the Paperwork Reduction Act

Manufacturers of dedicated-purpose pool pumps must certify to DOE that their products comply with any

applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for dedicated-purpose pool pumps, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including pumps. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910-1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has determined that this direct final rule fits within the category of actions included in Categorical Exclusion (CX) B5.1 and otherwise meets the requirements for application of a CX. (See 10 CFR part 1021, app. B, B5.1(b); 1021.410(b) and App. B, B(1)–(5).) The rule fits within this category of actions because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, and for which none of the exceptions identified in CX B5.1(b) apply. Therefore, DOE has made a CX determination for this rulemaking, and DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for this rule. DOE's CX determination for this rule is available at <http://energy.gov/nepa/categorical-exclusion-cx-determinations-cx>.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999) imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt

¹⁴² This estimate is based on estimates from Hoovers (www.hoovers.com). Last accessed July 27, 2016.

State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735.

DOE understands that publication of this direct final rule will preempt certain California Energy Commission regulations governing energy efficiency requirements for pool pumps. In accordance with Executive Order 13132, DOE has examined this rule and has determined that it would not have a substantial direct effect on any States, including California, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products, including DPPP, that are the subject of this direct final rule. Additionally, DOE solicited and received comments from the California Energy Commission, which are reflected in this rulemaking. Finally, States, including California, can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly

specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this direct final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (2 U.S.C. 1531) For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.

DOE has concluded that this direct final rule may require expenditures of \$100 million or more in any one year by the private sector. Such expenditures may include (1) investment in research and development and in capital expenditures by pool pump manufacturers in the years between the direct final rule and the compliance date for the new standards and (2)

incremental additional expenditures by consumers to purchase higher-efficiency pool pumps, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the direct final rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of this document and the TSD for this direct final rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(m) and 6316(a), this direct final rule establishes energy conservation standards for pumps that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified, as required by 6295(o)(2)(A), 6295(o)(3)(B) and 6316(a)). A full discussion of the alternatives considered by DOE is presented in chapter [17] of the TSD for this direct final rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), DOE has determined that this rule

would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this direct final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a direct final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth energy conservation standards for pool pumps, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this direct final rule.

L. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions." Id at FR 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.¹⁴³ Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. DOE has determined that the peer-reviewed analytical process continues to reflect current practice, and the Department followed that process for developing energy conservation standards in the case of the present rulemaking.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is a "major rule" as defined by 5 U.S.C. 804(2).

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this direct final rule.

¹⁴³ The 2007 "Energy Conservation Standards Rulemaking Peer Review Report" is available at the following Web site: <http://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0>.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on December 23, 2016.

David J. Friedman,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE amends part 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Section 431.462 is amended by adding the definition for "pool pump timer" in alphabetical order to read as follows:

§ 431.462 Definitions.

* * * * *

Pool pump timer means a pool pump control that automatically turns off a dedicated-purpose pool pump after a run-time of no longer than 10 hours.

* * * * *

■ 3. Section 431.465 is amended by adding paragraphs (e), (f), (g) and (h) to read as follows:

§ 431.465 Pumps energy conservation standards and their compliance dates.

* * * * *

(e) For the purposes of paragraph (f) of this section, "WEF" means the weighted energy factor and "hhp" means the rated hydraulic horsepower, as determined in accordance with the test procedure in § 431.464(b) and applicable sampling plans in § 429.59 of this chapter.

(f) Each dedicated-purpose pool pump that is not a submersible pump and is manufactured starting on July 19, 2021 must have a WEF rating that is not less than the value calculated from the following table:

Equipment class		Minimum allowable WEF score [kgal/kWh]	Minimum allowable WEF score [kgal/kWh]
Dedicated-purpose pool pump variety	hhp Applicability		
		Motor phase	
Self-priming pool filter pumps	0.711 hp ≤ hhp < 2.5 hp	Single	WEF = $-2.30 * \ln(hhp) + 6.59$.
Self-priming pool filter pumps	hhp < 0.711 hp	Single	WEF = 5.55, for hhp ≤ 0.13 hp $- 1.30 * \ln(hhp) + 2.90$, for hhp > 0.13 hp.
Non-self-priming pool filter pumps ...	hhp < 2.5 hp	Any	WEF = 4.60, for hhp ≤ 0.13 hp $- 0.85 * \ln(hhp) + 2.87$, for hhp > 0.13 hp.
Pressure cleaner booster pumps	Any	Any	WEF = 0.42.

(g) Each integral cartridge filter pool pump and integral sand filter pool pump that is manufactured starting on July 19, 2021 must be distributed in commerce with a pool pump timer that is either integral to the pump or a separate component that is shipped with the pump.

(h) For all dedicated-purpose pool pumps distributed in commerce with freeze protection controls, the pump must be shipped with freeze protection disabled or with the following default, user-adjustable settings:

(1) The default dry-bulb air temperature setting is no greater than 40 °F;

(2) The default run time setting shall be no greater than 1 hour (before the temperature is rechecked); and

(3) The default motor speed shall not be more than 1/2 of the maximum available speed.

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Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1255

Organic Research, Promotion, and Information Order; Proposed Rule

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 1255**

[Document Number AMS–SC–16–0112; PR–A1]

RIN 0581–AD55

Organic Research, Promotion, and Information Order**AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

SUMMARY: This rulemaking proposes the establishment of an industry-funded promotion, research, and information program for certified organic products. The purpose of the program would be to strengthen the position of certified organic products in the marketplace, support research to benefit the organic industry, and improve access to information and data across the organic sector. The proposed program, the Organic Research, Promotion, and Information Order (proposed Order), was submitted to the U.S. Department of Agriculture (USDA) by the Organic Trade Association (OTA). Under the proposed Order, certified producers (producers) and certified handlers (handlers) with gross sales in excess of \$250,000 for the previous marketing year of certified organic agricultural commodities would pay an assessment of one-tenth of one percent of net organic sales. Importers importing greater than \$250,000 in transaction value of organic products for the previous marketing year would pay an assessment of one-tenth of one percent of the transaction value of certified organic products reported to the U.S. Customs and Border Protection (Customs or CBP). Producers, handlers, and importers that fall below these thresholds could choose to pay assessments into the program as a “voluntarily assessed” entity. The proposed program would be implemented under the Commodity Promotion, Research, and Information Act of 1996 (the Act) and would be administered by a board of assessment payers and one public member appointed by the Secretary of Agriculture (Secretary). An initial referendum would be held among mandatorily and voluntarily assessed entities (*i.e.* domestic producers, handlers, and importers) to determine whether they favor implementation of the program prior to it going into effect. This proposed rule also announces the Agricultural Marketing Service’s (AMS)

intent to request approval from the Office of Management and Budget (OMB) of new information collection requirements to implement the program.

DATES: Comments must be received by March 20, 2017. Pursuant to the Paperwork Reduction Act (PRA), comments on the information collection burden that would result from this proposal must be received by March 20, 2017.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments may be submitted on the Internet at: <http://www.regulations.gov> or to the Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Room 1406–S, Stop 0244, Washington, DC 20250–0244; facsimile: (202) 205–2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection, including name and address, if provided, in the above office during regular business hours or it can be viewed at <http://www.regulations.gov>.

Pursuant to the PRA, comments regarding the accuracy of the burden estimate, ways to minimize the burden, including the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information, should be sent to the above address. In addition, comments concerning the information collection should also be sent to the Desk Office for Agriculture, Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street NW., Room 725, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Heather Pichelman, Division Director, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Room 1406–S, Stop 0244, Washington, DC 20250–0244; facsimile: (202) 205–2800; or electronic mail: Heather.Pichelman@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (the Act) (7 U.S.C. 7411–7425).

Executive Summary

This action invites comments on a proposed industry-funded research, promotion, and information program for certified organic products. Organic products are products produced under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501–

6522) and its implementing regulations at 7 CFR part 205. The organic market includes a range of agricultural commodities such as fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods as well as non-food items such as fiber (linen and clothing), personal care products, pet food, and flowers. The program would be financed by an assessment on domestic producers, handlers and importers of organic products and would be administered by a board of industry members nominated by organic stakeholders and appointed by the Secretary. The proposed initial assessment rate would be one tenth of one percent of net organic sales for producers and handlers, and one tenth of one percent of the transaction value of organic products imported into the United States for importers. Citing domestic supply shortages, challenges with viable pest management, and market confusion, program proponents have proposed an organic research and promotion program for the purposes of: (1) Developing and financing an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintaining and expanding existing markets for organic commodities.

A referendum would be held among eligible domestic producers, handlers and importers to determine whether they favor implementation of the program prior to it going into effect. The proposal was submitted to USDA by the Organic Trade Association (OTA), a membership business association, in collaboration with the 7-member GRO Organic Core Committee. OTA is a membership-based trade organization representing growers, processors, certifiers, farmers associations, distributors, importers, exporters, consultants, retailers, and others involved in the organic sector. The GRO Organic Core Committee is a subset of OTA’s larger Organic Research and Promotion Program Steering Committee. It included OTA subcommittee chairs and other industry leaders who built on the outreach and input from the larger committee to guide the development of a proposed Order.

This proposed rule also announces AMS’s intent to request approval from OMB of new information collection requirements to implement the program.

Table of Contents

- I. General Information
 - A. An overview of “organic”.
 - B. Does this action apply to me?

- C. What should I consider as I prepare my comments for AMS?
- II. Executive Order 12988
- III. Background
- A. Statutory and Regulatory Authority
- B. Overview of Proposal
- C. Industry Background
- D. Need for a Program
- E. Provisions of Proposed Program
- i. Definitions
- ii. Establishment of the Board
- iii. Expenses and Assessments
- iv. Promotion, Research and Information
- v. Reports, Books and Records
- vi. Miscellaneous Provisions
- IV. Executive Order 12866 and Executive Order 13563
- V. Regulatory Flexibility Act
- VI. Executive Order 13175
- VII. Civil Rights Impact Analysis
- VIII. Paperwork Reduction Act
- IX. List of Subjects in 7 CFR part 1255

I. General Information

A. An Overview of “Organic”

Organic is a labeling term that indicates that a food or other agricultural product has been produced in accordance with the Organic Foods Production Act of 1990 (OFPA) and the regulations in 7 CFR part 205. USDA certified organic products have strict production and labeling requirements,

and must be grown and processed according to federal regulations which address, among many factors, soil quality, animal husbandry practices, pest and weed control, and use of additives. Organic producers rely on natural substances and physical, mechanical, or biologically based farming methods to the fullest extent possible. Certified organic handlers must use certified organic ingredients (for a minimum of 95 percent of the product) and only approved non-organic ingredients to label processed products as organic. Organic producers and handlers must prevent commingling and contact of organic ingredients and products with non-organic products and substances not allowed under the USDA organic regulations.

To make an organic claim or use the USDA Organic Seal, the final product must follow the applicable production, handling and labeling regulations and go through the organic certification process specified at 7 CFR part 205. To become certified, producers and handlers must apply to a USDA-accredited certifying agent, develop and implement an organic system plan, and

be inspected. Organic certification allows producers and handlers to sell their raw or processed agricultural products as organic. Each production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the USDA organic regulations (7 CFR part 205).¹

B. Does this action apply to me?

You may be potentially affected by this action if you are engaged in the organic industry. Potentially affected entities may include, but are not limited to:

- Persons (entities) that are currently certified to produce or handle organic products under the USDA organic regulations (7 CFR part 205);

This includes entities that are currently eligible for organic assessment exemption under the regulations of 25 Federal marketing orders and 22 research and promotion (R&P) programs.²

Exempt commodities under R&P programs	Exempt commodities under Federal marketing orders
Beef—7 CFR part 1260; Christmas trees—7 CFR part 1214; Cotton—7 CFR part 1205; Dairy—7 CFR part 1150; Eggs—7 CFR part 1250; Fluid milk—7 CFR part 1160; Hass Avocados—7 CFR part 1219; Highbush Blueberries—7 CFR part 1218; Honey—7 CFR part 1212; Lamb—7 CFR part 1280; Mangos—7 CFR part 1206; Mushrooms—7 CFR part 1209; Paper and Paper-Based Packaging—7 CFR part 1222; Peanuts—7 CFR part 1216; Popcorn—7 CFR part 1215; Pork—7 CFR part 1230; Potatoes—7 CFR part 1207; Processed Raspberries—7 CFR part 1208; Softwood Lumber—7 CFR part 1217; Sorghum—7 CFR part 1221; Soybeans—7 CFR part 1220; and Watermelons—7 CFR part 1210.	Florida citrus—7 CFR part 905; Texas citrus—7 CFR part 906; Florida avocados—7 CFR part 915; California—kiwifruit 7 CFR part 922; Washington apricots—7 CFR part 922; Washington sweet cherries—7 CFR part 923; Southeastern California grapes—7 CFR part 925; Oregon/Washington pears—7 CFR part 927; Cranberries grown in the States of Massachusetts, <i>et al.</i> —7 CFR part 929; Tart cherries grown in the States of Michigan, <i>et al.</i> —7 CFR part 930; California olives—7 CFR part 932; Colorado potatoes—7 CFR part 948; Georgia Vidalia onions—7 CFR part 955; Washington/Oregon Walla Walla onions—7 CFR part 956; Idaho-Eastern Oregon onions—7 CFR part 958; Texas onions—7 CFR part 959; Florida tomatoes—7 CFR part 966; California almonds—7 CFR part 981; Oregon-Washington hazelnuts—7 CFR part 982; California walnuts—7 CFR part 984; Far West spearmint oil—7 CFR part 985; California dates—7 CFR part 987; Pecans grown in the States of Alabama, <i>et al.</i> —7 CFR part 986; California raisins—7 CFR part 989; and California dried prunes—7 CFR part 993

- Persons (entities) that import USDA certified organic products into the U.S.
- Persons (entities) that import products into the U.S. under an organic equivalency arrangement.³

C. What should I consider as I prepare my comments for AMS?

Your comments should clearly indicate whether or not you support any or all of the provisions put forth for the research and promotion program being

proposed. You should clearly indicate the reason(s) for the stated position(s). Your comments should also offer any recommended language changes that would be appropriate for your position. Please include relevant information and data to further support your position (e.g. industry and impact information, etc.). Specifically, AMS is requesting comments on the following items:

1. Under the proposed Order, importers importing greater than

\$250,000 in transaction value of organic products for the previous marketing year would pay an assessment. AMS is seeking:

a. Comments from importers on the proposed order, including their level of support and any alternatives for AMS to consider.

b. Given the limitations of organic trade data, comments regarding the accuracy of information in the proposal

¹ The USDA organic regulations at 7 CFR 205.101 provides for some exclusions and exemptions from certification. For example, a production or handling operation that sells agricultural products as “organic” but whose gross agricultural income from organic sales totals \$5,000 or less annually is exempt from certification but must comply with the applicable organic production and handling requirements as specified at 7 CFR 205.101(a)(1).

² Section 10004 of the Agricultural Act of 2014 (2014 Farm Bill) (Pub. L. 113–79) amended Section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) (7 U.S.C. 7401) on February 7, 2014. AMS issued Final Rule “Exemption of organic products from assessment under a commodity promotion law” (80 FR 82006) on December 31, 2015.

³ The U.S. has established organic equivalency trade partnerships with Canada, European Union, Japan, Republic of Korea, and Switzerland (accessed on August 24, 2016). For more information on current partnerships, refer to the “International Trade Partners” page available at www.ams.usda.gov/NOPInternationalAgreements.

and any other data sources that AMS should consider.

c. Comments on AMS' proposed approach of using transaction value rather than the proponents proposal to use gross organic sales for the purpose of determining assessments;

2. Under the proposed Order, both organic food and organic non-food items (e.g., flowers, pet food, and personal care products) would be subject to assessment. AMS is seeking:

a. Comments on the inclusion of organic non-food items under the proposed program.

b. Comments regarding additional data that could support further analysis of the impacts and implementation of a program that includes organic non-food items.

3. Under the proposed Order, producers, handlers, and importers, including those with trade in "dual-covered commodities" (i.e., commodities for which an existing commodity promotion program exists), could be subject to assessment. AMS is seeking:

a. Comments on the proposed assessment approach, on the scenarios describing how entities, including those with "dual-covered commodities", could be assessed or exempted from the program, and on any tools that AMS should consider to minimize the burden of calculating assessments on the affected entities.

b. Comments on additional procedures that would address assessments to be paid by or refunded to entities with "dual-covered commodities" that operate on different fiscal year calendars.

c. Comments on the proposed de minimis level and its effects on the proposed program.

4. The Regulatory Flexibility Act analysis, particularly on the number and size of entities covered under the proposed Order.

5. The proposed definitions for "gross organic sales" and "net organic sales" given that these would be used to determine exemptions and calculation of assessments owed. In particular, AMS is interested on the impacts of using "gross organic sales" in instances when profits could be low.

6. The proposed requirement that "voluntarily assessed entities" would need to pay assessments for the majority of years after initial referendum and leading up to any subsequent referenda. AMS is also interested in comments about the requirement that such entities would need to be active assessment payers should they serve on the Board.

7. The proposed approach for the distribution of Board seats.

II. Executive Order 12988

This rulemaking has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the Act provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the Act, a person subject to an order may file a written petition with the U.S. Department of Agriculture (USDA) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

III. Background

A. Statutory and Regulatory Authority

The Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522), as amended, provided the authority for USDA to establish the USDA organic regulations at 7 CFR part 205. The regulations in 7 CFR part 205 define 'organic' as a labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) and the regulations in 7 CFR part 205.

The Act authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. To date, there are 10 commodity promotion programs (i.e., research and promotion programs or R&P programs) operating under the authority of the Act. On February 7, 2014, section 10004 of the Agricultural Act of 2014 (2014 Farm Bill) (Pub. L. 113–79) amended section 501 of the

Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401), which authorizes generic commodity promotion programs under the various commodity promotion laws, to allow for an organic commodity promotion order. Specifically, the definition of "agricultural commodity" under section 513(1)(E) of the Act was amended to include "products, as a class, that are produced on a certified organic farm (as defined in 7 U.S.C. 6502); and certified to be sold or labeled as "organic" or "100 percent organic" (as defined in part 205 of title 7, Code of Federal Regulations (or a successor regulation)). Should this proposed rule become final, pursuant to section 10004 of the 2014 Farm Bill, the regulatory language currently exempting organic commodities from assessment by generic commodity promotion programs created under the various commodity promotion laws (7 U.S.C. 7401(e)) shall no longer be in effect. Such commodities would then become "dual-covered commodities", and persons producing, handling and importing them would need to elect to pay assessments to the commodity-specific program, or the organic commodity promotion program. For example, an organic blueberry producer that is currently exempt under the Blueberry Research and Promotion Order may no longer be exempt upon finalization of an organic research and promotion order. If a blueberry producer would be subject to assessment under both the Blueberry Promotion, Research, and Information Order and the proposed organic Order, they would need to select which program to pay their assessments into and submit the required forms to effectuate that election. AMS provides several scenarios for how the "dual-covered commodities" provision would work in the "Expenses and Assessments" section of this proposed rule and requests public comments on this issue.

The Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the Act provides for orders applicable to (1) producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if imports are subject to assessments). Section 516 states that an order may include an exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research,

promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

In addition, section 518 of the Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the order. An order also may provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board from among producers, first handlers and others in the marketing chain as appropriate, and importers, if imports are subject to assessment.

This proposed rule also announces AMS's intent to request approval by the OMB of new information collection requirements to implement the program.

B. Overview of Proposal

The 2014 Farm Bill amended the Act to allow the organic industry to submit a proposal for an organic R&P program. As the membership-based business association for the organic industry in North America, the OTA took on the role as a proponent group in the development of an organic R&P program proposal. OTA represents businesses across the organic supply chain and addresses all things organic, including food, fiber/textiles, personal care products, and new sectors as they develop. To develop the proposal, OTA established and collaborated with the 7-member GRO Organic Core Committee. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee. It included OTA subcommittee chairs and other industry leaders who built on the outreach and input from the larger committee to guide the development of a proposed Order.

Following the signing of the Farm Bill in February 2014, AMS met with OTA and other industry stakeholders, where they were informed that AMS works with program proponents once an industry proposal is submitted, and that implementing a program takes approximately 24–36 months from the time a final proposal is submitted to AMS for review. Of note, AMS also shared that the timing for promulgation of an order depends mostly on industry support, the number of comments received, and whether the proposal becomes controversial.

On May 15, 2015, OTA submitted a formal proposal for an organic R&P

program to AMS. In its petition for a proposed organic R&P program, OTA outlined its outreach to the industry to garner whether there was support for the program. OTA stated that it, among other things, facilitated six webinars, six panel debates and twenty town hall meetings across the country between 2012 and 2013. OTA said that it continued through 2014 and 2015 with its outreach through participation in gatherings of the organic industry such as the Western Organic Dairy Producers Alliance Conference in California, the Minnesota Department of Agriculture Organic Conference, and the Pennsylvania Farmers Union Annual Convention, staffing booths and participating in panels at these events. OTA also sent direct mailings to over 17,000 organic operations with information regarding a proposed organic R&P program in May and June of 2014, with a follow up mailing to over 11,000 organic operations in August 2014 based on feedback from the first mailing. OTA also conducted phone surveys of over 3,700 organic operations in 2014. According to OTA, of those who responded to these surveys, twice as many certified organic operations supported the establishment of an organic R&P program as opposed to the establishment of such a program. The proponent estimates that the completed surveys constitute a statistically representative sample with 11 percent of crop certificate holders, 13 percent of livestock certificate holders, and 8 percent of handling certificate holders completing the survey. The proponent group did not specify if any of these certificate holders were importers. AMS requests comments from importers conveying their views on this proposal.

While OTA's advocacy for an R&P program for organic products has garnered many supporters in the organic community, AMS has also heard from some farmers and farm organizations expressing opposition. In the interest of correctly gauging the level and specific topics of support and opposition, AMS issued an announcement inviting the public to submit alternative proposals or partial proposals on May 18, 2015. AMS allowed 60 days for submissions and received eight partial proposals. Since this time, AMS has maintained communication with OTA as the agency evaluated the proposal and researched how to propose such a new and complex order in a manner that is both equitable and functionally sound.

On April 1, 2016, AMS issued a Notice to Trade announcing a new procedure of posting all proposals for new R&P programs on the AMS Web

site, with the first proposal being OTA's proposed organic R&P program.⁴ The eight partial proposals were also made publicly available.⁵ On May 3, 2016, OTA submitted a letter to the AMS Administrator to formally amend its proposal to include some stakeholder feedback and language from the partial proposals. OTA submitted an amended proposal along with its letter.⁶ In its amended proposal, OTA revised its proposed definition of "research" to ensure it included agronomic and other production oriented research. The proponents also revised its proposed allocation of expenditures to ensure the majority of funds for research would go to agricultural research and the majority of funds for information would go to producer information. In its revision, OTA clarified that regional organic producer Board members establish the priorities, including regional considerations, for investments in agricultural research. Finally, OTA made a number of technical edits such as staggering Board terms.

Based on the information provided to date, AMS is publishing this proposed rule to invite comments on a proposed industry-funded research, promotion and information program for organic agricultural commodities. The program would cover the range of organic products that are certified and sold per the OFPA and its implementing regulations as well as organic products imported into the U.S. under an organic equivalency arrangement. Based on OTA's proposal, organic products would include both food items (e.g. fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods)⁷, and non-food items (fiber (linen

⁴ OTA's May 15, 2015 proposal is available on the AMS Web site at: https://www.ams.usda.gov/sites/default/files/media/OTAOrganicCheckoffApplicationUSDA_Combined.pdf.

⁵ The eight partial proposals submitted are available on the AMS Web site at: <https://www.ams.usda.gov/rules-regulations/research-promotion/proposals/organic>. The following organizations submitted partial proposals: Food & Water Watch (FWW), the Food & Water Watch (FWW), the Midwest Organic & Sustainable Education Service (MOSES), the National Farmers Union (NFU), the Northeast Organic Dairy Producers Alliance (NODPA), the Northeast Organic Farming Association (NOFA), the Ohio Ecological Food & Farming Association (OEFFA), the Organic Farmers' Agency for Relationship Marketing (OFARM), and the Western Organic Dairy Producers Alliance (WODPA).

⁶ OTA's May 2016 amended proposal is available on the AMS Web site at: <https://www.ams.usda.gov/sites/default/files/media/Revised20Organic20OTA20Proposal20Bundle200520022016.pdf>.

⁷ Of note, the USDA organic regulations at 7 CFR part 205 do not currently provide for organic certification of fish. Only upon issuance of a final rule on organic certification of fish would these

and clothing), supplements, personal care products, pet food, household products, and flowers). While the USDA organic regulations do not detail standards specific to non-food items, items that are agricultural products (e.g., pet food) and that meet the certification requirements of the USDA organic regulations can be certified and labeled “organic”, irrespective of the end use of the product.⁸ AMS seeks comments about the inclusion of non-food items in the proposed Order and any data that could support AMS analysis of the impacts and implementation of a program on the non-food organic sector.

The program would be financed by an assessment on domestic producers, handlers and importers of organic products and would be administered by a board of industry members nominated by organic stakeholders and selected by the Secretary. The initial assessment rate would be one tenth of one percent of net organic sales for producers and handlers with gross annual organic sales greater than \$250,000, and one tenth of one percent of the declared transaction value of organic products imported into the United States for importers of organic products declaring a transaction value greater than \$250,000 for the previous marketing year. While the program would provide for an exemption for (a) producers and handlers with gross organic sales of \$250,000 or less for the previous marketing year, and (b) importers with \$250,000 or less in transaction value of

imported organic products during the prior marketing year, it would also allow for such entities to voluntarily participate in the program by committing to pay assessments for the majority of years until the next referendum. While the proponent indicated a preference for mandating voluntarily assessed entities’ participation for the seven years following the initial referendum, AMS has modified this period to a majority of years for the purpose of consistency with subsequent referenda. Exports from the United States would also be exempt from assessments. The purpose of this program would be to: (1) Develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintain and expand existing markets for organic commodities.

A referendum would be held among eligible domestic producers, handlers and importers to determine whether they favor implementation of the program prior to it going into effect.

C. Industry Background

The Organic Marketplace

Organic foods and non-food items started out as a niche market primarily sold in direct-to-consumer markets. Double-digit annual growth in consumer demand in most years since the 1990s have allowed organic products to

expand from direct-to-consumer markets and specialty food stores to conventional supermarkets.⁹ In the following paragraphs, AMS used multiple data sources to describe the domestic production, imports, and export markets for organic products used to build the baseline and quantitative estimates for this proposed rule. Much of AMS’ analysis for this rule focuses on organic production, which produces raw agricultural commodities, livestock feed, and ingredients for food and non-food items (e.g., organic grains could be used for flour, for animal feed, or for pet food). Further, food items are covered in greater detail as they comprise the majority of the organic market and data on non-food items is more limited. AMS invites comments on the justification and limitations associated with each data source provided and any additional information on the non-food organic sector.

OTA’s 2016 Organic Industry Survey was used as a data source in several sections of this proposed rule owing to its focus on summarizing market information and trends within the organic industry across both food and non-food sectors. The Nutrition Business Journal conducts this survey on behalf of OTA. Data from the 2016 Organic Industry Survey (Table 1) shows that total organic food and non-food sales in the U.S. tripled from 2005 to 2015.

TABLE 1—U.S. ORGANIC SALES (\$1,000,000)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Food	13,260	15,629	18,188	21,571	22,497	24,123	26,336	29,023	32,335	35,952	39,754
Non-food	745	938	1,182	1,649	1,800	1,974	2,195	2,455	2,770	3,152	3,555
Total	14,005	16,567	19,370	23,220	24,297	26,097	28,531	31,478	35,105	39,104	43,309
Growth (percent)											
Food	19	18	16	19	4	7	9	10	11	11	11
Non-food	33	26	26	40	9	10	11	12	13	14	13
Total	20	18	17	20	5	7	9	10	12	11	11

Source: OTA 2016 Organic Industry Survey, conducted 1/7/2016–3/25/2016

Also shown in Table 1, sales of organic non-food items in 2015 were nearly five times what they were in 2005. Between 2005 and 2015, organic sales increased most significantly from 2005 to 2008. Non-food sales had its

highest point in 2008 at 40 percent growth from the previous year. In 2009, growth of organic non-food sales fell to 9 percent, and leveled off to between 10 and 14 percent in 2010 to 2015. Similarly, food sales hit a high point in

2008 at 19 percent growth before falling to 4 percent in 2009. Between 2010 and 2015, organic food sales experienced growth of 7 to 11 percent in each year.

Sales of all food, organic and conventional, as shown in Table 2, has

commodities be subject to assessment under this proposed Order.

⁸In August 2005, the NOP issued a Policy Memorandum 11–2 to certifying agents, stating that agricultural products which meet the NOP

certification standards can be certified and labeled “organic,” irrespective of the end use of the product. Policy Memo 11–2 is available on the AMS Web site in the NOP Handbook at: <http://www.ams.usda.gov/rules-regulations/organic/handbook>.

⁹Catherine Greene, *Organic Agriculture*, Economic Research Service, USDA (last modified April 07, 2014), see *Overview*, available at <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture.aspx>.

increased between 3 and 5 percent in each of the last five years. In 2005, about 2 percent of total food sales was organic;

in 2015, organic food made up about 5 percent of total food sales. On average,

organic food sales make up about 93 percent of total organic sales.

TABLE 2—U.S. SALES OF ORGANIC FOOD COMPARED TO TOTAL FOOD SALES (\$1,000,000)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Organic food	13,260	15,629	18,188	21,571	22,497	24,123	26,336	29,023	32,335	35,952	39,754
Total food	566,791	598,136	628,219	659,012	669,556	677,354	713,985	740,450	760,486	787,575	807,998
Growth (percent)											
Organic food	19	18	16	19	4	7	9	10	11	11	11
Total food	4	6	5	5	2	1	5	4	3	4	3

Source: OTA 2016 Organic Industry Survey, conducted 1/7/2016–3/25/2016

Organic foods continue to receive a price premium over their conventional counterparts, though the price premium fluctuates significantly depending upon the commodity. Organic produce and milk receive some of the highest price premiums over their conventional counterparts. These categories are also the top organic food sales categories.¹⁰ For the majority of organic produce, the price premium represents less than a 30 percent price differential. Milk, on the other hand, has been documented receiving a price premium anywhere from 60 to 109 percent.¹¹

Studies show that the vast majority of American consumers purchase organic food products, with a 2014 Consumer Reports survey showing that 84 percent of American consumers purchase organic food. The frequency at which they purchase organic food products,

however, varies significantly. Of those surveyed, 18 percent purchase organic food every week. Another 18 percent purchase organic food two to three times a month, while 9 percent said they purchase organic food once a month. Thirty-nine percent said they purchased organic food rarely and 15 percent said they never purchase organic food. One percent said they did not know or were unsure. Almost half of the 84 percent who buy organic foods, do so rarely.¹² A study conducted by OTA and KIWI magazine from 2009 to 2015 on U.S. parent consumer attitudes and beliefs showed that 83 percent of parents say they have purchased organic products, and 40 percent of parents are “making a great deal of effort” to choose organic foods and products.¹³

Domestic Producers and Production

AMS also utilized information from the National Agricultural Statistics Service (NASS) 2014 Organic Production Survey.¹⁴ In this survey, NASS reports acreage, production and sales data for organic crops and livestock for the 2014 production year. While NASS data from the 2015 production year became available on September 15, 2016, AMS has primarily used data sources for 2014 to produce a conservative estimate of the quantity of assessments that would be collected from covered entities through this proposed program. Given the increase in organic acreage, sales and value of organic products in 2015, the quantity of assessments is likely higher than our conservative estimate.¹⁵ A high-level comparison of 2014 and 2015 survey data is provided in Table 3.

TABLE 3—VALUE OF SALES OF CERTIFIED ORGANICALLY PRODUCED COMMODITIES

	2014	2015	Growth
Crops, including nursery and greenhouse	\$3,290,188,000	\$3,509,632,000	7
Livestock, poultry and their products	2,164,792,000	2,653,840,000	23
Total value of agricultural products sold	5,454,979,000	6,163,472,000	13

Source: NASS 2014 Organic Survey and NASS 2015 Certified Organic Survey

Prior to NASS's 2014 Organic Survey, USDA's Economic Research Service (ERS) collected information on U.S. organic production. Through analysis of USDA's Agricultural Resource Management Survey (ARMS) data, ERS continues to compare the costs of production and returns for organic and

conventional production in major crop/livestock sectors, and analyzes other economic characteristics of organic agriculture. Accordingly, this proposed rule references both NASS and ERS data on organic production where appropriate.

According to the NASS 2014 Organic Survey, there are 14,093 USDA-certified organic and exempt operations in the U.S. Exempt operations are those with annual sales of less than \$5,000, which are not certified, but may use the term “organic” to market their products. Exempt operations are prohibited from

¹⁰ Catherine Greene, *Organic Agriculture*, Economic Research Service, USDA (last modified April 07, 2014), see *Organic Market Overview*, available at <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx>.

¹¹ Ibid.

¹² National Research Center, *Organic Food Labels Survey*, Consumer Reports (March 2014), p. 3, available at <http://www.greenerchoices.org/pdf/CR2014OrganicFoodLabelsSurvey.pdf>.

¹³ Organic Trade Association, *2015 U.S. Families' Organic Attitudes and Beliefs—2015 Tracking Study* (March 2015), available at <https://ota.com/resources/consumer-attitudes-and-beliefs-study>.

¹⁴ National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>.

¹⁵ This is also true with regard to AMS's analysis on imports.

using the “USDA Organic” seal. The total of certified organic producers in the U.S. amounts to 12,634 farms, with the remaining 1,459 operations exempt from certification.

Across the U.S., California has the greatest number of certified organic producers with 2,632 farms, 21 percent of the total U.S. population of certified organic producers. The next greatest is Wisconsin at 9 percent, followed by New York at 7 percent. The states of Iowa, Pennsylvania, and Washington each had 5 percent of total U.S. certified organic producers while Maine, Minnesota, Ohio, Oregon, and Vermont each have 4 percent. The following states have between 1 and 2 percent of total U.S. certified organic producers: Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska,

New Hampshire, New Mexico, North Carolina, North Dakota, South Dakota, Texas, Utah and Virginia. The remaining 15 of 50 states have less than 1 percent of total U.S. certified organic producers.

Because the proposed rule aims to cover all organic commodities, there are a variety of units of measurement that cannot be compared as they stand. For example, the unit of measurement for cotton is the U.S. Gin Universal Density Bale (bale), which is equal to 500 lbs. of lint cotton, while the unit of measurement for dairy products is the hundredweight (cwt). In an effort to address the Act requirement to quantify the geographical distribution of organic production in the United States, AMS used the 1992 ERS publication “Weights, Measures, and Conversion Factors for Agricultural Commodities and Their Products” to convert all data

from the 2014 NASS Organic Production Survey into the measurement unit of pounds. While conversion factors for many commodities can change from year to year, this is the most up-to-date publication by ERS with regard to conversion factors. The conversion factors for poultry and cattle, according to ERS, are as follows:

- 1 dozen eggs = 1.6 pounds
 - 1 head of chicken = 4.3 pounds
 - 1 head of turkey = 20.56 pounds
 - 1 head of cattle = 1,091 pounds
- Using production data converted into a single, comparable unit, AMS has prepared an analysis of different aspects of the composition of organic industry production in the U.S. in 2014. Starting with Table 4, AMS estimated the makeup of the U.S. organic industry by production volume on a per pound basis.

TABLE 4—U.S. CERTIFIED ORGANIC PRODUCTION BY AGRICULTURAL COMMODITY CATEGORY

	Fruits	Vegetables	Field crops	Dairy	Poultry
U.S.	7%	13%	47%	30%	2%

Source: NASS 2014 Organic Survey; units of measure converted lbs. by AMS using ERS conversion factors.

In terms of organic production volume in the U.S., field crops is largest with 47 percent of total volume, followed by dairy at 30 percent,

vegetables at 13 percent, fruits at 7 percent, and poultry at 2 percent. Organic production of beef cattle, nuts and turkey makes up the remaining 1

percent of total organic production volume.

Figure 1. Certified Organic Production by State, 2014

Certified Organic Production by State, 2014



Figure 1 above shows the distribution of organic production by volume across the U.S. Of total organic production across the U.S., California accounts for 21 percent. Based on NASS 2014 Organic Survey data, California produces the majority of the volume in most agricultural commodities. In descending order, California produced the following portion of organic agricultural commodities across the U.S.: 63 percent of nuts, 57 percent of vegetables, 50 percent of poultry (excluding eggs), 27 percent of fruit, 23 percent of dairy products, 23 percent of beef cattle, and 10 percent of field crops.

After California, Washington State is the next largest producer of organic commodities in the U.S. with 7 percent of total volume. The majority of Washington's production is in fruit, with 64 percent of the total organic non-citrus fruit production volume in the U.S. Florida's citrus industry accounts for 2 percent of all organic fruit production and 16 percent of U.S. organic citrus production. Washington also accounts for 12 percent of egg production, 6 percent production of vegetables, 5 percent of beef cattle, 3 percent of dairy products, and 1 percent of field crops.

New York, Oregon, and Wisconsin each produce 6 percent of total organic

volume in the U.S. Second only to California, Oregon produces 8 percent of organic vegetables. After California, New York and Oregon have the highest production of dairy products at 9 percent of total production each. New York and Oregon also produce 7 and 6 percent, respectively, of organic field crops. Wisconsin follows California in field crop production at 9 percent and in beef cattle at 3 percent. Wisconsin also produces 5 percent of organic dairy products, behind Pennsylvania at 6 percent and California.

In summary, production of organic agriculture in the U.S. is primarily concentrated in five states: California with 21 percent; Washington with 7 percent; and New York, Oregon, and Wisconsin with 6 percent total organic production each. In addition to these five top-producing states, 19 states produced between 1 and 5 percent of total production. The remaining 26 states produced less than 1 percent of total certified organic production in the U.S. The total sum of production data at the state level does not equal total production as reported for the entire U.S. Rather, production data reported by state in each of the categories discussed previously makes up 80 percent of total production data as reported at the national level. The reason for this

limitation is the withholding of data by state by NASS for proprietary reasons. The 20 percent absent data represent information that if disclosed by NASS would violate the anonymity of some of its survey respondents in their given states. This 20 percent absent data is mainly attributable to three commodities: Eggs, poultry, and cattle/beef, which amounts to less than 2.1 of total production. The missing 20 percent, however, would not likely alter the portions of production by state as they relate to each other as there are production values missing for 49 out of the 50 states. As discussed in §§ 1255.40 through 1255.47 of the proposed Order, which details the establishment and membership of the proposed Organic Research and Promotion Board, adding 2 of production to any of the proposed production regions would not alter the distribution of board seats. We invite comments on the determination that the 20 percent absent data would not be so significant as to modify the distribution of Board membership by production region.

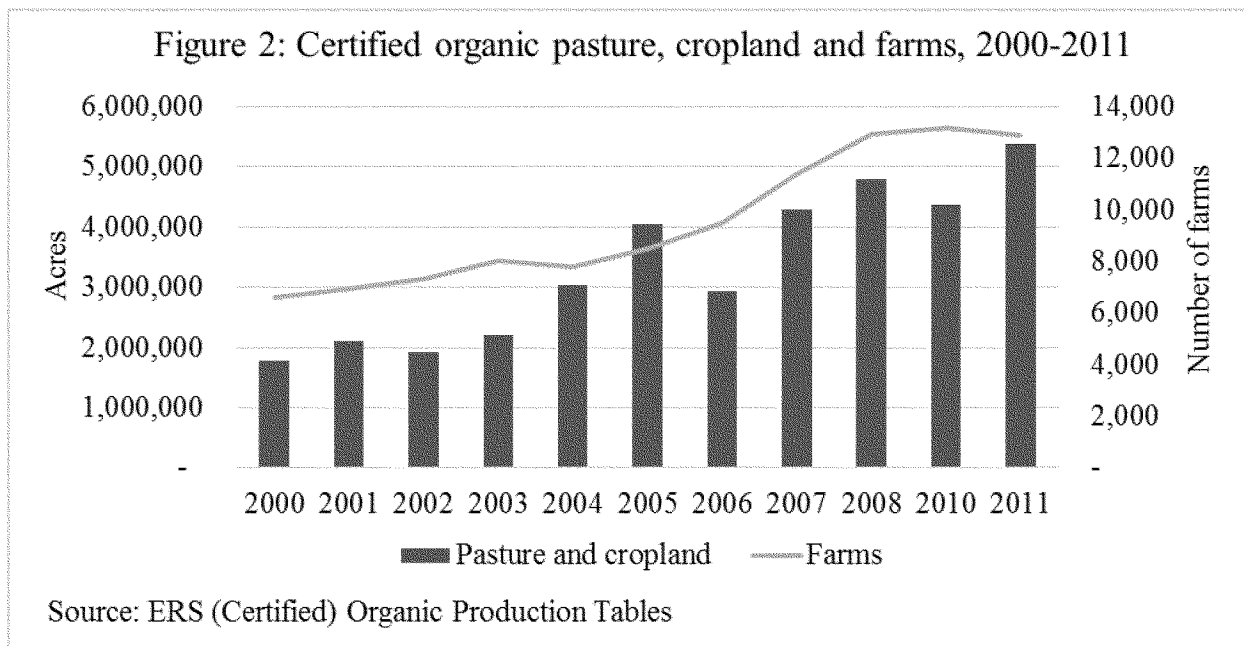
Domestic Acreage

The U.S. had less than 1 million acres of certified organic farmland in 1990. This number doubled between 1990 and 2002, and doubled again between 2002

and 2005. Figure 2 below shows combined certified organic pasture and cropland and farm operations for 2000 to 2011, using data from ERS.¹⁶ No data exists for 2009. Between 2005 and 2011, the amount of organic pasture and rangeland fluctuated, but certified

organic cropland expanded by close to 80 percent. The organic livestock sector experienced even faster growth during the same time period. In 2011, there were roughly 5.4 million acres of certified organic farmland—with 3.1 million acres of cropland and 2.3

million acres of rangeland/pasture.¹⁷ Despite the growth in certified organic farmland over the last decade, certified organic farmland remains below one percent of the total farmland acreage in the U.S.



Organic acreage data from ERS stops at 2011. NASS released its first report on organic production with certified operations segregated from exempt operations in 2011. Data from ERS and NASS overlap in 2011 only. According to NASS, 2011 certified organic acreage totaled about 3.65 million acres, which included 2.03 million acres of cropland and 1.62 million acres of pasture and rangeland.¹⁸ In 2014, total certified organic acres operated was 3.64 million acres, a slight decrease from three years prior.¹⁹ As referenced earlier, data recently released by NASS in September 2015 shows a trend toward increased organic acreage (e.g., from 3.64 million acres in 2014 to 4.36 million acres in 2015).

The number of U.S. farms with acres in operation for certified organic production, however, increased 38 percent from 9,140 farms in 2011 to 12,595 farms in 2014. The amount of land transitioning to organic in 2014 was 122,175 acres on 1,365 farms, down from 2008 at 194,384 acres on 1,938 farms.²⁰ Land transitioning to organic was not reported by NASS in 2011.

Organic production has grown not only when measured in terms of acreage, but also when measured by the number of certified organic operations. When USDA first started certifying organic operations under the USDA organic regulations, which provided the authority for the National Organic Program (NOP), there were just over

7,000 certified organic operations. NASS reported 2011 total sales of organic products at more than \$3.5 billion.²² In 2014, total certified organic sales were nearly \$5.5 billion, up 54 percent from three years previously.²³ It should be noted that sales as reported by NASS represent sales by producers or farmers only. The figures aforementioned do not encompass sales by handlers, manufacturers, or retailers.

Geographic Distribution of U.S. Certified Operations

One of the limitations of the NASS 2014 survey is that it does not include all certified organic handlers. Thus, a list of certified organic producers and handlers was obtained from the "2014

¹⁶ Catherine Greene, *Organic Production*, Economic Research Service, U.S. Department of Agriculture, see Table 4. Certified organic producers, pasture, and cropland.

¹⁷ Catherine Greene, *Organic Production*, Economic Research Service, U.S. Department of Agriculture (last modified September 27, 2013), see Documentation, available at <http://ers.usda.gov/data-products/organic-production/documentation.aspx>.

¹⁸ National Agricultural Statistics Service, *2011 Certified Organic Production Survey*, U.S. Department of Agriculture (October 2012), p. 7, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-10-04-2012.pdf>.

¹⁹ National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09172015.pdf>; of note, NASS data only accounts for acres harvested, not acres under organic certification, which may cause organic acreage as reported in the survey to be underrepresented.

²⁰ National Agricultural Statistics Service, *2008 Organic Survey*, U.S. Department of Agriculture, p. 1, available at https://www.agsensus.usda.gov/Publications/2007/Online_Highlights/Organics/organics_1_01.pdf.

²¹ There is a three year transition period to convert conventional farmland into organic

farmland. During the transition period, the farm must adhere to all organic practices, but it is not allowed to use the organic seal on products grown on that land during transition.

²² National Agricultural Statistics Service, *2011 Certified Organic Production Survey*, U.S. Department of Agriculture (October 2012), p. 7, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-1004-2012.pdf>.

²³ National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 10, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>.

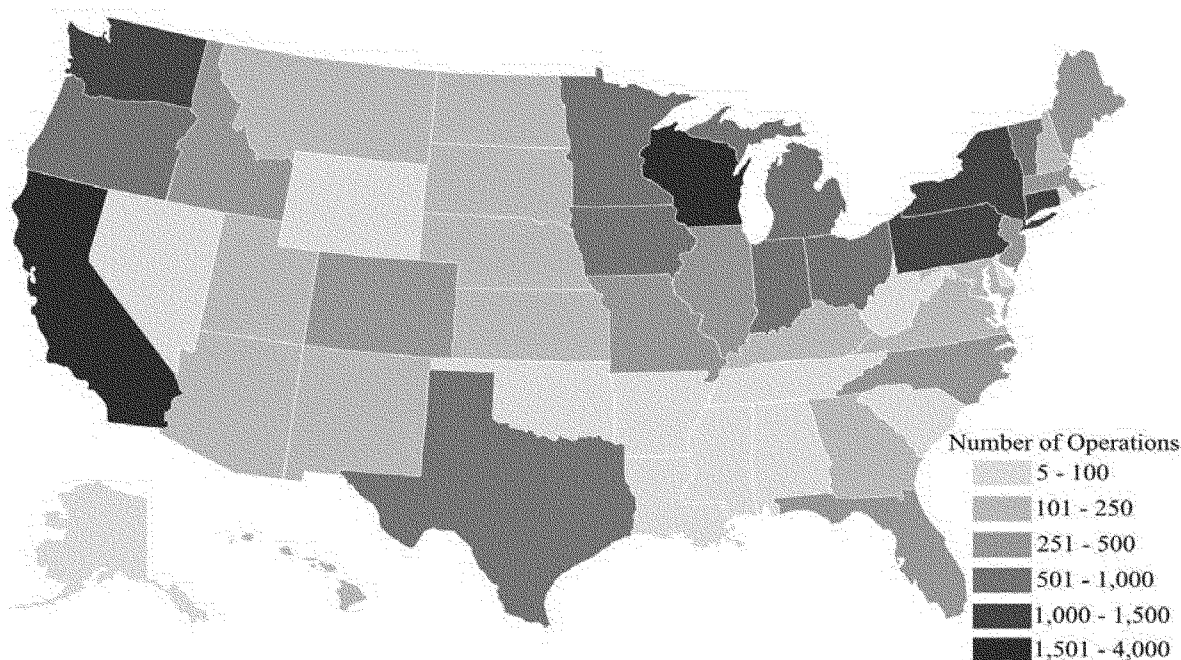
Annual Count of USDA–NOP Certified Organic Operations” report from the Organic Integrity Database managed by NOP.²⁴ The 2014 data show a total U.S. certified organic operations (producers

and handlers) at 19,465 entities, up 5 percent from 2013. As Figure 3 shows, the majority of certified operations are in California with more than 4,000 entities, or 21 percent of the U.S. total.

Wisconsin had more than 1,500 certified operations or 8 percent of the total. New York and Washington each had 6 percent of total U.S. certified operations with more than 1,000 entities apiece.

Figure 3. U.S. Certified Operations, 2014

Certified Organic Operations by State, 2014



International Markets

Products produced in foreign countries can also be USDA certified organic under the USDA organic regulations and imported into the U.S. In addition, products produced in foreign countries can be certified to a foreign standard and imported into the U.S. under an organic equivalency arrangement. Given that importers would be assessed under a proposed organic R&P program, a baseline

understanding of the international market for organic products is valuable.

The Foreign Agricultural Service (FAS) reports on imports and exports of agricultural commodities flowing into and out of the U.S. Specific trade data is available by FAS through its Global Agricultural Trade System (GATS).²⁵ Trade data for over 30 selected organic commodities show that U.S. organic exports measured more than \$553 million in value, while imports were about \$1.2 billion in value in 2014. The

majority of U.S. organic exports go to Canada and Mexico at 48 percent and 30 percent, respectively, but the U.S. also exports organic products to over 80 countries. Exports of organic products to Canada amounted to more than \$265 million in 2014, while organic exports to Mexico totaled nearly \$166 million in value. The top exports of organic agricultural products in 2014 were fresh apples, lettuce, and grapes at 21 percent, 13 percent, and 12 percent, respectively.

²⁴ NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/Integrity/Reports/Reports.aspx>.

²⁵ Report to the Organic Trade Association—Preliminary Analysis of USDA's Organic Trade Data: 2011 to 2014. Edward C. Jaenicke, Iryna

Demko, April 2015 http://ota.com/sites/default/files/indexed_files/OTAJaenickeMay2015_TradeDataReport.pdf.

A key point of distinction between importers and organic producers and handlers is that under the regulations at 7 CFR part 205, a person that only sells, transports, stores, receives, or acquires products that are received in and remain in a container without being processed is “excluded” from certification (*i.e.*, does not need to be certified). This means that, in many cases, an importer who is only acquiring products to then sell in the U.S. in an existing container (*e.g.*, functioning as a broker) are not themselves certified. Such entities would not appear in NOP’s database of certified operations and can only be captured through other data sources (*e.g.*, through the U.S. Customs and Border Protection (CBP) database). According to data from CBP, there were more than 2,135 importers of organic products with codes in the Harmonized Tariff Schedule (HTS) in 2014. As reported by the U.S. Department of Commerce, Census Bureau, Foreign Trade Statistics data, organic products in the GATS database represent over \$1.2 billion in imports for 2014. More generally, USDA reports that all agricultural imports were valued at \$111.7 billion in 2014. Organic coffee, soybeans, bananas, and olive oil were the top organic imports.²⁶ It is important to note that due to the limited number of established HTS codes for organic products, the organic export and import figures do not capture all international trade for organic products.

AMS acknowledges that the limited organic trade data indicates that the number of importers of organic products is underreported. For this reason, AMS is requesting comments on how to obtain information on these importers for the purposes of this program.

D. Need for a Program

In the following paragraphs, AMS summarizes three lines of reasoning OTA provided as evidence of the need for the establishment of a national organic research and promotion program. OTA’s justification includes (1) domestic supply shortages of organic products, particularly feed and ingredients; (2) the need for viable pest management in organic production; and (3) market confusion.

Domestic Supply Shortages

Today, 93 percent of organic sales take place in conventional and natural food supermarkets and chains.²⁷

²⁶ Foreign Agricultural Service. Global Agricultural Trade System (GATS) database. U.S. Department of Agriculture. Available at <http://www.fas.usda.gov/gats>.

²⁷ Catherine Greene, *Organic Agriculture*, Economic Research Service, USDA (last modified

Organic foods are currently available in three out of four traditional grocery stores and about 20,000 natural food stores across the U.S.²⁸ The remaining 7 percent of organic food sales occur in farmers’ markets, foodservice, and marketing channels other than retail stores. The dramatic increase in conventional store participation in organic sales is not due to any decrease of direct-to-consumer markets. Farmers’ markets, to the contrary, have grown steadily from 1,755 markets in 1994 to 8,144 in 2013.²⁹ According to a USDA survey, farmers’ market managers believed that more organic farmers were needed to meet consumer demand.³⁰ According to a 2004 ERS report, “44 percent of organic handlers reported short supplies of needed ingredients or products” and “13 percent were unable to meet market demand for at least one of their organic products that year.”³¹ In addition, 52 percent of organic companies said that “a lack of dependable supply of organic raw materials has restricted their company from generating more sales of organic products.” In a nutshell, overcoming the challenge of meeting the demand for U.S. organic supply requires an increase in: (a) Certified organic farmers, (b) organic acreage, and (c) viable pest management options.

U.S. producers have been challenged to keep pace with growing consumer demand for organic products for over a decade, and new statistics from the U.S. Department of Commerce show that organic imports play a key role in meeting U.S. demand. Among all organic product imports, soybeans showed the biggest jump in value from 2011 to 2012, more than doubling to \$90.2 million, and imports of organic rice, wheat, and other U.S. staple crops also grew.³² There has also been increasing news coverage of the organic supply shortage. In 2014, demand for organic eggs was up, but there were not enough U.S. farmers growing organic soybeans and organic corn to feed the organic chickens. As a result, organic

April 07, 2014), see *Organic Market Overview*, available at <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx>.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Catherine Green, Carolyn Dimitri, Biing-Hwan Lin, William McBride, Lydia Oberholtzer, and Travis Smith, *Emerging Issues in the U.S. Organic Industry*, Economic Research Service, USDA (June 2009) available at https://www.ers.usda.gov/webdocs/publications/eib55/17257_eib55fm_1_.pdf.

³² Catherine Greene, *Growth Patterns in the U.S. Organic Industry*, Amber Waves, (October 24, 2013), available at <http://www.ers.usda.gov/amber-waves/2013-october/growth-patterns-in-the-us-organic-industry.aspx#.V8WgVTVWJVo>.

egg producers cut back on production or bought foreign organic feed as reported by NPR.³³ *Bloomberg* recently wrote about the lack of organic farmers and low supplies of organic feed grain that is restraining organic dairy production across the U.S. and causing “severe shortages in the organic dairy aisle.”³⁴ Despite potentially higher returns, a 2015 ERS study stated that: “the adoption of organic field crop production has been slow and is challenging due to such factors as achieving effective weed control and the processes involved with organic certification.”³⁵

There is a three-year transition period to convert conventional farmland into organic farmland. During the transition period, the farm must adhere to all organic practices, but it is not allowed to market, sell, use the organic seal, or otherwise represent as organic products grown on that land during transition. While there are several USDA programs (*e.g.* Environmental Quality Incentives Program (EQIP), National Institute of Food and Agriculture (NIFA), and Natural Resources Conservation Service (NRCS)) that are designed to assist farms in the transition process, this three-year period can be difficult. During this time, the farm internalizes the increased production costs of an organic farm without receiving the price premium and, depending on the size and existing practices of the farm, may need to make dramatic changes to farming techniques. The proponent OTA stated its belief that a national industry-funded program could aim at increasing organic acreage by funding farmer education programs on organic certification, organic labeling, and organic farming techniques to help encourage farmers to transition to organic and help them during the transitional period.

Viable Pest Management

Organic and conventional farmers face similar challenges in finding the right combination of tools to help protect their products from pests. Just as in conventional farming, organic farming faces very real and imminent

³³ Dan Charles, *Chickens That Lay Organic Eggs Eat Imported Food, and It’s Pricey*, NPR (February 27, 2014), available at <http://www.npr.org/blogs/thesalt/2014/02/26/283112526/chickens-laying-organic-eggs-eat-imported-food-and-its-pricey>.

³⁴ Lydia Mulvany, *Grocery Stores Are Running Out of Organic Milk*, *Bloomberg Business* (February 9, 2015), available at <http://www.bloomberg.com/news/articles/2015-02-10/not-only-hipsters-cry-when-u-s-grocers-run-out-of-organic-milk>.

³⁵ <http://www.ers.usda.gov/media/1875181/err188.pdf> William McBride, Catherine Greene, *The Profit Potential of Certified Organic Field Crop Production*, Economic Research Service, USDA (June 2009) available at

threats from invasive species and other types of pests. There was a supply shortage of organic apples across the U.S. in April 2014 due to insect problems and some acreage reduction.³⁶ Organic farmers are restricted to the pest management substances that are approved in the National List of Allowed and Prohibited Substances (National List), which includes limited approved pest management strategies.

The National Organic Standards Board (NOSB), a Federal Advisory Committee Act (FACA) Committee, makes recommendations for amendments to the National List (List). Under the Sunset Provision of the OFPA, a substance must be reviewed by the NOSB within five years of its addition to the National List or its last sunset review, and renewed by the Secretary, or the substance will sunset. The NOSB also reviews petitions from individuals and organizations to add, remove, or change a listed substance and makes recommendations based on those petitions to the USDA twice a year.³⁷ The List has been amended several times since it went into effect in 2002. Several synthetic substances that were once allowed on the National List are now prohibited. With the removal of certain substances, organic farmers must reevaluate how to manage particular pests with what remains available to them.

The transition of organic apples and pears from antibiotic to non-antibiotic fire blight management tools is one example of changing pest management strategies that the proponent has said the proposed Order could help organic producers develop. Antibiotic fire blight management tools were phased out of organic production in late 2014. There are a number of completed and ongoing studies on non-antibiotic fire blight management tools with approved substances, but the time lag between when results are released and when they can be translated into actual farming practices can leave organic farmers unprotected against some very serious pests.³⁸ Additional funding for research (via an R&P program) could help farmers during these gaps, and

could anticipate changes to the List so that alternative farming techniques can already be in place when a substance is phased out.

The proposed program could also direct additional research dollars towards pest management. Such funds could provide for on-farm research devoted to helping organic farmers develop practices and techniques for current and future pest management issues, such as citrus greening disease. There is currently no strategy, either conventional or organic, that has proven to be 100 percent effective at treating or preventing the spread of citrus greening disease. Organic citrus producers need viable alternatives to the non-National List materials currently being used to treat citrus greening disease and other pest issues.

Market Confusion

The proponent group states that market confusion is another concern that could be addressed through R&P activities (e.g., consumer information). OTA cited a Consumer Reports survey to show that, while 84 percent of U.S. consumers buy organic foods sometimes, and 45 percent buy them at least once a month, there is a disparity in the marketplace between what the seal means and what consumers think it means.³⁹ OTA points to a Natural Marketing Institute report that states most consumers are: (a) Unaware of the characteristics or regulations of organic products, (b) are unclear about the benefits, or (c) easily confuse it with the term “natural”.⁴⁰ In its proposal, the proponent emphasizes that the number of labels and labeling claims in the market today contributes to consumer confusion. OTA identifies consumer confusion as the basis for the development of a federal organic law in 1990 and states that there is an ever increasing number of regulated and non-regulated labels that may be used on packaging (e.g. natural, local, non-GMO, etc.).

As one example, OTA cites recent research on U.S. and Canadian consumers showing that 17 percent of the people surveyed incorrectly believed that foods labelled “organic” were also locally grown. Another 23

percent falsely believed that local produce is grown organically.⁴¹

According to OTA consumer surveys in recent years, new organic consumers (i.e. those who only began purchasing organic products in the past two years) account for between 30 and 40 percent of American families. In 2014, 34 percent of surveyed consumers fell into this category.⁴² This means that for sales of organic agricultural commodities to maintain and expand in the long term, the industry must continually invest in educating consumers on the meaning of the USDA organic label.

Through an R&P program, the proponent hopes to educate those who are unaware of the benefits of organic products, as well as clear up confusion among consumers regarding what it means for food to be “organic”—as compared to other regulated and unregulated claims in the marketplace. The assessment is anticipated to generate over \$25 million annually. According to OTA, this assessment is vital to the long-term success of organic so that the resources of the diverse organic community can be pooled together to benefit the entire industry.

E. Provisions of Proposed Program

i. Definitions

Pursuant to section 513 of the Act, §§ 1255.1 through 1255.37 of the proposed Order define certain terms that would be used throughout the Order. Several of the terms are common to all R&P programs authorized under the Act while other terms are specific to the proposed Order. The following discussion explains the definitions and provisions of the proposed Order and describes AMS’s substantive departures from OTA’s proposal.

Sections 1255.11, 1255.13, 1255.22, 1255.27, 1255.33, 1255.34, 1255.35, 1255.36, and 1255.37 would define the terms “conflict of interest,” “Department or USDA,” “Order,” “person,” “Secretary,” “State,” “suspend,” “terminate,” and “United States,” respectively. The definitions are the same as those specified in section 513 of the Act.

Section 1255.1 would define the term “Act” to mean the Commodity Promotion, Research, and Information

³⁶ Dan Wheat, *Organic Apples May Run Out Sooner Than Usual*, Capital Press (April 8, 2014), available at <http://www.capitalpress.com/Organic/20140408/organic-apples-may-run-out-sooner-than-usual>.

³⁷ National Organic Program, *About the National List*, Agricultural Marketing Service, USDA (last modified on February 24, 2015), available at <http://www.ams.usda.gov/AMSV1.0/NOPPetitionedSubstancesDatabase>.

³⁸ Harold Ostenson and David Granatstein, *Critical Issue Report: Fire Blight Control Programs in Organic Fruit*, The Organic Center (November 2013), see page 4.

³⁹ National Research Center, *Organic Food Labels Survey*, Consumer Reports (March 2014), p. 3, available at <http://www.greenerchoices.org/pdf/CR2014OrganicFoodLabelsSurvey.pdf>.

⁴⁰ Natural Marketing Institute, *2015 Growing the Organic Industry, Strategies for Brand Success* (February 2015), available at <http://www.nmisolutions.com/index.php/research-reports/health-a-wellness-reports/2015-growing-the-organic-industry-strategies-for-brand-success>.

⁴¹ For more information see: Hannah Goldberg, *People Still Don't Know the Difference Between "Organic" and "Local"*, Time (July 11, 2014), available at: <http://time.com/2970505/organic-misconception-local/>.

⁴² The Organic Trade Association, *2014 U.S. Families' Organic Attitudes and Beliefs Study* (April 2014), available at <https://ota.com/what-ota-does/market-analysis/consumer-attitudes-and-beliefs-study>.

Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

AMS added the term “Agricultural inputs” at section 1255.2 for consistency with the USDA organic regulations at 7 CFR part 205. Examples of agricultural inputs from the NASS 2014 Organic Production Survey description of “production expenses” have also been included for clarity. Lastly, this term also gives context to the term “Net organic sales” at section 1255.21. Thus, “Agricultural inputs” would be defined as: “all substances or materials used in the production or handling of organic agricultural products (e.g. fertilizer, lime, soil conditioners, agricultural chemicals, beneficial insects, other approved materials for pest control, seed, plants, vines, trees, feed purchased for livestock, etc.)”.

AMS added the term “Agricultural product” at proposed section 1255.3 for consistency with the USDA organic regulations at 7 CFR part 205. An “agricultural product” would be any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, which is marketed in the United States for human or livestock consumption. This term is also necessary to remain consistent with the regulated and recognized terms used by certified entities in the U.S., and to give context to the terms “ingredient” at section 1255.19 and “organic” at section 1255.23.

Consistent with the definition of “covered person” at 7 U.S.C. 7401 which describes who may be subject to an organic commodity promotion order as “a producer, handler, marketer, or importer of an organic agricultural commodity”, the definition for “assessed entity” at section 1255.4 states that this order is applicable to certified organic producers, certified organic handlers, and importers. Under the permissive terms under section 516 of the Act, the term “assessed entity” also provides exemptions for covered persons. More specifically, any certified organic producer or certified organic handler (as defined in §§ 1255.10 and 1255.9) that has gross organic sales in excess of \$250,000 for the previous marketing year must pay assessments to the proposed Board.

OTA’s proposal to assess entities based on the proposed definition of “gross organic sales” (see section 1255.16) makes it challenging to assess importers at the U.S. port of entry, because the importer may engage in a variety of roles (e.g., as a wholesaler that has purchased the product from abroad, but has yet not sold it in the U.S., or as

a customs broker that is paid a fee to transact customs business on behalf of others).⁴³ An importer can, however, report on the transaction value (the price actually paid from the buyer to the seller for the merchandise) for the imported merchandise (19 CFR 152.103). Therefore, AMS determined that domestic importers (§ 1255.17) with a transaction value (“Entered Value” on CBP Form 7501) greater than \$250,000 for organic products during the previous marketing year would be assessed under the proposed Order.⁴⁴ AMS seeks comments on this approach.

Additionally, any exempt covered person may elect to participate in the proposed Order by remitting an assessment pursuant to § 1255.52 (see “voluntarily assessed entity” at sections 1255.38 and 1255.52).

Section 1255.5 would define the term “Board” or “Organic Research and Promotion Board” to mean the administrative body established pursuant to § 1255.40, or such other name as recommended by the Board and approved by the Secretary.

Pursuant to the permissive terms under section 516 of the Act, the proposed Order would provide for three exemptions which would need to be applied for annually. The document the Board would use to grant an exemption would be a “certificate of exemption” which is defined as a certificate issued by the Board, pursuant to § 1255.53, to an eligible certified organic producer, certified organic handler or importer. The three exemptions are discussed in further detail in the description of section 1255.53.

Organic certification verifies that a farm or handling facility located anywhere in the world complies with OFPA and the USDA organic regulations and allows an entity to sell,

⁴³ Customs business. “Customs business” means those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. “Customs business” also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with CBP in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, “customs business” does not include the mere electronic transmission of data received for transmission to CBP and does not include a corporate compliance activity. <https://www.law.cornell.edu/cfr/text/19/111.1>

⁴⁴ U.S. Customs and Border Protection relies upon CBP Form 7501 “Entry Summary” to determine relevant information (e.g., transaction value, classification, origin, etc.) regarding the imported commodity. Available at: <https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501>.

label, and represent products as organic. The regulations at 7 CFR part 205 describe the specific standards required for the use of the word “organic” or the USDA organic seal on food, feed, or fiber products. For this reason, AMS added two new terms to the proposed Order for “certification” and “certified operation” for consistency with the regulations at 7 CFR part 205. Additional language regarding the recognition of organic products imported under established organic equivalency arrangements is included in the section 1255.7 definition of “certification or certified”, which is defined as: “a determination made by a USDA-accredited certifying agent that a production or handling operation is in compliance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto, and which is documented by a certificate of organic operation”.⁴⁵ Section 1255.8 defines a “certified operation” as a crop or livestock production operation, wild-crop harvesting or handling operation, or portion of such operation that is certified by a USDA-accredited certifying agent as utilizing a system of organic production or handling as described by the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205. The products that such certified operations are certified to produce and/or handle are documented by a certificate of operation, and are commonly referred to as “certified organic” or “certified” products.

The USDA organic regulations at 7 CFR part 205 provide separate definitions for the terms “handle”, “handler”, “handling operation” and “producer” that share similarities with the Act’s definitions for the terms “first handler” and “producer”. To make a clear distinction between the proposed Order’s terms and the Act’s commonly used terms “first handler” and “producer”, and to reiterate that organic products must be produced by certified entities, AMS departed from OTA’s proposal and has changed the term in section 1255.9 from “organic handler” to “certified organic handler”. A “certified organic handler” would be defined as a person who handles certified organic products in accordance

⁴⁵ The United States has trade arrangements with several nations to facilitate the exchange of organic products. These arrangements provide additional market opportunities for USDA organic producers. The current terms of such arrangements are available at: <https://www.ams.usda.gov/services/organic-certification/international-trade>.

with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.270 through 7 CFR 205.272, and all other applicable requirements of 7 CFR part 205 and receives, sells, consigns, delivers, or transports certified organic products into the current of commerce in the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States. Further, section 1255.10 was changed from “organic producer” to “certified organic producer”, which is defined as a person who produces certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.202 through 7 CFR 205.207 or 7 CFR 205.236 through 7 CFR 205.240, and all other applicable requirements of 7 CFR part 205.

Consistent with the Act, section 1255.11 defines “Conflict of interest” as a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

OTA’s proposed term “covered entity” was omitted because it was duplicative of the term “assessed entities”.

Section 1255.12 defined “Customs or CBP” as the United States Customs and Border Protection, an agency of the United States Department of Homeland Security.

Section 1255.13 defined “Department” as the U.S. Department of Agriculture, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary’s stead.

The 2014 Farm Bill amendments to 7 U.S.C. 7401 (Commodity promotion and evaluation), which provided the authority for USDA to issue an organic commodity promotion order, also specified that persons covered by both an organic commodity promotion order and another agricultural commodity promotion order would be allowed to elect which order to be assessed under. Such “dual-covered commodities” include the commodities covered under the 22 research and promotion programs and the 25 marketing orders listed previously in this rule. Consistent with 7 U.S.C. 7401, section 1255.14 would define a “dual-covered commodity” as an agricultural commodity that (a) is produced on a certified organic farm; and (b) is covered under both—(1) this Part; and (2) any other agricultural commodity promotion order issued under a commodity promotion law.

More simply put, under an organic commodity promotion order, an organic blueberry *producer* (emphasis added) would be producing a “dual-covered commodity”, because there is already a Blueberry Promotion, Research and Information Order (7 CFR part 1218), and that order assesses blueberry *producers* (emphasis added). Under the proposed Order, an organic blueberry producer would have the option to pay into either the blueberry program or the organic program.

However, only covered persons under an applicable commodity promotion order (which can include producers, handlers, first handlers, processors, importers, exporters, feeders, and seed stock producers, depending upon the order) are entitled to such an election. For example, an organic blueberry handler would not have the ability to elect to pay into the blueberry program instead of the organic program, as blueberry handlers are not “covered” by the blueberry program and are not assessed. AMS provides several scenarios for how the “dual-covered commodities” provision would work in the “Expenses and Assessments” section of this proposed rule and requests public comments on this issue. The scenarios include how assessments would work for a person producing both organic and conventional products (*i.e.*, “split operations”) and a person producing multiple commodities.

Many crop producers use the terms “marketing year” and “crop year” interchangeably.⁴⁶ For example, the 2008 wheat crop year, was June 1, 2008, through May 30, 2009. Not only does the crop year vary for each commodity, but it also often does not coincide with the calendar year. For example, for peanuts, which would be a dual-covered commodity under the Order, producers currently pay assessments based on the crop year (August 1 to July 31). For the purposes of this Order, section 1255.15 would define “fiscal year and marketing year” as the 12-month period ending on December 31 or such other period as recommended by the Board and approved by the Secretary. AMS invites public comments on additional procedures that would address assessments to be paid by or refunded to producers, handlers, and importers of dual-covered commodities covered under commodity promotion programs

⁴⁶ USDA ERS Farm Policy Glossary definition for “crop year” is “the 12-month period starting with the month when the harvest of a specific crop typically begins”. <http://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary.aspx>.

operating under different fiscal year calendars.

The definitions for the terms “gross organic sales” and “net organic sales” at sections 1255.16 and 1255.21, respectively, are highly important to those entities that could potentially be affected should this proposed rule become final. AMS is inviting comments specific to the definitions for these two terms because their wording establishes the structure for: (a) determining which entities are eligible for exemptions, and (b) calculating the assessments certified producers and certified handlers shall pay to the Board.

ERS and NASS employ a variety of terms and measures to describe different aspects of sales and income of U.S. farms. For example, one descriptor of U.S. farms comes from the ERS 2012 Census of Agriculture Farm Typology Report, which uses farm size classifications based on a measure called “gross cash farm income” (GCFI). GCFI includes the farm operator’s sales of crops and livestock, fees for delivering commodities under production contracts, government payments, and farm-related income. Another measure, which is used in the NASS and RMA’s (Risk Management Agency) 2014 Organic Survey, is “value of sales”, which is defined as: “the gross value of sales before taxes and production expenses of all organic agricultural products sold or removed from the place in 2014 regardless of who received the payment. The gross value of sales is at the commodity level and does not include value-added organic products”.⁴⁷

ERS’s 2014 edition of the Structure and Finances of U.S. Farms: Family Farm Report states that gross value of sales “can be much larger than GCFI for farms with livestock production contracts, because the value of the livestock removed is included in gross [value of] farm sales. Contract producers receive a production contract fee for their services, but the fee is a fraction of the value of livestock removed.”⁴⁸ In other words, a dairy farmer operating under a production contract to raise heifers, or a poultry operation under a production contract to raise broilers,

⁴⁷ USDA NASS, 2012 Census of Agriculture, Special Study: 2014 Organic Survey. Special Tabulation on Certified Organic Farms Sales. Public Survey can be accessed at https://www.agsensus.usda.gov/Publications/2012/Online_Resources/Organics/ORGANICS.pdf.

⁴⁸ Hoppe, Robert A. *Structure and Finances of U.S. Farms: Family Farm Report, 2014 Edition*, EIB-132, U.S. Department of Agriculture, Economic Research Service, December 2014. Accessed at www.ers.usda.gov/publications/eib-economic-information-bulletin/eib132.

could both have high gross sales, but low net profit. AMS is requesting public comment on this issue owing to its being highlighted as an issue of concern in a partial proposal submitted to AMS from an organic dairy producers association.⁴⁹

In an effort to reduce the burden of reporting time associated with this proposed program, AMS researched what measures of sales and incomes that private businesses already calculate on an annual basis for the purpose of filing U.S. income tax returns. Consequently, for the purposes of clarity and bringing the definition closer into alignment with the IRS definition of “gross receipts”, AMS has chosen not to adopt OTA’s proposed definition for “gross organic revenue”, which was defined as: “total gross sales in organic products”. AMS instead proposes the term: “Gross organic sales”, which would be defined at section 1255.16 as: “the total amount the person received for all organic products during the fiscal year without subtracting any costs or expenses.”

As previously noted, importers currently do not need to be certified. Given this point, section 1255.17 would define an “importer” as: any person who imports certified organic products from outside the United States for sale in the United States as a principal or as an agent, broker, or consignee of any person who produces organic products outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such organic products. Importers of organic products can be identified through organic certificates, import certificates, HTS codes, or any other demonstration that they meet the definition above.

Section 1255.18 would define “information” as information and programs for consumers, the organic industry, and producers. This includes educational activities and information and programs designed to enhance and broaden the understanding of the use and attributes of organic products, increase organic production, support the transition of acres and farms to organic production in the United States, provide technical assistance, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies. These include:

(a) Consumer education, advertising and information, which means any effort taken to provide information to,

and broaden the understanding of, the general public regarding organic products; and

(b) Industry information, which means information and programs that would enhance the image of the organic industry, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies; and

(c) Producer information, which means information related to agronomic and animal husbandry practices and certification requirements, and information supporting the sustainable transition of acreage, farms and ranches to organic production in the United States, long-term system management, increasing organic production, direct and local marketing opportunities, export opportunities, and organic research.

AMS notes that the proposed definition incorporates feedback on the definition from a number of partial proposals.

AMS added the term “ingredient” at proposed section 1255.19 for consistency with the USDA organic regulations at 7 CFR part 205 and to give context to the terms “net organic sales” at section 1255.21. An “ingredient” would be defined to mean: any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

Section 1255.20 would define the term “National Organic Program” to mean: the program authorized by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) for the purpose of implementing its provisions.

Distinct from the commonly held definition of “net sales”, which can be described as: The amount of sales generated after the deduction of returns, allowances for damaged or missing goods and any discounts allowed, section 1255.21 would define “Net organic sales” to mean: Gross sales in organic products minus (a) the cost of certified organic ingredients, feed, and agricultural inputs used in the production of organic products and (b) the cost of any non-organic agricultural ingredients used in the production of organic products.⁵⁰

Section 1255.22 would define “Order” to mean: An order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion, research, education and information regarding organic products authorized under the Act.

OTA’s proposed term “organic certificate holder” was omitted because it was duplicative of the terms “certified organic handler” and “certified organic producer”.

For statutory and regulatory consistency, AMS added the term “organic” at section 1255.23 to mean: A labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205. The primary purpose of the term “organic” in the proposed Order is as a modifier in reference to products produced by certified organic producers and/or certified organic handlers. For clarification, the phrase “organic products” used throughout the Order are synonymous with the terms: “certified products” or “certified organic products”.⁵¹

Section 1255.24 would define “organic products” to mean: Products produced and certified under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto.

Section 1255.25 would define Organic Trade Association (OTA) as a membership business association who, in collaboration with the GRO Organic Core Committee, petitioned USDA for the Organic Research, Promotion, and Information Order. OTA is a membership-based trade organization representing growers, processors, certifiers, farmers associations, distributors, importers, exporters, consultants, retailers, and others involved in the organic sector. The GRO Organic Core Committee is a subset of OTA’s larger Organic Research and Promotion Program Steering Committee. This was added to clarify the organization who would assist the Department with nominations for the initial Board under section 1255.41.

Section 1255.26 would define “part” to mean: The Organic Research, Promotion, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a *subpart* of such part.

Throughout the order, the terms “person/persons” and “entity/entities” are often used interchangeably. Section 1255.27 would define “person” to mean: Any individual, group of individuals, partnership, corporation,

⁴⁹ Northeast Organic Dairy Producers Alliance, Partial proposal on an organic commodity promotion order. <https://www.ams.usda.gov/sites/default/files/media/OrganicCheckoff/PartialProposal20NODPA207.18.15.pdf>.

⁵⁰ The regulations at 7 CFR part 205 specify strict conditions for the use of non-organic agricultural ingredients in organic products.

⁵¹ The term “organic” is also used in the terms “certified organic handler” at section 1255.9 and “certified organic producer” at section 1255.10, to more clearly identify the types of products such entities are certified to sell.

association, cooperative, or any other legal entity.⁵² Comparable to the same definition at 7 CFR part 205, section 1255.28 would define a “product processor” as: a certified organic handler who cooks, bakes, heats, dries, mixes, grinds, churns, separates, extracts, cuts, ferments, eviscerates, preserves, dehydrates, freezes, or otherwise manufactures organic products, and includes the packaging, canning, jarring, or otherwise enclosing organic food in a container.

Section 1255.29 would define “programs, plans and projects” to mean: Those research, promotion, and information programs, plans or projects established pursuant to the Order.

Section 1255.30 would define “promotion” to mean: Any action, including paid advertising and the dissemination of information, utilizing public relations or other means, to enhance and broaden the understanding of the use and attributes of organic products for the purpose of maintaining and expanding markets for the organic industry.

Section 1255.31 would define the term “Qualified State Commodity Board” to mean: For purposes of section 1255.54 governing assessment offsets, an existing or future producer or handler governed entity—

- (a) That is authorized by State law or a State government agency;
- (b) That is organized and operating within a State;
- (c) That is not federally administered; and
- (d) That receives mandatory contributions and conducts promotion, research, and/or information programs.

In response to stakeholder feedback obtained from the partial proposals previously mentioned, OTA’s May 2016 revised proposal broadened the proposed definition of “research” to include agricultural research as a priority. Therefore, section 1255.32 would define “research” to include definitions for both agricultural and other research:

- (a) Agricultural research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to improve organic farm production systems and practices, increase farm profitability and productivity, expand organic farming opportunities, and enhance sustainability for farms, farm families and their communities; enhance plant

and animal breeding and varietal development for organic systems and improve the availability of other production inputs; optimize natural resource conservation, biodiversity, ecosystem services, and other environmental outcomes of organic agriculture, and advance organic farm and food safety objectives.

(b) Other research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to enhance or increase the consumption, image, desirability, use, marketability, or production of organic products; or to do studies on nutrition, market data, processing, environmental and human health benefits, quality of organic products, including research directed to organic product characteristics and product development, including new uses of existing organic products, new organic products or improved technology in the production, processing and packaging of organic products.

Section 1255.33 would define “Secretary” to mean: The Secretary of Agriculture of the United States, or any other officer or employee of the Department to whom authority has been delegated, or to whom authority may hereafter be delegated, to act in the Secretary’s stead.

Section 1255.34 would define “state” as: Any of the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

Section 1255.35 would define “suspend” to mean: To issue a rule under 5 U.S.C. 553 to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

Section 1255.36 would define “terminate” to mean: To issue a rule under 5 U.S.C. 553 to cancel permanently the operation of an order or part thereof beginning on a date certain specified in the rule.

Section 1255.37 would define “United States” to mean: Collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

Section 1255.38 would define a “voluntarily assessed entity” to mean: Any covered person with gross organic sales or transaction value of \$250,000 or less for the previous marketing year that elects to participate in the Order by remitting an assessment pursuant to § 1255.52.

ii. Establishment of the Board

Pursuant to section 515 of the Act, §§ 1255.40 through 1255.47 of the proposed Order would detail the establishment and membership of the proposed Organic Research and Promotion Board, nominations and appointments, the term of office, removal and vacancies, procedure, reimbursement and attendance, powers and duties, and prohibited activities.

Section 1255.40 would specify the Board establishment and membership. The Board would be composed of mandatorily and voluntarily assessed entities (*i.e.* domestic certified organic producers, handlers, and importers for the U.S. market who produce, handle, and import organic products in the United States during a fiscal period). The Board would be comprised of 17 seats as follows: 8 certified organic producer seats (including a voluntarily assessed producer), 7 certified organic handler seats, one importer seat, and one at-large public member, who shall be a non-voting member. Thus, each voting member of the board represents 6.25 percent of the votes.

While OTA’s proposal took the approach of distributing the producer seats based on the number of certified operations per state (see Table 5), AMS took a different approach to ensure consistency with section 7414 of the Act. Section 7414 of the Act states that “the composition of each board shall reflect the geographical distribution of the production of the agricultural commodity involved in the United States and the quantity or value of the agricultural commodity imported into the United States”. For this reason, AMS combined the commodity-level production data available from the 2014 NASS Organic Production Survey to estimate certified organic production as a whole for each state. As previously mentioned, AMS used ERS conversion factors to convert commodity production volumes (*e.g.* bushels of blueberries, gallons of milk, tons of grapes, etc.) to the same measurement of pounds. This made it possible to generate an estimate of the percent certified organic production by state, and combine them into “production regions” representing the number of producer seats that OTA proposed.

Table 5, below, shows the geographical distribution of producer board seats by region as proposed by OTA in May 2016. The portion of total U.S. certified organic production and certified organic farm operations has been calculated to illustrate how the proposed distribution comports with the Act. As previously stated, NASS data on

⁵² Under existing research and promotion programs, the identification method for a “person” or “entity” is a taxpayer identification number (TIN) used by the Internal Revenue Service (IRS).

certified organic production at the state level represents around 80 percent of

total production at the national level. This is due to proprietary concerns that

prevent NASS from publishing data on a more micro level.

TABLE 5—GEOGRAPHIC REGIONS AS PROPOSED BY OTA, MAY 216

	States	Portion of U.S. certified organic production (percent)	Portion of U.S. certified organic farm operations (percent)	Board seats for producers
Region 1	AK, AZ, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY	20	16	1
Region 2	CA	21	21	1
Region 3	IL, IN, MI, WI	10	15	1
Region 4	AR, IA, KA, LA, MN, MO, NE, ND, OK, SD, TX	11	15	1
Region 5	AL, DE, DC, FL, GA, KY, MD, MS, NC, NJ, OH, PA, SC, TN, VA, WV.	8	16	1
Region 6	CT, ME, MA, NH, NY, RI, VT	10	17	1
Voluntarily assessed entity .....	.....	.....	.....	1
Total .....	.....	80	100	7

Source: NASS 2014 Organic Survey data; calculations by AMS.

It should be noted that the proponent group revised its proposed regions in July 2016 after discussions with AMS. The revision changed the number of regions to 7, divided as follows:

- (1) AK, AZ, HI, NM, NV, OR, WA, 6 Southern CA counties;
- (2) The remaining counties of CA;
- (3) IL, MI, WI;
- (4) AR, IA, IN, MO, OH;
- (5) MA, ME, NH, NY, VT;

- (6) AL, CT, DE, FL, GA, KY, LA, MD, MS, NC, NJ, PA, RI, SC, TN, VA, WV;
- (7) CO, ID, KA, MN, MT, ND, NE., OK, SD, TX, UT, WY.

In its July 2016 revision, the proponent group also changed “voluntarily assessed entity” to “voluntarily assessed producer”, thereby adding another producer seat to the board and bringing total producer seats to 8 out of 17 total board members.

The absence of NASS production data at the county level makes it difficult to estimate the production volume that would result from dividing California into two separate regions.

Table 6 shows an example of the regions similar to OTA’s proposal divided by AMS using certified organic production volume rather than number of certified organic entities.

TABLE 6—GEOGRAPHIC REGIONS DIVIDED BY PRODUCTION VOLUME

	States	Portion of U.S. certified organic production (percent)	Portion of U.S. certified organic farm operations (percent)	Board seats for producers
Region 1	AK, CA, HI	21	22	2
Region 2	OR, WA	13	9	1
Region 3	AZ, CO, ID, KA, MT, NE, NV, NM, ND, OK, SD, TX, UT, WY.	12	11	1
Region 4	IA, MN, WI	11	17	1
Region 5	AL, AR, DE, FL, GA, IL, IN, KY, LA, MD, MI, MS, MO, NJ, NC, OH, PA, SC, TN, VA, WV.	12	24	1
Region 6	CT, ME, MA, NH, NY, RI, VT	10	17	1
Voluntarily assessed producer .....	.....	.....	.....	1
Total .....	.....	80	100	8

Source: NASS 2014 Organic Survey data; calculations by AMS.

As proposed, of the 8 producer seats, one would be an at-large, voluntarily assessed certified organic producer. The remaining 7 seats were spread among 6 production regions as shown by Table 6. Of the 6 regions, 5 regions represent between 10 and 13 percent of certified organic production in the U.S. Region 1,

which represents Alaska, California, and Hawaii, represents 21 percent of certified organic production. Due to the lack of county-level data that would make it possible to divide California into two regions, Region 1 would hold 2 certified organic producer seats. Remaining Regions 2 through 6 would

each hold one certified organic producer seat. Specific areas within each production region would be specified in § 1255.40(b)(1) of the proposed Order. The proposed production regions are shown below in Figure 4.

Figure 4. U.S. Certified Organic Production by State, 2014*



*States not displaying a percent of production have less than 1% of U.S. production.

Based on the Act, the composition of each board should reflect “the quantity or value of the agricultural commodity imported into the United States”. It would be difficult to determine the number of importer seats based on quantity; therefore, the proposal relies upon value of imports to determine importer representation on the Board. As previously mentioned, a single member’s vote out of the 16 voting members would represent a little over 6 percent of the total votes. Thus, the single importer seat on the Board would constitute 6 percent of the vote. As a share of the total estimated assessment revenue from the proposed Order, about 5 percent would come from total assessments on importer sales value of organic products (see Table 7). Comparing these two proportions indicates that the share of the single importer seat on the Board (6 percent) is similar to the share of the total estimated assessment revenue that importers would pay into the program (5 percent).

Seven members would be certified organic handlers at large, but of those seven members, two shall be product processors as defined in section 1255.28. OTA chose to have product processor member representation on the

Board for the purpose of providing representation for the diversity of the organic value chain. One member shall be an importer of organic products. For clarity, with the exception of the at-large public member, both voluntarily and mandatorily assessed entities are eligible to be nominated for the Board seats for which they meet the definitions. AMS invites comments on the proposed distribution of Board seats for producers, handlers, and importers.

OTA also opted to have no alternate Board members. The proponent stated that it wanted to ensure that industry members who seek representation and serve on the Board are committed to their service and participate in all Board meetings.

At least once in every five-year period, but not more frequently than once in every 3-year period, the Board must review, based on a 3-year average, the geographical distribution of production of organic agricultural commodities and the value of organic agricultural commodities imported into the United States. The review would be conducted using the surveys and databases generated and maintained by USDA (e.g. NASS surveys, the NOP Organic Integrity Database (OID), the GATS database, ITDS/ACE, etc.) and, if

available, other reliable reports from the industry. If warranted, the Board would recommend to the Secretary that the Board membership be reapportioned appropriately to reflect such changes. The distribution of production between regions also shall be considered. Any changes in Board composition would be implemented by the Secretary through rulemaking.

Further, OTA wanted to periodically consider reapportionment based on the participation rate of voluntarily assessed entities. Hence, at least once in every five-year period, but not more frequently than once in every 3-year period, the Board would review the annual assessment receipts for voluntarily assessed entities in order to determine if the size of the Board should be changed to reflect changes in the number of participating voluntarily assessed entities. If warranted, the Board would recommend to the Secretary that the Board membership be reapportioned appropriately to reflect such changes. Any changes in Board composition would be implemented by the Secretary through rulemaking.

Section 1255.41 of the proposed Order would specify Board nominations and appointments. While the proponent proposed for Board candidates to submit

nominations for the initial and subsequent Boards directly to the Secretary, this would be inconsistent with the Department's role in the nomination process with respect to the research and promotion programs that were established under the Act. Therefore, the initial nominations would be conducted by OTA with the support of USDA. Before considering any nominations, OTA and USDA would publicize the nomination process, using trade press or other means it deems appropriate, and conduct outreach to all U.S. certified organic producers, certified organic handlers, and importers of organic products. OTA would use meetings, mail or other methods to solicit potential nominees and would work with USDA to help ensure that all interested persons are apprised of the nomination process. Entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role for which they meet the definitions provided at sections 1255.9, 1255.10, and 1255.17. Further, voluntarily assessed certified organic producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the certified organic producer seat for which they are geographically qualified. Once OTA has received all of the nominations, the information will be submitted to the Secretary for appointment. Nominations for the initial Board will be handled by USDA.

Regarding subsequent nominations, the Board would solicit nominations using trade press or other means it deems appropriate, and shall conduct outreach to: (1) All U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 for the previous marketing year, (2) importers of organic products that declared a transaction value greater than \$250,000 for the previous marketing year, and (3) all voluntarily assessed entities who have remitted assessments subject to section 1255.52(d) (e.g., "opted into the program"). Entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role (certified organic producer, certified organic handler, and importer) for which they meet the definitions provided at sections 1255.9, 1255.10, and 1255.17. Further, voluntarily assessed certified organic producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the

certified organic producer seat for which they are geographically qualified. All Board nominees would have the opportunity to provide to the Board a short background statement outlining their qualifications and desire to serve on the Board. Entities that are a combination of a certified organic producer, certified organic handler, or importer could also vote in the nomination process described below for the certified organic producer, certified organic handler, and importer nominees, provided they are geographically qualified and meet the definitions provided at 1255.9, 1255.10, and 1255.17. The producer nomination process is described below:

Certified organic producers who produce organic agricultural commodities in more than one region could seek nomination in only the region in which they are domiciled. The names of certified organic producer nominees (producer nominees) would be placed on a ballot by region. For the seven Board seats allocated by geographic region, certified organic producers must be domiciled in the region for which they seek nomination. The names of producer nominees would be placed on a ballot by region. The ballots along with any background statements would be mailed to the certified organic producers with gross organic sales in excess of \$250,000, and any voluntarily assessed certified organic producer in that region that has remitted an assessment pursuant to section 1255.52(d) for the previous marketing year for a vote. Domestic certified organic producers may vote in each region in which they produce organic products. The votes would be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position would be submitted to the Secretary.

The names of the nominees for the "at-large" voluntarily assessed domestic certified organic producer seat would also be placed on a ballot. The ballots along with any background statements would be mailed to all voluntarily assessed certified organic producers for a vote. The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for the position would be submitted to the Secretary.

The names of the nominees for the five "at-large" domestic certified organic handler seats and the two "at-large" product processor seats would also be placed on a ballot. The ballots along with any background statements

would be mailed to all certified organic handlers with gross organic sales revenue in excess of \$250,000, and any voluntarily assessed certified organic handlers who have remitted an assessment pursuant to section 1255.52(d) for the previous marketing year for a vote. The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top ten candidates for the handler positions and the top four candidates for the product-processor seats would be submitted to the Secretary.

The names of the nominees for the importer seat would also be placed on a ballot. The ballots along with any background statements would be mailed to importers who imported a transaction value for organic products in excess of \$250,000, and any voluntarily assessed importers who have remitted an assessment pursuant to 1255.52(d) for the previous marketing year for a vote. The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates would be submitted to the Secretary. The names of the nominees for the "at-large" non-voting public member seat would also be placed on a ballot.

The ballots along with any background statements would be mailed to: (1) All U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 in the previous marketing year, (2) importers of organic products that declared a transaction value greater than \$250,000 for the previous marketing year, and (3) all voluntarily assessed entities who have remitted assessments subject to section 1255.52(d) (e.g., "opted into the program"). The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates would be submitted to the Secretary.

The Board would submit nominations to the Secretary at least 6 months before the new Board term begins. The Secretary would select the members of the Board from the nominations submitted by the Board. OTA also recommended that no two board members be employed by a single corporation, company, partnership or any other legal entity. Further, OTA recommended that Board membership should strive to reflect a wealth of marketing and research experience as well as the wide variety of business attributes reflected throughout the organic supply chain (*i.e.* quantity and

type of products produced, entity size, etc.). This is to help ensure that representation on the Board is balanced.

In order to provide the Board flexibility, the Board could recommend to the Secretary modifications to its nomination procedures. Any such modifications would be implemented through rulemaking by the Secretary.

Section 1255.42 of the proposed Order would specify the term of office. With the exception of the initial Board, each Board member would serve a three-year term or until the Secretary appointed his or her successor. Each term of office would begin on January 1 and end on December 31. No member could serve more than two consecutive terms, excluding any term of office less than three year terms, and no single corporation, company, partnership or any other legal entity can be represented on the Board by an employee or owner for more than two consecutive terms. For the purpose of ensuring that no more than approximately one-third of the Board members' terms expire in any given year, the terms of the initial Board members would be staggered for two, three and four years and would be recommended to the Secretary by the proponent group.

Section 1255.43 of the proposed Order would specify criteria for the removal of members and for filling vacancies. If a Board member ceased to work for or be affiliated with a certified organic producer, certified organic handler, or importer or ceased to do business in the region he or she represented, such position would become vacant. Additionally, the Board could recommend to the Secretary that a member be removed from office if the member consistently failed or refused to perform his or her duties or engaged in dishonest acts or willful misconduct. The Secretary could remove the member if he or she finds that the Board's recommendation shows adequate cause. If a position became vacant, nominations to fill the vacancy would be conducted using the nominations process as proposed in § 1255.41 of the Order. A vacancy would not be required to be filled if the unexpired term is less than six months.

Section 1255.44 of the proposed Order would specify procedures of the Board. A majority (9) of the voting Board members would constitute a quorum. If participation by telephone or other means were permitted, members participating by such means would count towards the quorum requirements or other voting requirements as authorized under the Order. Proxy voting would not be permitted. A motion would carry if supported by 9

voting Board members, except for recommendations to change the assessment rate or to adopt a budget, both of which would require affirmation by at least two-thirds (11) of the voting Board members. If the Board has vacant positions, recommendations to change the assessment rate or to adopt a budget would have to pass by an affirmative vote of two-thirds of the voting Board members, exclusive of the vacant seats.

For example, if a 16 voting member Board had a vacancy, there would be 15 voting Board members. If the Board held a meeting, and 6 members were present and 3 participated by telephone, there would be a quorum (9) for the meeting. If the Board were voting on the upcoming year's budget, 10 members ($.66 \times 15$ members) would have to vote in favor of the budget for it to pass.

The proposed Order would also provide for the Board to take action by mail, telephone, electronic mail, facsimile, or any other electronic means when the chairperson believes it is necessary. Actions taken under these procedures would be valid only if all members and the Secretary were notified of the meeting and all members were provided the opportunity to participate and a majority of Board members voted in favor of the action (unless two-thirds vote were required under the Order). Additionally, all votes would have to be confirmed in writing and recorded in Board minutes.

The proposed Order would specify that Board members would serve without compensation. However, Board members would be reimbursed for reasonable travel expenses, as approved by the Board, incurred when performing Board business.

Section 1255.46 of the proposed Order would specify powers and duties of the Board. These are similar in promotion programs authorized under the Act. They include, among other things, to administer the Order and collect assessments; to develop bylaws and recommend regulations necessary to administer the Order; to select a chairperson and other Board officers; to create an executive committee and form other committees and subcommittees as necessary; to hire staff or contractors; to provide appropriate notice of meetings to the industry and USDA and keep minutes of such meetings; to develop programs and enter into contracts to implement programs; to submit a budget to USDA for approval 60 calendar days prior to the start of the fiscal year; to borrow funds necessary to cover startup costs of the Order; to invest Board funds appropriately; to recommend changes in the assessment rate as appropriate and within the limits of the Order; to have

its books audited by an outside certified public accountant at the end of each fiscal period and at other times as requested by the Secretary; to make public an accounting of funds received and expended; to receive, investigate and report to the Secretary complaints of violations of the Order; and to recommend amendments to the Order as appropriate. Additionally, when researching priorities for each marketing year, the Board will provide public notice using local, state, or regional entities, mail and/or other methods to solicit public input from all covered entities, and will have at least one meeting or conference call to determine the priorities for each marketing year.

Section 1255.47 of the proposed Order would specify prohibited activities that are common to all promotion programs authorized under the Act. In summary, the Board nor its employees and agents could engage in actions that would be a conflict of interest; use Board funds to lobby (influencing legislation or governmental action or policy, by local, state, national (*i.e.*, the National Organic Standards Board (see 7 U.S.C. 6518)), and foreign governments or subdivision thereof, other than recommending to the Secretary amendments to the Order); and engage in any advertising or activities that may be false, misleading or disparaging to another agricultural commodity. Such prohibitions are outlined in the *Guidelines for AMS Oversight of Commodity Research and Promotion Programs*, which provides the parameters for commodity promotion program activities and restrictions. For example, Section IX titled "Policy on Review and Approval of Promotional and Educational Materials" states that AMS will disapprove advertising that is deemed disparaging to another commodity. It defines "disparaging" as depicting other commodities in a negative or unpleasant light via either overt or subjective video, photography, or statements (excluding those that are strictly comparative).

iii. Expenses and Assessments

Pursuant to sections 516 and 517 of the Act, sections 1255.50 through 1255.54 of the proposed Order detail requirements regarding the Board's budget and expenses, financial statements, assessments, and exemption from assessments. Proposed section 1255.50 states that at least 60 calendar days before the start of the fiscal period, and as necessary during the year, the Board would submit a budget to USDA covering its projected expenses. The budget must include a summary of anticipated revenue and expenses for

each program along with a breakdown of staff and administrative expenses. Except for the initial budget, the Board's budgets should include comparative data for at least one preceding fiscal period.

The proponents have proposed that no less than 25 percent of the funds shall be allocated to research; 25 percent of the funds shall be allocated to information; 25 percent of funds shall be allocated to promotion; and 25 percent of the funds shall remain discretionary. Further, in response to stakeholder feedback obtained from partial proposals, OTA revised its description of the funds allocated to research to include the requirement that a majority of such funds be allocated to agricultural research; of the funds allocated to information, a majority shall be allocated to producer information; and the regional organic producer Board members would establish priorities, including regional considerations, for investments in agricultural research. Any funds allocated in a specific area that was not spent during the current fiscal year would carry over to the next fiscal year in the same category.

Each budget, except for the initial budget, would include staff and administrative expense breakdowns, with comparative data for at least one preceding fiscal year. Each budget would provide adequate funds to cover the Board's anticipated expenses as well as to provide for a reserve as stated in the Order. Any amendment or addition to an approved budget would be approved by USDA, including shifting of funds from one program, plan or project to another. Shifts of funds that do not result in an increase to the Board's approved budget would not have to have prior approval from USDA. For example, if the Board's approved budget provided for \$1 million in research projects and \$500,000 in consumer advertising, a shift of \$50,000 from research to consumer advertising would require USDA approval. However, a shift within the \$1 million research line item would not require prior USDA approval. USDA did modify the regulatory text at section 1255.50 to clarify that only shifts in funds within a program, as stated in the example above, did not need USDA approval. Any other amendment or shift in funds to different programs must be approved prior to use of the funds.

The Board would be authorized to incur reasonable expenses for its maintenance and functioning. During its first year of operation, the Board could borrow funds for startup costs and capital outlay. Any borrowed funds

would be subject to the same fiscal, budget and audit controls as other funds of the Board.

The Board could also accept voluntary contributions. Any contributions received by the Board would be free from encumbrances by the donor and the Board would retain control over use of the funds. The Board may also receive other funds provided through USDA or other sources. For example, the Board could receive Federal grant funds, subject to approval by the Secretary, for a specific research project. The Board would also be required to reimburse USDA for costs incurred by USDA in overseeing the Order's operations, including all costs associated with referenda.

The Board would be limited to spending no more than 15 percent of its available funds for administration, maintenance, and the functioning of the Board, in accordance with the Act. This limitation would begin three fiscal years after the Board's first meeting. Reimbursements to USDA would not be considered administrative costs. As an example, if the Board received \$30 million in assessments during fiscal year 5, and had available \$1 million in reserve funds, the Board's available funds would be \$31 million. In this scenario, the Board would be limited to spending no more than \$4.65 million ($0.15 \times \31 million) on administrative costs. Additionally, no program, plan or project shall expend on administrative costs more than 15 percent of the total funds allocated for that specific program, plan or project.

The Board could also maintain a monetary reserve and carry over excess funds from one fiscal period to the next. However, such reserve funds could not exceed one fiscal year's budgeted expenses. For example, if the Board's budgeted expenses for a fiscal year were \$30 million, it could carry over no more than \$30 million in reserve. With approval of the Secretary, reserve funds could be used to pay expenses.

The Board could invest its revenue collected under the Order in the following: (1) Obligations of the United States or any agency of the United States; (2) General obligations of any State or any political subdivision of a State; (3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve; (4) Obligations fully guaranteed as to principal interest by the United States; and (5) Other investments as authorized by the Secretary.

Section 1255.51 states that the Board would be required to submit to USDA financial statements on a quarterly

basis, or at any other time as requested by the Secretary. Financial statements must include, at a minimum, a balance sheet, income statement, and expense budget that shows expenditures during the specified period, year-to-date and unexpended budget. Financial statements would be submitted to USDA within 30 calendar days after the time period to which it applies. The Board would also submit an annual financial statement within 90 calendar days after the fiscal year to which it applies.

Assessments

Under section 1255.52, the Board's programs and expenses would be funded through assessments on certified organic producers, certified organic handlers, and importers of organic products in the U.S. market. The proposed Order would provide for an initial assessment rate of one-tenth of one percent of net organic sales for domestic producers and handlers with gross annual organic sales greater than \$250,000 in the previous marketing year. Per the proposed definition at section 1255.21, net organic sales would be equal to total gross sales in certified organic products minus (a) the cost of certified organic ingredients, feed, and inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used in the production of certified products. The proposed Order would provide for an initial assessment rate of one-tenth of one percent of transaction value for importers with transaction value greater than \$250,000 in the previous marketing year.

To facilitate audience understanding of the method of assessment being proposed, OTA provided a sample self-assessment worksheet which outlines the process for calculating cost deductions, net organic sales, and subsequent assessments to be paid to the Board. The worksheet is accessible as a "Related Document" on www.regulations.gov as well as on the AMS Web site. AMS is seeking public comments on the proposed assessment approach, particularly on the calculations described below and any tools that would be helpful to minimize the burden on producers, handlers and importers.

Assessments—Organic Producers

Organic producers would first calculate their net organic sales by taking their total gross organic sales and subtracting the cost of any certified organic ingredients, feed, and agricultural input costs. Examples of organic input costs that may be deducted from gross sales include

fertilizer, lime, and soil conditioners; agricultural chemicals and other organic materials for pest control; seeds, plants, vines and trees; livestock purchased or leased; and organic feed purchased for livestock and poultry. Once the producer has calculated their net organic sales, he/she would multiply this by one-tenth of one percent (*i.e.*, 0.001) to determine the assessment that would be paid to the organic R&P program. For example, an organic dairy producer would take their bulk organic milk sales and subtract the cost of organic feed, hay and any other agricultural input costs to obtain their net organic milk sales. The producer did not use any non-organic agricultural ingredients that need to be subtracted. Finally, the producer would multiply their net organic milk sales by one-tenth of one percent to determine the assessment owed.

Assessments—Organic Handlers

Organic handlers would also first need to calculate their net organic sales for all certified organic products. For processed products, handlers would take the total gross sales in certified products and subtract the cost of certified organic ingredients and the cost of any non-organic agricultural ingredients used in its products. For example, if Company A was processing and selling a certified “organic” blended orange juice per 7 CFR 205.301, they would take their total gross organic sales and first subtract the cost of certified organic ingredients (*e.g.*, cost of organic oranges and organic mangoes). Assuming the product does not include any non-organic agricultural ingredients per 7 CFR 205.606 of the National List, the handler would not have any non-organic agricultural ingredients to subtract from gross organic sales. In this case, the calculation for net organic sales is simply the total gross organic juice sales minus the cost of organic oranges and organic mangoes. By deducting the cost of organic ingredients purchased from producers, assessments will only be paid on the value added to the organic commodity as it moves through the supply chain.

If Company B was processing and selling the same certified “organic” juice, but in this case used a non-organic agricultural ingredient to improve color (*e.g.*, carrot juice color as provided for by 7 CFR 205.606), then the handler would take the total gross organic sales of the “organic” juice and subtract the cost of organic oranges and mangoes and the cost of the carrot juice color to determine their net organic sales. The non-organic carrot juice color is subtracted to ensure only the value

added for organic content of a product is assessed for the organic R&P program. In both examples, the handler would then multiply their net organic juice sales by one-tenth of one percent to determine the assessment owed.

Handlers of “made with organic” products would use a similar approach with an additional step to determine their assessment. “Made with organic” products are certified and must contain at least 70 certified organic ingredient content, but can use non-organic agricultural ingredients as part of product composition per the requirements at 7 CFR 205.301(c). Understanding that section 7412(1)(E)(ii) of the Act specified that the scope of an “agricultural commodity” as limited to products that are “certified to be sold or labeled as “organic” or “100 percent organic”, this proposal would assess only the value added of the certified organic ingredient content of “made with organic” products rather than the entire certified product.

For example, Company C has a line of “made with organic” granola bars. The granola bar is composed of 70 certified “organic” oats and grains, but uses non-organic sugar and non-organic raisins. Under this proposal, Company C would first take its gross organic sales of the granola bar and subtract the cost of organic ingredients (oats and grains) and the cost of the non-organic agricultural ingredients (sugar and raisins) to obtain net organic sales. Because the granola bar is a “made with organic” product, the handler would have the additional step of multiplying the net organic sales by the percent organic ingredient content (*i.e.*, 70 or the share of organic ingredients subject to assessment under the Act). After applying the percent organic ingredient content to net organic sales, the handler would multiply their adjusted net organic sales by one-tenth of one percent to determine the assessment owed.

Assessments—Importers

The proponent group proposed a similar approach for importers calculating assessments. In its proposal, OTA states that importers would pay one-tenth of one percent of net organic sales minus the cost of organic ingredients. Their proposal also stated that the assessment would occur when the importer took custody of the certified organic goods. Importer assessments would be collected through Customs. If Customs does not collect the assessment from an importer, then the importer would be responsible for paying the assessment directly to the

Board within 90 calendar days after the end of the marketing year.

As previously discussed, OTA’s proposal to assess importers using this approach would be challenging to implement. Since importers engage in a variety of roles (*e.g.* as a wholesaler that has purchased the product from abroad, but has yet not sold it in the U.S., or as a customs broker that is paid a fee to transact customs business on behalf of others but does not take ownership of the product), it is difficult to always know the gross organic sales and thus, net organic sales. An importer can, however, report on the transaction value (the price actually paid from the buyer to the seller for the merchandise) for the imported merchandise (19 CFR 152.103). Therefore, AMS is proposing that domestic importers (§ 1255.17) use transaction value (“Entered Value” on CBP Form 7501) to determine assessments owed under the proposed Order.

For example, Importer A is importing two organic products: Certified organic bananas and coffee. The transaction value shown on the CBP Form 7501 for these products is \$200,000 and \$400,000 respectively. Importer A would add the transaction value for all organic commodities (\$200,000 plus \$400,000) to obtain a total transaction value (\$600,000) for all organic products. Importer A would then multiply the total transaction value by one-tenth of one percent to determine the assessment owed.

As another example, Importer B is importing processed products: Organic chocolate bars and “made with organic” granola bars (*i.e.*, 70 organic ingredient content). The transaction value shown on the CBP Form 7501 for these products is \$600,000 and \$400,000 respectively. In this case, Importer B would need to reduce the transaction value for the granola bars to assess only the organic ingredient content. This is obtained by multiplying the transaction value (\$400,000) by 0.70 to determine the adjusted transaction value for granola bars (\$280,000). Importer B would then add the granola bar transaction value (\$280,000) to the chocolate transaction value (\$600,000) to obtain a total transaction value (\$880,000) for the purposes of calculating its organic assessment. Importer B would multiply the total transaction value by one-tenth of one percent to determine the assessment owed.

Assessment Review and Collection

Two years after the Order becomes effective and periodically thereafter, the Board would review the assessment rate

and, if appropriate, recommend a change in the rate. At least two-thirds of the Board members would have to favor a change in the assessment rate. Any change in the assessment rate would be subject to rulemaking by the Secretary.

Assessments would be collected by the Board on a quarterly or yearly basis. Importers and domestic producers and handlers would be required to pay their assessments owed to the Board no later than 90 days following the marketing year in which the organic product was imported, produced or handled. If a certified organic producer, certified organic handler or importer fails to pay the assessment within 90 calendar days of the date it is due, the Board may impose a late payment charge and interest. The late payment charge and rate of interest would be prescribed in the Order's regulations issued by the Secretary.

Certified organic producers and handlers with gross organic sales of \$250,000 or less in the prior marketing year may choose to participate in the Order as voluntarily assessed entities by remitting one-tenth of one percent of net organic sales. Similarly, importers of organic products whose transaction value is \$250,000 or less may elect to participate in the Order by paying assessment on one-tenth of one percent of the transaction value of organic products. All payments must be received no later than 90 days after the end of the year in which the product was produced, handled or imported.

In summary, AMS is seeking public comments on the proposed assessment approach, particularly on the calculations and any additional examples or tools that could be provided to assist producers, handlers and importers should this program be implemented.

Exemptions

De Minimis

The Order would provide for three exemptions from assessment. The first exemption is for entities at a de minimis level. Certified organic producers, certified organic handlers and importers of organic products whose gross organic sales and transaction value was \$250,000 or less during the prior fiscal year would be exempt from paying assessment. Domestic producers, handlers and importers would apply to the Board for an exemption prior to the start of the new fiscal year. This would be an annual exemption; entities would have to reapply each year. They would

have to certify that they had gross sales or transaction value from sales of organic products that were \$250,000 or less in the previous fiscal year. They would submit to the Board past shipment or import data to support the exemption request. The Board would then issue, if deemed appropriate, a certificate of exemption to the eligible producer, handler or importer.

Once approved, domestic producers, handlers and importers would not have to pay assessments to the Board for the applicable fiscal year. Any assessments of approved importers collected by Customs would be refunded by the Board within 60 calendar days after receipt of such assessments by the Board. No interest would be paid on the assessments collected by Customs.

Producers, handlers and importers who did not apply to the Board for an exemption and had gross revenue or transaction value of \$250,000 or less in organic product sales during the prior fiscal year would receive a refund from the Board for the applicable assessments within 90 calendar days after the end of the current fiscal year. Board staff would determine the assessments paid and issue refunds accordingly. No interest would be paid on the assessments collected by the Board.

The Board could recommend additional procedures to administer the exemption as appropriate. Any procedures would be implemented through rulemaking by the Secretary.

USDA considers several factors when evaluating the merits of a proposed de minimis quantity. These factors include an estimate of the total quantity (or value) of the respective agricultural commodity covered under the proposed commodity promotion program order (value assessed and value exempt); free rider implications; the impact of program requirements on small businesses; and available funding to support a viable program under the order. USDA reviews these factors in light of all available data and information to determine whether a proposed exemption threshold is de minimis in quantity when viewed in the context of an effective and functioning commodity promotion program.

The Organic Industry Survey, which was carried out by the Nutrition Business Journal (NBJ) on behalf of OTA, reported 2014 retail sales of all organic commodities at \$39.1 billion. The survey included responses from manufacturers, producers, ranchers, and retailers of organic products. Results were supplemented with data from the

Natural Foods Merchandiser's annual industry survey, the analytic consulting firms SPINS and the IRI Group, and with information from public financial statements and media reports. The proponent group estimated the revenue that would be earned by the program through assessments of certified organic producers, certified organic handlers, and importers. They assumed a retail price markup of 40 percent over the price at the handler level.⁵³ Applying the assumed 40 percent markup to the total organic retail sales figure, as reported in the Organic Industry Survey, results in an estimate of combined organic sales of producers, handlers and importers equal to \$27.9 billion.

In its proposal for a research and promotion program, the proponent group initially stated that it expected the program to generate \$30 million through assessments. In discussions with AMS, the proponent group adjusted the estimated revenue of the program to be \$28.1 million. AMS used a similar method to that of the proponent group to calculate the potential assessment income of the program; however, the estimates by AMS are lower than those of the proponent group. One reason for this is that while OTA used 2014 data to estimate producer assessment income and 2015 data to estimate assessment income of importers and handlers, AMS used 2014 data only for consistency in estimating potential assessment income at producer, handler and importer levels. Secondly, AMS has access to more detailed reports by the U.S. Customs and Border Protection than what is publicly accessible through the GATS database. These detailed reports allowed AMS to deduct importers whose organic shipment sales values were no more than \$250,000, and who would be exempt from assessment.

As previously mentioned, this proposal proposes a de minimis level of \$250,000 in annual gross sales of organic products for domestic producers and handlers and in annual transaction value for importers of organic products. AMS conducted analysis on this and other levels for de minimis including \$500,000 and \$750,000. Table 7 shows potential assessment revenue from producers, importers and handlers at different exemption levels. Again, this analysis uses data for 2014, which is the year for which most recent and complete data is available from multiple sources.

⁵³ OTA cited a 2012 study by the United States Agency for International Development (USAID)

titled U.S. Specialty Foods End-Market Analysis for the 40 percent retail markup assumption.

TABLE 7—POTENTIAL ASSESSMENT REVENUE AT EXEMPTION LEVELS

	250,000	500,000	750,000
Producers ¹	3,502,602,536	3,153,346,208	2,923,278,884
Handlers ²	20,656,445,878	19,943,407,378	19,375,473,888
Importers ³	1,184,783,076	1,139,594,905	1,100,966,481
Total	25,343,831,491	24,236,348,490	23,399,719,252
Assessment revenue	25,343,831	24,236,348	23,399,719

¹ 2014 Organic Survey, NASS.

² 2016 Industry Survey, OTA; 2012 County Business Patterns and 2012 Economic Census, Census Bureau.

³ U.S. Customs and Border Protection; Global Agricultural Trade Statistic, FAS.

Assessment revenue that would be collected at each of the de minimis exemption levels would be approximately \$23.4 million at \$750,000, \$24.2 million at \$500,000, and \$25.3 million at \$250,000. At the proposed exemption level of \$250,000, about 14 percent of the assessment revenue would come from producers, 81 percent would come from handlers, and 5 percent would be from importers. Producer assessable sales was calculated by subtracting estimated input costs from total sales in organic products at revenue levels of \$250,000, \$500,000, and \$750,000. No expense data exists for handlers, so input costs have not been deducted from total sales at the handler level. This means that handler assessable sales is likely lower than

what is reported in the table above; however, all assumptions made in estimating potential assessment revenue have been made to generate the most conservative figure. Specifically, the assumption at the beginning of this analysis that assumes a retail markup in price of 40 percent ultimately results in lower total sales revenue for handlers than if the analysis assumed a lower retail price markup.⁵⁴ Secondly, retail sales of organic commodities increased nearly 11 percent between 2014 and 2015, according to findings in OTA 2016 Industry Survey. Data released in the NASS 2015 Certified Organic survey in September 2016 show that producer value of certified organic agricultural products sold in 2015 increased 13 percent from 2014 to almost \$6.2

billion. From the growth in sales from 2014, which is the year for which data was analyzed to estimate assessment revenue, and the restrained assumption of a 40 percent retail markup over handler prices, AMS believes that the proposed program has the potential to collect at least \$25.3 million in assessment revenue at an exemption level of \$250,000 in annual sales.

While Table 7 shows the potential revenues generated from producers, importers and handlers that would be subject to assessment, Table 8 shows the portions of sales value and entities at the producer, importer and handler levels that would be exempt from assessment at each exemption level.

TABLE 8—PORTION OF VALUE AND ENTITIES EXEMPT FROM ASSESSMENT AT EXEMPTION LEVELS

	Producers ¹		Handlers ²		Importers ³		Total	
	Value %	Entities %	Value %	Entities %	Value %	Entities %	Value %	Entities %
250,000	12	76	3	40	4	85	5	63
500,000	21	87	6	64	8	90	9	78
750,000	26	91	9	70	11	92	12	83

¹ 2014 Organic Survey, NASS; Organic Integrity database, NOP.

² 2016 Industry Survey, OTA; 2012 County Business Patterns and 2012 Economic Census, Census Bureau.

³ U.S. Customs and Border Protection; Global Agricultural Trade Statistics, FAS.

At the proposed exemption level of \$250,000 in gross annual revenue, 12 percent of certified organic sales value from producers would be exempt, and 76 percent of producers would be exempt. For handlers, 3 percent of certified organic sales value and 40 percent of entities would be exempt. Of total importers of organic products, 4 percent of organic sales value would be exempt, and 85 percent of entities would be exempt. For comparison, the portion of entities and sales value that would be exempt under de minimis levels of \$500,000 and \$750,000 were also evaluated. At exemption levels of gross annual sales revenue in excess of

\$250,000, \$500,000, and \$750,000, the total values of exempt sales would be 5 percent, 9 percent and 12 percent, respectively. Most research and promotion programs with de minimis thresholds in place exempt between 3 and 11 percent of total assessable quantity. The portion of total sales value that would be exempt at any of the three exemption levels evaluated in Table 8 all within or just barely outside this range. The proposed de minimis amount relative to total sales value is comparable to those of the majority of research and promotion programs overseen by AMS.

In the field of economics, a free rider is an entity who benefits from a service without having to pay for it. The free rider problem occurs in many different scenarios, including in research and promotion programs. In this case, the “free riders” would be those entities that do not pay assessments into the program, but benefit from the program’s existence. Ideally, the de minimis level excludes entities for whom the compliance cost of collecting the assessment would outweigh the amount of the assessment itself that would be due to the Board from these entities.

Based on the same data used to generate the figures in Tables 7 and 8,

⁵⁴ USAID, U.S. Specialty Foods End-Market Analysis, 2012.

AMS estimates that the average assessment that would be collected from a producer, handler, or importer whose gross organic sales or transaction value was less than or equal to \$250,000 would amount to \$94 per entity annually. This means that at the de minimis level of \$250,000, as proposed by the proponent, the average amount in assessments that the Board would not collect from exempt entities would be \$94 apiece. AMS was unable to determine the cost of compliance on a single case basis to compare with the potential assessment revenue per entity with less than or equal to \$250,000 in gross annual sales or transaction value. AMS did, however, find that the annual

compliance costs of other Boards with generic promotion programs ranges between about 0.5 and 3 percent of the Boards' total revenue. Applying these proportions to the estimated total revenue (\$25.3 million) of the proposed Order would result in annual compliance costs ranging between \$126,719 and \$760,315. Compliance costs vary depending on the complexity of each case, and a single case could require staff, auditor, AMS, and USDA Office of General Counsel time and expenses, as well as associated court fees. Based on these estimates, AMS seeks comments on whether the costs of enforcing compliance among smaller entities (those with less than or equal to

\$250,000 in gross annual sales or transaction value) would outweigh the value in assessments the Board would collect from those entities.

Another potential instance of free riders is importers of organic products without HTS codes. Importers of organic products that are not among those currently in the HTS system would have the responsibility to report to the Board any assessments on transaction value in excess of \$250,000 annually. There are currently 38 HTS codes representative of imported organic agricultural products. These codes and their product descriptions are listed in the table below.

HTS code	HTS description
0409000005	NATURAL HONEY, CERTIFIED FOR ORGANIC
0703200005	GARLIC, FRESH WHOLE BULBS, CERTIFIED ORGANIC
0709604015	SWT BELL PEPPER, FRT OF CAPSICUM/PIMENTA, GRNHSE, CERT ORGANIC
0709604065	SWT BELL PEPPER, OTH, FRUIT, CAPSICUM/PIMENTA, CERT ORGANIC, OTHER
0802120005	SHELLED ALMONDS, CERTIFIED ORGANIC
0803900025	FRESH BANANAS, CERTIFIED ORGANIC
0804400020	AVOCADOS, HASS & HASS LIKE, CERTIFIED ORGANIC
0804504045	FRESH MANGOES ENTERED SEPT 1 TO MAY 31, CERTIFIED ORGANIC
0804506045	FRESH MANGOES ENTERED JUNE 1 TO AUG 31, CERTIFIED ORGANIC
0808100045	APPLES, FRESH, VALUED >\$0.22 PER KG, CERTIFIED ORGANIC
0808302015	PEARS, ORGANIC, ENTERED 4/1–6/30, FRESH
0808304015	PEARS, ORGANIC, ENTERED 7/1–3/31, FRESH
0808402015	QUINCES; FRESH, APR 1 THRU JUNE 30, CERTIFIED ORGANIC
0808404015	QUINCES, ORGANIC, ENTERED 7/1–3/31, FRESH
0810400026	BLUEBERRIES, FRESH, CULTIVATED, CERTIFIED ORGANIC
0901110015	ARABICA COFFEE NOT ROAST/DECAFFEINATED, CERTIFIED ORGANIC
0901110045	COFFEE, NOT ROASTED, NOT DECAFFEINATED, OTHER, CERTIFIED ORGANIC
0901120015	COFFEE, DECAFFEINATED, NOT ROASTED, CERTIFIED ORGANIC
0901210035	COFFEE, ROASTED, NOT DECAFFEINATED, ≤2KG RET CONT, CERT ORGANIC
0901210055	COFFEE, ROASTED, N/DECAFFEINATED, NOT 2KG OR LESS, CERT ORGANIC
0901220035	COFFEE, ROASTED, DECAFFEINATED, ≤2KG RETAIL CONT, CERT ORGANIC
0902101015	FLAVORED GREEN TEA IMMEDIATE PACKING NOT EXCEED 3KG, CERT ORGANIC
0902109015	GREEN TEA (NOT FERM) IMMEDIATE PACKINGS NTE 3KG, N/FLVR, CERT ORGANIC
0902209015	OTHER GREEN TEA (NOT FERMENTED), N/FLAVORED, CERTIFIED ORGANIC
0902300015	BLACK TEA FERMENT/PRT FRMNTD, IN TEA BAGS, ≤3KG, CERT ORGANIC
0910110010	GINGER, NOT GROUND, CERTIFIED ORGANIC
1001190025	DURUM WHEAT, CERTIFIED ORGANIC, EXCEPT SEED
1005902015	CORN (MAIZE)—YELLOW DENT CORN, CERTIFIED ORGANIC
1006309015	RICE: OTHER SEMI OR WHOLLY MILLED POL/GLZ OR NOT, CERT ORGANIC
1201900010	SOYBEANS, ORGANIC, WHETHER OR NOT BROKEN, NESOI
1204000025	FLAXSEED (LINSEED), FOR USE AS OIL STOCK, W/N BROKEN, ORGANIC
1509102030	CER OR LB EX VRGN OLVE OIL N/CHEM MOD CON LT 18KG
1509102040	OLIV OIL, NOT CHEM. MOD. VIRGIN, WT <18KG, ORG, OTH THAN XTRA VIR
1509104030	OLIVE OIL, NOT CHEM MOD, VIRGIN, OTH, CERT ORG, LAB EXTRA VIRGIN
1509104040	OLIVE OIL, NOT CHEM MOD, VIRGIN, OTH, CERT ORG, NTLAB EXTRA VIR
2204100065	SPARKLING WINE, OF FRESH GRAPES VALUED >\$1.59 PER LITER, ORG
2204215035	RED WINE, >\$1.05 PER L, ALCHL STRGTH BY VOLM ≤14, CONT ≤2L, ORG
2204215050	WHITEWINE >\$1.05/L, ALCHOL STRNGTH BY VOLUM ≤14, CONT ≤2L, ORG

In general, AMS seeks comments on the proposed de minimis level and its effect on the proposed program.

Exports

The second exemption under the proposed Order would be for exports, or sales of certified organic commodities by domestic producers and handlers to locations outside of the United States. The Board would develop procedures

for approval by USDA for refunding assessments that may be inadvertently paid on such sales and establish any necessary safeguards as appropriate. Safeguard procedures would be implemented by the Secretary through rulemaking. If the Board determined that exports should be assessed, it would make that recommendation to the Secretary. Any such action would be

implemented by USDA through notice and comment rulemaking.

Dual-Covered Commodities

The third exemption from assessment under the proposed Order would be for dual-covered commodities. Should this proposed rule become final, the regulatory language currently exempting organic commodities from assessment by generic commodity promotion

programs created under the various commodity promotion laws would no longer be in effect. AMS would conduct rulemaking to implement such a change. Such commodities would then become “dual-covered commodities”, and persons producing, handling and importing them would need to elect to pay assessments to the commodity-specific program (e.g., highbush blueberries, beef, dairy, almonds, etc.), or the organic commodity promotion program. Certified organic producers, handlers and importers of dual-covered commodities would apply to the Secretary, on a form provided by the Board, for an assessment exemption prior to the start of the marketing year. This would be an annual exemption and certified organic producers, certified organic handlers and importers would need to reapply each year to perpetuate their exemption. Such entities would be required to certify that they have remitted an assessment for the dual-covered commodity pursuant to a commodity promotion law. Upon receipt of an application for exemption, the Secretary would determine whether an exemption may be granted. The Secretary may request documentation providing proof of the remittance of the assessment for the dual-covered commodity. The Secretary would issue, if deemed appropriate, a certificate of exemption to the eligible certified organic producer, handler or importer. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

Assessment Scenarios

Based on the proposed definitions, assessment provisions and exemptions described thus far, AMS developed the following scenarios to aid public understanding of how a proposed Order would be implemented. AMS invites public comments on this aspect of the proposed Order and the following scenarios.

Scenario 1—Jane Smith’s Organic Strawberry Farm

Jane Smith is a certified organic producer, producing only organic strawberries on her farm and has gross organic sales of \$500,000 for the previous marketing year. To determine whether she is required to pay assessments and to who, Jane needs to answer the following questions: (1) Whether she is an “assessed entity” under the proposed Order; (2) whether she produces a commodity subject to assessment under another agricultural commodity promotion order; and (3) if she does, whether she is subject to assessment under that agricultural

commodity promotion order. For question 1, she is considered an “assessed entity” because she is a certified organic producer with gross organic sales in excess of \$250,000 for the previous marketing year. Further, because she is above the \$250,000 de minimis exemption threshold, she cannot claim a de minimis exemption and, thus, would be subject to the proposed Order. For question 2, she does not produce a commodity subject to another agricultural commodity promotion program as strawberries do not have such a program in place. As a result, she does not need to address question 3. As a producer with gross organic sales above \$250,000 for the previous marketing year, she would be required to remit assessments under the proposed Order.

Scenario 2—Jane Smith’s Organic Blackberry Farm

Jane Smith is a certified organic producer, producing only organic blackberries on her farm and has gross organic sales of \$100,000 for the previous marketing year. To determine whether she is required to pay assessments and to who, Jane first needs to answer question 1 about whether she is an “assessed entity” under the proposed Order. While she is a certified organic producer, she does not have gross organic sales in excess of \$250,000 for the previous marketing year. Therefore, she could either (a) apply for exemption from paying assessments under the proposed de minimis provision at proposed section 1255.53 or (b) opt into the proposed Order as a “voluntarily assessed entity” per proposed section 1255.38 and pay assessments on her \$100,000 gross organic sales for the previous marketing year. In this scenario, questions 2 and 3 do not apply because there is currently no blackberry promotion program in place.

Scenario 3—Jane Smith’s Organic Blueberry Farm (A “Dual-Covered Commodity”)

Jane Smith is a certified organic producer, producing only organic blueberries on her farm and has gross organic sales of \$500,000 for the previous marketing year. These sales equate to approximately 147,000 pounds of organic blueberries (assuming an organic price of \$3.40 per pound).⁵⁵ To determine whether she is required to pay assessments and to who, Jane needs to answer the same questions: (1) Whether she is an “assessed entity”; (2)

whether she produces a commodity subject to assessment under another agricultural commodity promotion order; and (3) if she does, whether she is subject to assessment under the other promotion order.

For question 1, she is considered an “assessed entity” because she is a certified organic producer with gross organic sales in excess of \$250,000 for the previous marketing year and she cannot claim the de minimis exemption. For question 2, unlike the strawberry example in Scenario 1, she does produce a commodity subject to assessment under another commodity promotion order, the Blueberry Promotion, Research and Information Order (7 CFR part 1218) (Blueberry Order). For question 3, she is a “producer” per section 1218.16 of the Blueberry Order and would be subject to assessment per section 1218.52 which states that the funds for the order are paid from assessments on producers and importers. Further, because she produces about 147,000 pounds of blueberries for the previous marketing year, she is above the 2,000 pound per year de minimis exemption for the Blueberry Order (section 1218.53) and, therefore would be subject to assessment. Given that Jane meets the criteria to be assessed under both the proposed Order and the existing Blueberry Order, she can decide which program she would like to pay into, remit assessments to that program and file for an exemption with USDA for the other one.

Scenario 4—Jane Smith’s Mixed Berry Farm (A “Split Operation”)

Jane Smith is a berry producer, producing both organic and conventional blueberries and organic strawberries. This can be considered a “split operation” because she produces both organic and conventional products. Jane has a total of \$500,000 in blueberry sales for the previous marketing year, of which \$300,000 is from organic blueberries (about 80,000 pounds at \$3.40 per pound) and \$200,000 is from conventional blueberries (about 103,000 pounds at \$1.95 per pound). Organic strawberry sales are \$300,000 for the previous marketing year.

To determine whether she is required to pay assessments and to who, Jane needs to answer the same questions: (1) Whether she is an “assessed entity” under the proposed Order; (2) whether she produces a commodity subject to assessment under another commodity promotion order; and (3) if she does, whether she is subject to pay assessments to it. Jane’s total gross organic sales are \$600,000 (the \$300,000

⁵⁵ Price derived from data published in the NASS 2014 Organic Production Survey (09/17/2015).

in organic blueberries plus the \$300,000 in organic strawberries). For question 1, she is considered an “assessed entity” because she is a certified organic producer with gross organic sales in excess of \$250,000 for the previous marketing year. Further, because she is above the \$250,000 de minimis exemption threshold, she cannot claim a de minimis exemption and, thus, would be subject to the proposed Order.

For question 2, Jane does produce a commodity subject to assessment under another commodity promotion order, the Blueberry Order. For question 3, she is a “producer” per section 1218.16 of the Blueberry Order and would be subject to assessment per section 1218.52. She produces in excess of the 2,000 pound per year de minimis exemption for the Blueberry Order (section 1218.53) and, therefore, could not claim an exemption from the Blueberry Order.

Under this scenario, Jane is clearly required to pay the assessment on the 103,000 pounds of conventional blueberries; this assessment is owed under the Blueberry Order regardless of the proposed Order. For the organic portion of her split operation, she has a total of \$600,000 in gross organic sales. Jane can either: (a) Pay assessments on the \$300,000 in organic blueberries (*i.e.*, about 80,000 pounds) under the Blueberry Order and pay assessments on the \$300,000 in organic strawberry sales under the proposed Order or (b) pay assessments on the \$600,000 in gross organic sales under the proposed Order. In either case, Jane must file for exemptions from the respective program that she is not paying into but would otherwise be subject to assessment under.

If the scenario were slightly different and, instead of \$300,000 in organic strawberry sales, Jane’s organic strawberry sales are \$100,000, the decision point would remain the same. Jane can either: (a) Pay assessments on the \$300,000 in organic blueberries (*i.e.*, about 80,000 pounds) under the Blueberry Order and pay assessments on the \$100,000 in organic strawberry sales under the proposed Order or (b) pay assessments on the \$400,000 in gross organic sales under the proposed Order. While \$100,000 in organic strawberry sales is less than the \$250,000 de minimis threshold for the proposed Order, entities cannot opt into a program for the purpose of becoming exempt under the other program’s de minimis exemption. In general, unless an entity for a “dual-covered commodity” would be considered de minimis under both the proposed Order and the commodity promotion program,

that entity must pay assessments under one or both programs.

Scenario 5—Joe Smith’s Beef Operation (Another “Dual-Covered Commodity”)

Joe Smith is a certified organic producer, producing only organic beef on his operation and has gross organic sales of \$100,000 for the previous marketing year. To determine whether he is required to pay assessments and to who, Joe first needs to answer question 1 about whether he is an “assessed entity” under the proposed Order. While he is a certified organic producer, he does not have gross organic sales in excess of \$250,000 for the previous marketing year. For question 2, he does produce a commodity subject to assessment under another commodity promotion order, the Beef Promotion and Research Order (7 CFR part 1260) (Beef Order). For question 3, he is a “producer” per section 1260.116 of Beef Order and would be subject to assessment per section 1260.172 which states that the funds for the order are paid from assessments on producers at a rate of one dollar per head of cattle. There is no de minimis exemption under the Beef Order. While \$100,000 in organic beef sales is less than the \$250,000 de minimis threshold for the proposed Order, Joe cannot claim he is exempt from the Beef Order because he is planning to pay into the proposed Order only to then claim he is also exempt from the proposed Order. Under this scenario, Joe could either (a) pay his assessments into the Beef Order or (b) pay assessments on the \$100,000 in organic beef sales to the proposed Order.

While these scenarios focus on agricultural producers, the examples above could be utilized with organic handlers and importers. In the case of importers, the entity would need to look at transaction value rather than gross organic sales. However, as previously noted in the case of “dual-covered commodities”, one must determine in any scenario whether the entity is “covered” under an applicable commodity promotion order (which can include producers, handlers, first handlers, processors, importers, exporters, feeders, and seed stock producers, depending upon the order). Only “covered” entities are entitled to make a choice between paying into a proposed organic Order and the commodity specific promotion order. For example, an organic blueberry handler would not have the ability to elect to pay into the blueberry program instead of the organic program, as blueberry handlers are not “covered” by the blueberry program and are,

therefore, not assessed. In this instance, the organic blueberry handler would need to pay into the organic program if it had gross organic sales in excess of \$250,000 for the previous marketing year or, if less than \$250,000 in gross organic sales, chose to participate as a “voluntarily assessed entity”.

Assessment Offset

AMS is inviting public comment on the proposed provision to provide for an assessment offset for those entities subject to the Order that also pay a state promotion assessment. Section 1255.54 states that the Board, with approval of the Secretary, can credit an organic producer or handler up to 25 percent of the amount to be remitted to the Board pursuant to section 1255.52 to offset collection and compliance costs relating to such assessments and for fees paid to Qualified State Commodity Boards required by State law. The proponent group proposed the level of the offset at 25 percent. The offset would only be for monies that go to research and promotion programs and not for dues or quality specifications. AMS is specifically interested in comments regarding the proposed offset for collection and compliance costs and how this would be implemented.

Under this proposal, organic producers and handlers who have an obligation to pay into a state commodity promotion program would be able to offset part of their assessment obligation. A Qualified State Commodity Board is defined as a State program, authorized by State law or State government agency that receives mandatory contributions and conducts promotion, research and/or information. These state programs do not need to be specifically for organic research and promotion. For example, if there is an Idaho state potato research and promotion program, an Idaho organic potato producer could hypothetically be required to pay a \$30 assessment annually to the state program. Under this proposed Order, that same producer also may be obligated under section 1255.52 to pay \$100 to the federal organic research and promotion program. In this scenario, the producer would be allowed to offset 25 percent or \$25 of the \$100 owed under the federal program, and thus pay \$75 to the federal program and \$30 to the state program. It should be noted that the producer would not be able to offset the total amount of the state obligation; rather, only up to 25 percent of what he or she owed under the federal program.

It is important that stakeholders be aware that USDA does not control state or regional commodity promotion

programs. Furthermore, USDA does not address such programs in Federal regulations to maintain a clear separation of jurisdictions, authorities, and powers. However, USDA acknowledges that some state and regional commodity promotion programs work in concert with Federal programs. As such, USDA will encourage the boards/committees/councils that oversee the Federal commodity promotion programs to remind entities that request a Federal organic assessment exemption that there may be state and regional commodity promotion program assessments that are not exempted as part of a Federal program exemption.

iv. Promotion, Research and Information

Pursuant to section 516 of the Act, sections 1255.60 through 1255.62 of the proposed Order would detail requirements regarding promotion, research and information programs, plans and projects authorized under the Order. The Board would develop and submit to the Secretary for approval programs, plans and projects regarding promotion, research, information and other activities including consumer and industry information and advertising (designed to, among other things, build markets and develop new products, including new uses of existing organic products, new organic products or improved technology in the production, processing and packaging of organic products). No program, plan or project would be implemented prior to USDA approval. The Board would be required to evaluate each plan and program to ensure that it contributes to an effective and coordinated research, promotion and information program. Such activities that are found not to contribute to an effective program would be terminated.

As stated in section 1255.61, at least once every five years, the Board would fund an independent evaluation of the effectiveness of the Order and programs conducted by the Board. The Board would submit to USDA, and make public, the results of this periodic evaluation. Finally, section 1255.62 states that any patents, copyrights, trademarks, inventions, product formulations and publications developed through the use of funds received by the Board would be the property of the U.S. Government, as represented by the Board. These along with any rents, royalties and the like from their use would be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board, and could be licensed with approval of the Secretary.

This provision of the proponent's proposal was modified to ensure its compliance with AMS policy for all research and promotion programs.

v. Reports, Books, and Records

Pursuant to section 515 of the Act, sections 1255.70 through 1255.72 specify the reporting and recordkeeping requirements under the proposed Order as well as requirements regarding confidentiality of information.

Section 1255.70 states that organic producers, handlers and importers would be required to submit periodically to the Board certain information as the Board may request. Specifically, organic producers and handlers would submit a report that would include, but not be limited to, the entity's name, address, and telephone number and the value of net organic sales of its organic products. Organic producers and handlers would submit this report at the same time they remit their assessments to the Board (no later than 90 days following the end of the year in which the organic product was produced or handled).

Likewise, importers would be required to submit a report to the Board that would include, but not be limited to, the importer's name, address, and telephone number; the transaction value of imported organic products; and the country/countries of export. Importers would submit this report at the same time they remit their assessments. Importers who paid their assessments through Customs would not have to submit such reports to the Board because Customs would collect this information upon entry.

Under section 1255.71, certified organic producers, certified organic handlers, and importers of organic products, including those who were exempt, would be required to maintain books and records needed to carry out the provisions of the proposed program, including for verification of any required reports. Such books and records must be made available during normal business hours for inspection by the Board's or USDA's employees or agents. Certified organic producers, certified organic handlers, and importers of organic products would be required to maintain such books and records for two years beyond the applicable fiscal year to which they apply.

Under section 1255.72, all information obtained from persons subject to the Order as a result of proposed recordkeeping and reporting requirements would be kept confidential by all persons, including all current and former employees of the

Board, all current and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. This information would not be available to Board members or certified organic producers, certified organic handlers, and importers. Only those persons with a specific need for the information would have access to it and for the sole purpose of administering the proposed program. Such information could only be disclosed if the Secretary considered it relevant, and the information was revealed in a judicial proceeding or administrative hearing brought at the direction or at the request of the Secretary or to which the Secretary or any officer of the United States is a party. Other exceptions for disclosure of confidential information would include the issuance of general statements based on reports or on information relating to a number of persons subject to the proposed Order, if the statements did not identify the information furnished by any person, or the publication, by direction of the Secretary, of the name of any person violating the proposed Order and a statement of the particular provisions of the Order violated.

vi. Miscellaneous Provisions

Referenda

Pursuant to section 518 of the Act, § 1255.81(a) of the proposed Order specifies that the program would not go into effect unless it is approved by a majority of assessed entities voting in the referendum. For example, if 10,000 organic producers, handlers, and importers voted in a referendum, 5,001 would have to vote in favor of the Order for it to pass in the referendum. It is proposed that a single assessed entity may cast one vote in the referendum. A single entity is recognized by its individual tax identification number. This is a modification from the proponent's proposal, which recommended that a single assessed entity could cast one vote for each organic certificate held.

USDA made this modification to ensure consistency with other research and promotion programs under USDA oversight. Because organic certifying agents who certify producers and handlers vary as to the number of organic certificates issued to an entity upon certification, it would be difficult to ensure equity in the number of votes across entities. For example, a certified organic producer of blueberries and beef may receive one certificate from Certifying Agent A covering both the crops and livestock component of their

operation. However, if the producer was certified by Certifying Agent B, they may receive two certificates—one for crops and one for livestock. The USDA organic regulations do not specify the number of certificates to be provided, only that the entity has met the requirements to be certified organic. Therefore, this modification to the proposed Order is intended to ensure that each entity is represented appropriately in any referendum.

The proposed Order states that each ballot request by an importer would have to include an affidavit attesting to that importer's participation in the organic industry, and a voluntarily assessed entity in an initial referendum would have to include in a ballot request a commitment to be assessed for the majority of years until the next continuance referendum. This is a modification from the proponent's proposal, which stated that voluntarily assessed entities voting in an initial referendum would have to commit to be assessed for all of the next seven years (until the next continuance referendum). Upon review, AMS determined that requiring voluntarily assessed entities who vote in the initial referendum to pay into the program every year thereafter until the next referendum would not align with how the same type of entities would be treated that began paying assessments after the initial referendum.

Accordingly, AMS is proposing that, at initial referendum, voluntarily assessed entities would need to commit to pay in for a majority of years until the next referendum, consistent with how voluntarily assessed entities would be treated in subsequent referenda. The proposed Order also states that bloc voting would be prohibited.

Section 1255.81(b) of the proposed Order specifies criteria for subsequent referenda. Under the Order, a referendum would be held to ascertain whether the program should continue, be amended, or be terminated. This section specifies that a referendum would be held every seven years, which is in accordance with the Act. The Order would continue if favored by a majority of the assessed entities voting.

Additionally, a referendum shall be conducted by the Secretary if requested by 10 percent or more of all assessed entities. As in the initial referendum, each importer ballot request would include an affidavit attesting to that importer's participation in the organic industry, and a voluntarily assessed entity would have to include in a ballot request a commitment to be assessed for the majority of the next seven years (until the next continuance

referendum). It also states that bloc voting would be prohibited.

All assessed entities in good standing would be eligible to vote in a subsequent referendum. It states that to be in good standing:

(1) A dual-covered entity would have to demonstrate that it has paid into the proposed program for a majority of the years since the most recent referendum; or

(2) A voluntarily assessed entity would have to demonstrate that it has paid into the proposed program for a majority of the years since the most recent referendum; or

(3) An entity would have to demonstrate that it attained its organic certification since the most recent referendum; or

(4) An assessed entity that did not meet any of the above descriptions would have to demonstrate that it has paid into the proposed program every year since the most recent referendum.

For example, given these provisions and assuming that an organic R&P program passed its initial referendum and was implemented in 2017, a subsequent referendum would need to be held by 2024. Both dual-covered entities and voluntarily assessed entities who voted in the initial referendum would need to pay assessments into the organic program for at least four of the seven years leading up to 2024 in order to vote in the 2024 referendum. If a dual-covered entity decided to start paying into the organic program (rather than the commodity specific program) in 2020 (*i.e.*, between 2017 and 2024), then that entity would have to show that it paid assessments for all four of the remaining years leading up to 2024. This would equally apply for voluntarily assessed entities who join in between the initial and any subsequent referendum.

In other cases, a dual-covered commodity or voluntarily assessed entity could pay assessments for 2018, 2019, 2020, and 2022 (*i.e.*, staggered/not continuous) and would be eligible to vote in a 2024 referendum since they paid for a majority of years since the initial referendum. While not addressed in the proponent's proposal, AMS expects that nominees for Board positions would be active program participants (*i.e.* paying assessments) during the years for which they may be selected to serve on the Board. AMS seeks comments on this issue and on the proposal for entities to pay in for a majority of years to vote in referenda.

Section 1255.80 and sections 1255.82 through 1255.88 describe the rights of the Secretary; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe

proceedings after termination; address personal liability, separability, and amendments; and provide OMB control numbers. These provisions are common to all research and promotion programs authorized under the Act. It is noted that section 1255.87, regarding amendments, states that any changes to the assessment rate proposed by the Board would be subject to referendum but that any other amendments to this subpart may be proposed by the Board. Additionally, a list of all amendments made since the last referendum would be sent to all assessed entities in advance of each referendum.

IV. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563. The Office of Management and Budget designated this action "not significant" and therefore, has not reviewed this proposed rule.

V. Initial Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of the proposed rule on small entities. Accordingly, AMS has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural support services firms (handlers and importers) as those having annual receipts of no more than \$7.5 million.

In 2014, there were a total of 19,466 certified organic operations in the U.S.

and its territories.⁵⁶ This total includes both certified organic producers and certified organic handlers. The number of operations that were certified solely as organic handlers, according to NOP, totaled 8,327 entities. The remaining 11,139 certified organic entities include operations that are certified only as producers and operations that are certified as both producers and handlers. Producers of certified organic commodities are required to be certified as organic handlers if they sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

Data from the NASS 2014 Organic Survey show that about 91 percent of certified organic producers had 2014 organic sales value of \$750,000 or less.⁵⁷ Applying this proportion to the 11,139 certified organic producers referenced earlier results in 10,126 producing entities being considered small.

There is no one catch-all definition by the SBA of what constitutes a small handler of agricultural products. Therefore, to maintain consistency with other federal programs and marketing orders, AMS defines a small handler as one which has no more than \$7.5 million in annual receipts as defined by the SBA under subsector 115 of the North American Industry Classification System (NAICS), "Support Activities for Agriculture and Forestry".⁵⁸ According to the 2012 County Business Patterns and 2012 Economic Census released June 22, 2015, about 95 percent of firms classified under subsector 115 of NAICS had less than \$7.5 million in annual receipts and would be considered small. Applying this proportion to the number of certified organic handlers results in an estimated 7,895 handler operations out of 8,327 being considered small under the SBA definition.

According to data from Customs, there were 2,135 importers of organic products with HTS codes in 2014. Of these, about 98 percent had annual sales revenue of less than \$7.5 million in 2014. Adding the 2,135 number of organic importers to the 19,466 combined number of certified organic producers and handlers results in a total

of 21,601 operations with sales of certified organic products in the U.S. Of this total, 20,121 entities, or 93 percent, would be considered to be small under the SBA definitions.

This rule proposes an industry-funded research, promotion, and information program for organic products. Organic products include food items, such as fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods, and non-food items, such as fiber for linen and clothing, supplements, personal care products, pet food, household products, and flowers. The purpose of this program would be to: (1) Develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintain and expand existing markets for organic commodities. The program would be financed by an assessment on certified organic domestic producers and handlers and importers. The proposed program would be implemented under Act and would be administered by a board of mandatorily and voluntarily assessed industry members selected by the Secretary. Under the proposed Order, certified producers and handlers with gross sales in excess of \$250,000 for the previous marketing year of organic agricultural commodities would pay one-tenth of one percent of net organic sales (total gross sales in organic products minus (a) the cost of certified organic ingredients and agricultural inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used in the production of organic products). Entities importing greater than \$250,000 in transaction value of organic products for the previous marketing year would pay one-tenth of one percent of the transaction value of organic products reported to U.S. Customs. An initial referendum will be held among mandatorily and voluntarily assessed entities (*i.e.* domestic producers, handlers, and importers) to determine whether they favor implementation of the program prior to it going into effect.

The proposed program is expected to grow markets for organic products by increasing the number of certified organic farmers, increasing the amount of organic acreage, conducting research into viable pest management tools, and educating consumers on the meaning of the USDA organic label. The revenue generated by the assessment is expected to finance these activities to help increase the supply of organic

commodities. According to the proponent group, the organic industry cannot keep pace with consumer demand for organic products. To solve this issue, the proposed program would use its assessment revenue to expand the supply of certified organic commodities through the aforementioned activities. While the benefits of the proposed program are difficult to quantify, the benefits are expected to outweigh the costs.

In its overview of the organic industry, OTA stated that it had partnered with the GRO Organic Core Committee to facilitate preliminary discussions among stakeholders to determine whether there is a need for an organic promotion and research order. As part of its outreach, OTA and the GRO Organic Core Committee held six webinars, three panel debates, and 20 town hall meetings in 2012 and 2013. In the spring and summer of 2014, OTA and the GRO Organic Core Committee engaged in direct outreach to all organic certificate holders across the U.S. The proponents mailed brochures and postcards with information on the emerging framework for an organic research and promotion order to 17,500 organic producers and handlers. OTA and the GRO Organic Core Committee conducted two rounds of surveys by mail and telephone to gauge support of the program. Of the survey respondents, twice as many certified operators supported the establishment of an organic research and promotion order than were opposed, according to the proponent. The survey respondents represented 11 percent of crop certificate holders, 13 percent of livestock certificate holders, and 8 percent of handling certificate holders. OTA also received feedback indicating that there was disagreement among industry producer members as to whether covered certified producers should be assessed, or only those whose gross organic sales exceeds \$250,000. In an effort to gather metrics on this particular issue of concern to the industry, OTA reached out to 2,000 certified organic producers who indicated that they fell below \$250,000 in gross organic sales with a combination of phone and mail surveys. OTA received responses from roughly 1,200 of those surveyed, 13 percent of which favored the removal of the \$250,000 threshold. Consequently, the proponents rejected the proposal to assess all certified producers.

In lieu of a research and promotion program, the proponents considered a voluntary trade association promotion program to be overseen by OTA, a federal marketing order, and

⁵⁶ NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/integrity/>.

⁵⁷ National Agricultural Statistics Service, 2014 Organic Survey, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>.

⁵⁸ U.S. Small Business Administration, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes", February 26, 2016.

encouraging each organic crop to create its own research and promotion program. The proponents concluded that a research and promotion program that would encompass all organic products would best meet the needs of the organic industry in an administratively efficient manner with all benefiting parties paying their fair share.

Establishment of this program would impose an additional reporting and recordkeeping burden on importers and domestic producers and handlers of organic products. Importers and domestic certified organic producers and handlers interested in serving on the Board would be asked to submit a nomination form to the Board indicating their desire to serve or to nominate another industry member to serve on the Board. Interested persons could also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, importers and domestic certified organic producers and handlers would have the opportunity to cast a ballot and vote for candidates to serve on the Board. Nominees would also have to submit a background information form to the Secretary to ensure they are qualified to serve on the Board.

Additionally, importers whose annual transaction value does not exceed \$250,000, and domestic producers and handlers whose gross organic sales do not exceed \$250,000 could submit a request to the Board for an exemption from paying assessments on this value. An entity whose commodity is currently represented under a different commodity promotion program or marketing order could submit to the Board its election of the program into which it will pay assessments. Mandatorily and voluntarily assessed entities would be asked to submit either an "Organic Import Report" or an "Organic Production and Handling Report" that would accompany their assessments paid to the Board and report the net organic sales and/or transaction value for organic products during the applicable period. Entities granted an exemption from assessments from the Board would not be required to submit these reports.

Finally, domestic producers, handlers, and importers who wanted to participate in a referendum to vote on whether the Order should become effective would have to complete a registration form for submission to the Secretary. These forms are being submitted to OMB for approval under OMB Control No. 0581–NEW. Specific burdens for the forms are detailed later

in this document in the section titled PAPERWORK REDUCTION ACT. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

While AMS has performed this initial RFA analysis regarding the impact of the proposed rule on small entities, in order to have as much data as possible for a more comprehensive analysis, we invite comments concerning potential effects. AMS is also requesting comments regarding the number and size of entities covered under the proposed Order.

VI. Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

VII. Civil Rights Impact Analysis

Consideration has been given to the potential civil rights implications of this proposed rule on affected parties to ensure that no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status or protected genetic information. Although detailed demographic information is not available on the importers and domestic certified organic producers and handlers who would be subject to the program, broad consideration was given to the employees of such entities and those individuals who wish to use information collected under this mandatory program. This proposed rule does not require affected entities to relocate or alter their operations in ways that could adversely affect such persons or groups. Moreover, the program would not exclude from participation any persons or groups, deny any persons or groups the benefits of the program, or subject any persons or groups to discrimination.

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS announces its intention to request an approval of a new information collection and recordkeeping requirements for the proposed organic program.

Title: Organic Research, Promotion, and Information Order.

OMB Number: 0581–NEW.

Expiration Date of Approval: 3 years from approval date.

Type of Request: New information collection for research and promotion program.

Abstract: The information collection requirements in the request are essential to carry out the intent of the Act. The information collection concerns a proposal received by USDA for a national research and promotion program for the organic industry. The program would be financed by assessments levied upon domestic certified organic producers, certified organic handlers, and importers of organic products, and would be administered by a board of industry members selected by the Secretary. The program would provide for an assessment exemption for: (a) Certified organic producers and certified organic handlers with gross organic sales of \$250,000 or less for the previous marketing year, (b) importers of organic products declaring a transaction value equal to \$250,000 or less for the previous marketing year, (c) shipments of certified organic commodities by domestic certified organic producers and certified organic handlers to locations outside of the United States, and (d) producers, handlers, and importers of dual-covered commodities (e.g., highbush blueberries, beef, dairy, almonds, etc.) who elect to pay assessments under other applicable commodity promotion programs. A referendum would be held among assessed domestic certified organic producer, certified organic handler entities, and importers to determine whether they favor implementation of the program prior to it going into effect. The purpose of the program would be to promote organic goods, educate the public, and support market and agricultural research.

In summary, the information collection requirements under the program concern Board nominations, the collection of assessments, and referenda. Regarding assessments, domestic certified organic producers, certified organic handlers, and importers would submit an "entity registration statement and application

for exemption from assessment” form for the purpose of registering with the Board and, if desired, to apply for an exemption from paying assessments. The application for exemption portion of the form would need to be submitted to the board annually. Persons producing, handling and importing dual-covered commodities that opt to remit assessments to existing commodity promotion programs would annually submit a “Dual-Covered Commodity Application for Exemption From Assessments” form to the Secretary. Mandatorily and voluntarily assessed entities would also be asked to submit either an “Organic Import Report” or an “Organic Production and Handling Report” that would accompany their assessments paid to the Board and report the net organic sales and/or transaction value for organic products during the applicable period. Entities granted an exemption from assessments from the Board would not be required to submit these reports.

For Board nominations, importers and domestic certified organic producers and handlers interested in serving on the Board would be asked to submit a “Nomination Form” to the Board indicating their desire to serve or to nominate another industry member to serve on the Board. Interested persons could also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, importers and domestic certified organic producers and handlers would have the opportunity to submit a “Nomination Ballot” to the Board where they would vote for candidates to serve on the Board. Nominees would also have to submit a background information form, “AD-755,” to the Secretary to ensure they are qualified to serve on the Board.

There would also be an additional burden on importers and domestic certified organic producers and handlers voting in referenda. The referendum ballot, which represents the information collection requirement relating to referenda, is addressed in a proposed rule on referendum procedures which is published separately in this issue of the **Federal Register**. The following estimates are based on an assumption that there is no participation by voluntarily assessed entities. Per the Initial Regulatory Flexibility Analysis, of the 11,139 producers, 8,327 handlers, and 2,135 importers, it is estimated that about 2,691 producers, 5,015 handlers, and 326 importers would pay assessments under the Order and thus be eligible to vote in the referendum.

Information collection requirements that are included in this proposal include:

(1) Organic Production & Handling Report

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3 hours per certified organic producer or certified organic handler.

Respondents: Domestic certified organic producers and certified organic handlers.

Estimated Number of Respondents: 7,706.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 92,472 hours.

(2) Organic Importer Report

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3 hour per importer.

Respondents: Importers.

Estimated Number of Respondents: 326.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 3,912 hours.

(3) Entity Registration Statement and Application for Exemption From Assessment

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.8782 hours per application.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 21,601.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 18,970 hours.

(4) Dual-Covered Commodity Application for Exemption From Assessments

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per importer or domestic producer or handler reporting on organic products produced or imported. Upon approval of an application, such entities would receive exemption certification.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 1,021.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,021 hours.

(5) Nomination Form

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 275.

Estimated Number of Responses per Respondent: 0.33.

Estimated Total Annual Burden on Respondents: 22.69 hours.

(6) Nomination Ballot

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 8,032.

Estimated Number of Responses per Respondent: 0.33.

Estimated Total Annual Burden on Respondents: 662.64 hours.

(7) Background Information Form AD-755 (OMB Form No. 0505-0001)

Estimate of Burden: Public reporting for this collection of information is estimated to average 0.5 hours per response for each Board nominee.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 32 (32 for initial nominations to the Board, 0 for the second year, 5 for the third year, and up to 6 annually thereafter).

Estimated Number of Responses per Respondent: 1 every 3 years.

Estimated Total Annual Burden on Respondents: 16 hours for the initial nominations to the Board, 0 hours for the second year of operation, and up to 6 hours annually thereafter.

(8) Background Statement

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 275.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 68.75 hours.

(9) A Requirement To Maintain Records Sufficient To Verify Reports Submitted Under the Order

Estimate of Burden: Public recordkeeping burden for keeping this information is estimated to average 1 hour per recordkeeper maintaining such records.

Recordkeepers: Domestic producers and handlers (19,466), importers (2,135).

Estimated Number of Recordkeepers: 21,601.

Estimated Total Recordkeeping Hours: 21,601 hours.

As noted above, under the proposed program, domestic certified organic producers, certified organic handlers, and importers would be required to pay assessments to and file reports with the Board. While the proposed Order would impose certain recordkeeping requirements on certified organic producers, certified organic handlers, and importers, information required under the proposed Order could be compiled from records currently maintained. Such records shall be retained for at least 5 years beyond the fiscal year of their applicability.

An estimated 21,601 respondents would provide information to the Board (19,466 domestic certified organic producers and handlers, and 2,135 importers). Data for the list of certified organic producers and handlers was obtained from the 2014 NASS Organic Survey and the "2014 Annual Count of USDA-NOP Certified Organic Operations" report from the Organic Integrity Database.⁵⁹ Data to establish the list of importers of organic products in 2014 was obtained from the USDA AMS International Trade Data System/ Automated Commercial Environment (ITDS/ACE).⁶⁰ The estimated cost of providing the information to the Board by respondents would be \$4,989,011.35. This total has been estimated by adding the cost of the hours required for producer and handling reporting (135,638.17 hours multiplied by \$34.89, the mean hourly earnings of certified producers and handlers) and importer reporting (8,490.92 hours multiplied by \$30.22, the average mean hourly earnings of importers). Data for computation of the hourly rate for producers and handlers (Occupation Code 11-9013: Farmers, Ranchers, and other Agricultural Managers) and importers (Occupation Code 13-1020: Buyers and Purchasing Agents) was obtained from the U.S. Department of Labor's Bureau of Labor Statistics.

The proposed Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under

other programs administered by USDA and other state programs.

The proposed forms would require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms would be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly would likely coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for five years is consistent with OFPA section 6511(d)(1) requirements for the production and handling or agricultural products sold or labeled as organically produced. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual domestic certified organic producers, certified organic handlers and importers who are subject to the provisions of the Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

Request for Public Comment Under the Paperwork Reduction Act

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and USDA's oversight of the proposed Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal production areas in the United States for organic commodities; (d) the accuracy of USDA's estimate of the number of domestic certified organic producers, handlers, and importers of organic products that would be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic,

mechanical, or other technological collection techniques or other forms of information technology.

Comments concerning the information collection requirements contained in this action should reference OMB No. 0581-NEW. In addition, the docket number, date, and page number of this issue of the **Federal Register** also should be referenced. Comments should be sent to the same addresses referenced in the **ADDRESSES** section of this rule.

OMB is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after publication. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

USDA made modifications to the proponent's proposal to conform to other similar national research and promotion programs implemented under the Act.

While the proposal set forth below has not received the approval of USDA, it is determined that this proposed Order is consistent with and would effectuate the purposes of the Act.

As previously mentioned, for the proposed Order to become effective, it must be approved by a majority of domestic certified organic producers, handlers, and importers voting in the referendum.

Referendum procedures will be published separately in this issue of the **Federal Register**.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments received in response to this rule by the date specified will be considered prior to finalizing this action.

List of Subjects in 7 CFR Part 1255

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Organic, Promotion, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, it is proposed that Title 7, Chapter XI of the Code of Federal Regulations be amended by adding part 1255 to read as follows:

PART 1255—ORGANIC RESEARCH, PROMOTION AND INFORMATION ORDER

Subpart A—Organic Research, Promotion, and Information Order

Definitions

Sec.

1255.1 Act.

1255.2 Agricultural inputs.

1255.3 Agricultural product.

⁵⁹ NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/Integrity/Reports/Reports.aspx>.

⁶⁰ U.S. Customs and Border Protection ACE and Automated Systems. Available at: <https://www.cbp.gov/trade/automated>.

- 1255.4 Assessed entity.
- 1255.5 Board.
- 1255.6 Certificate of exemption.
- 1255.7 Certification or certified.
- 1255.8 Certified operation.
- 1255.9 Certified organic handler.
- 1255.10 Certified organic producer.
- 1255.11 Conflict of interest.
- 1255.12 Customs or CBP.
- 1255.13 Department.
- 1255.14 Dual-covered commodity.
- 1255.15 Fiscal year and marketing year.
- 1255.16 Gross organic sales.
- 1255.17 Importer.
- 1255.18 Information.
- 1255.19 Ingredient.
- 1255.20 National Organic Program.
- 1255.21 Net organic Sales.
- 1255.22 Order.
- 1255.23 Organic.
- 1255.24 Organic products.
- 1255.25 Organic Trade Association.
- 1255.26 Part and subpart.
- 1255.27 Person.
- 1255.28 Product processor.
- 1255.29 Programs, plans and projects.
- 1255.30 Promotion.
- 1255.31 Qualified State Commodity Board.
- 1255.32 Research.
- 1255.33 Secretary.
- 1255.34 State.
- 1255.35 Suspend.
- 1255.36 Terminate.
- 1255.37 United States.
- 1255.38 Voluntarily assessed entity.

Organic Research and Promotion Board

- 1255.40 Establishment and membership.
- 1255.41 Nominations and appointments.
- 1255.42 Term of office.
- 1255.43 Removal and vacancies.
- 1255.44 Procedure.
- 1255.45 Reimbursement and attendance.
- 1255.46 Powers and duties.
- 1255.47 Prohibited activities.

Expenses and Assessments

- 1255.50 Budget and expenses.
- 1255.51 Financial statements.
- 1255.52 Assessments.
- 1255.53 Exemption from assessment.
- 1255.54 Assessment offset.

Promotion, Research and Information

- 1255.60 Programs, plans and projects.
- 1255.61 Independent evaluation.
- 1255.62 Patents, copyrights, trademarks, inventions, product formulations, and publications.

Reports, Books and Records

- 1255.70 Reports.
- 1255.71 Books and records.
- 1255.72 Confidential treatment.

Miscellaneous

- 1255.80 Right of the Secretary.
- 1255.81 Referenda.
- 1255.82 Suspension or termination.
- 1255.83 Proceedings after termination.
- 1255.84 Effect of termination or amendment.
- 1255.85 Personal liability.
- 1255.86 Separability.
- 1255.87 Amendments.
- 1255.88 OMB control numbers.

Subpart B—[Reserved]

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

Subpart A—Organic Research, Promotion and Information Order

Definitions

§ 1255.1 Act.

Act means the Commodity Promotion, Research and Information Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

§ 1255.2 Agricultural inputs.

Agricultural inputs means all substances or materials used in the production or handling of organic agricultural products (e.g. fertilizer, lime, soil conditioners, agricultural chemicals, beneficial insects, other approved materials for pest control, seed, plants, vines, trees, feed purchased for livestock, etc.).

§ 1255.3 Agricultural product.

Agricultural product. Any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, that is marketed in the United States for human or livestock consumption.

§ 1255.4 Assessed entity.

Assessed entity means any certified organic producer or certified organic handler that has gross organic sales in excess of \$250,000 for the previous marketing year, any importer with a transaction value greater than \$250,000 in organic products for the previous marketing year, and any voluntarily assessed entity.

§ 1255.5 Board.

Board means the Organic Research and Promotion Board established pursuant to § 1255.40, or such other name as recommended by the Board and approved by the Secretary.

§ 1255.6 Certificate of exemption.

Certificate of exemption means a certificate issued by the Board, pursuant to § 1255.53, to a certified organic producer, certified organic handler or importer that:

(a) Has gross organic sales less than or equal to \$250,000 for the previous marketing year,

(b) Has imported a transaction value less than or equal to \$250,000 in organic products during the previous marketing year, or

(c) Entity that produces, handles or imports dual-covered commodities. Certificates of exemptions issued to entities that opt to pay into dual-covered commodity research and

promotion programs or marketing orders are issued by the Secretary.

§ 1255.7 Certification or certified.

Certification or certified. A determination made by a USDA-accredited certifying agent that a production or handling operation is in compliance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto, and which is documented by a certificate of organic operation.

§ 1255.8 Certified operation.

Certified operation. A crop or livestock production operation, wild-crop harvesting or handling operation, or portion of such operation that is certified by a USDA-accredited certifying agent as utilizing a system of organic production or handling as described by the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205.

§ 1255.9 Certified organic handler.

Certified organic handler means a person who handles certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.270 through 7 CFR 205.272, and all other applicable requirements of part 205 and receives, sells, consigns, delivers, or transports certified organic products into the current of commerce in the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 1255.10 Certified organic producer.

Certified organic producer means a person who produces certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.202 through 7 CFR 205.207 or 7 CFR 205.236 through 7 CFR 205.240, and all other applicable requirements of part 205.

§ 1255.11 Conflict of interest.

Conflict of interest means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

§ 1255.12 Customs or CBP.

Customs or CBP means the U.S. Customs and Border Protection, an agency of the U.S. Department of Homeland Security.

§ 1255.13 Department.

Department means the U.S. Department of Agriculture, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1255.14 Dual-covered commodity.

Dual-covered commodity means an agricultural commodity that is produced on a certified organic farm and is covered under this part and any other agricultural commodity promotion order issued under a commodity promotion law.

§ 1255.15 Fiscal year and marketing year.

Fiscal year and marketing year means the 12-month period ending on December 31 or such other period as recommended by the Board and approved by the Secretary.

§ 1255.16 Gross organic sales.

Gross organic sales means the total amount the person received for all organic products during the fiscal year without subtracting any costs or expenses.

§ 1255.17 Importer.

Importer means any person who imports certified organic products from outside the United States for sale in the United States as a principal or as an agent, broker, or consignee of any person who produces organic products outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such organic products. Organic importers can be identified through organic certificates, import certificates, HTS codes, or any other demonstration that they meet the definition above.

§ 1255.18 Information.

Information means information and programs for consumers, the organic industry, and producers. This includes educational activities; and information and programs designed to enhance and broaden the understanding of the use and attributes of organic products, increase organic production, support the transition of acres and farms to organic production in the United States, provide technical assistance, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies. These include:

(a) Consumer education, advertising and information, which means any effort taken to provide information to, and broaden the understanding of, the general public regarding organic products; and

(b) Industry information, which means information and programs that would enhance the image of the organic industry, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies; and

(c) Producer information, which means information related to agronomic and animal husbandry practices and certification requirements, and information supporting the sustainable transition of acres, farms and ranches to organic production in the United States, long-term system management, increasing organic production, direct and local marketing opportunities, export opportunities, and organic research.

§ 1255.19 Ingredient.

Ingredient means any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

§ 1255.20 National Organic Program.

"National Organic Program" means the program authorized by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) for the purpose of implementing its provisions.

§ 1255.21 Net organic sales.

Net organic sales means total gross sales in organic products minus (a) the cost of certified organic ingredients, feed, and agricultural inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used in the production of certified products.

§ 1255.22 Order.

Order means an order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion, research, education and information regarding organic products authorized under the Act.

§ 1255.23 Organic.

Organic means a labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205.

§ 1255.24 Organic products.

Organic products means products produced and certified under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto.

§ 1255.25 Organic Trade Association.

Organic Trade Association (OTA) means a membership business association who, in collaboration with the GRO Organic Core Committee, petitioned USDA for the Organic Research, Promotion, and Information Order. OTA is a membership-based trade organization representing growers, processors, certifiers, farmers associations, distributors, importers, exporters, consultants, retailers, and others involved in the organic sector. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee.

§ 1255.26 Part and subpart.

Part means the Organic Research, Promotion, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a *subpart* of such part.

§ 1255.27 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1255.28 Product processor.

Product processor means a certified organic handler who cooks, bakes, heats, dries, mixes, grinds, churns, separates, extracts, cuts, ferments, eviscerates, preserves, dehydrates, freezes, or otherwise manufactures organic products, and includes the packaging, canning, jarring, or otherwise enclosing organic food in a container.

§ 1255.29 Programs, plans and projects.

Programs, plans and projects means those research, promotion, and information programs, plans or projects established pursuant to the Order.

§ 1255.30 Promotion.

Promotion means any action, including paid advertising and the dissemination of information, utilizing public relations or other means, to enhance and broaden the understanding of the use and attributes of organic products for the purpose of maintaining and expanding markets for the organic industry.

§ 1255.31 Qualified State Commodity Board.

Qualified State Commodity Board means, for purposes of § 1255.54 governing assessment offsets, an existing or future producer or handler governed entity—

(a) That is authorized by State law or a State government agency;

(b) That is organized and operating within a State;

(c) That is not federally administered; and

(d) That receives mandatory contributions and conducts promotion, research, and/or information programs.

§ 1255.32 Research.

Research includes both agricultural and other research.

(a) Agricultural research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to improve organic farm production systems and practices, productivity, expand organic farming opportunities, and enhance sustainability for farms, farm families and their communities; enhance plant and animal breeding and varietal development for organic systems and improve the availability of other production inputs; optimize natural resource conservation, biodiversity, ecosystem services, and other environmental outcomes of organic agriculture, and advance organic farm and food safety objectives.

(b) Other research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to enhance or increase the consumption, image, desirability, use, marketability, or production of organic products; or to do studies on nutrition, market data, processing, environmental and human health benefits, quality of organic products, including research directed to organic product characteristics and product development, including new uses of existing organic products, new organic products or improved technology in the production, processing and packaging of organic products.

§ 1255.33 Secretary.

Secretary means the Secretary of Agriculture of the United States, or any other officer or employee of the Department to whom authority has been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1255.34 State.

State means any of the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 1255.35 Suspend.

Suspend means to issue a rule under 5 U.S.C. 553 to temporarily prevent the operation of an order or part thereof

during a particular period of time specified in the rule.

§ 1255.36 Terminate.

Terminate means to issue a rule under 5 U.S.C. 553 to cancel permanently the operation of an order or part thereof beginning on a date certain specified in the rule.

§ 1255.37 United States.

United States means collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

§ 1255.38 Voluntarily assessed entity.

Voluntarily assessed entity means any covered person with gross organic sales or transaction value of \$250,000 or less for the previous marketing year and thus not subject to assessment under this part, but elects to participate in the Order by remitting an assessment pursuant to § 1255.52.

Organic Research and Promotion Board

§ 1255.40 Establishment and membership.

(a) *Establishment of the Board.* There is hereby established an Organic Research and Promotion Board to administer the terms and provisions of this Order. Seats on the Board shall be apportioned as set forth in paragraph (b) of this section. There shall be no alternate Board members.

(b) The Board shall be composed of 17 members and shall be established as follows:

(1) Two members shall be certified organic producers (assessed mandatorily or voluntarily) from Region 1, which consists of the states of Alaska, California, and Hawaii;

(2) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 2, which consists of the states of Oregon and Washington;

(3) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 3, which consists of the states of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming;

(4) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 4, which consists of the states of Iowa, Minnesota, and Wisconsin;

(5) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 5, which consists of the states of Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana,

Maryland, Michigan, Mississippi, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia;

(6) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 6, which consists of the states of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, Washington DC, Puerto Rico, and U.S. Virgin Islands, and all other parts of the United States not listed in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(5) and (b)(6) of this section;

(7) One member shall be a voluntarily assessed certified organic producer at large, who shall have gross organic sales of \$250,000 or less;

(8) Five members shall be certified organic handlers at large (assessed mandatorily or voluntarily);

(9) Two members shall be product processors (assessed mandatorily or voluntarily);

(10) One member shall be an importer (assessed mandatorily or voluntarily); and

(11) One member shall be an at-large public member, who shall be a non-voting member.

(c) At least once in every five-year period, but not more frequently than once in every three-year period, the Board will review the participation rate of voluntarily assessed entities. The review will be conducted using the Board's annual assessment receipts. If warranted, the Board will recommend to the Secretary that the membership or size of the Board be adjusted to reflect changes in the number of participating voluntarily assessed entities. Any changes in Board composition shall be implemented by the Secretary through rulemaking.

(d) At least once in every five-year period, but not more frequently than once in every 3-year period, the Board must review, based on a 3-year average, the geographical distribution of production of organic agricultural commodities in the United States with respect to the certified organic producer Board member seats; and the value of organic agricultural commodities imported into the United States with respect to the importer seat(s). The review will be conducted using the NOP's list of certified organic operations and, if available, other reliable reports from the industry. If warranted, the Board will recommend to the Secretary that the membership or size of the Board be adjusted to reflect changes in geographical distribution of production of organic agricultural commodities in the United States, and the value of organic agricultural commodities

imported into the United States. Any changes in Board composition shall be implemented by the Secretary through rulemaking.

§ 1255.41 Nominations and appointments.

(a) Nominees must be certified organic producers, certified organic handlers, or importers who are mandatorily or voluntarily assessed, except for the voluntarily assessed entity (who must be a voluntarily assessed certified organic producer) and the non-voting at-large public member.

(1) All Board nominees (mandatorily and voluntarily assessed) may provide a short background statement outlining their qualifications to serve on the Board.

(2) Reserved.

(b) Nominations for the initial Board will be handled by the Department and OTA. The nomination process shall be publicized, using trade press or other means deemed appropriate, and shall conduct outreach to all known certified organic producers, certified organic handlers, and importers of organic products, as well as the non-voting at-large public member. Voluntarily assessed producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the seat for which they are geographically qualified. Entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role (certified organic producer, certified organic handler, and importer) for which they meet the definitions provided at §§ 1255.9, 1255.10, and 1255.17. OTA may use local, state, or regional entities, mail or other methods to solicit potential nominees. The Secretary shall select the initial members of the Board from the nominations submitted.

(c) For subsequent nominations, the Board would solicit nominations using trade press or other means it deems appropriate, and shall conduct outreach to:

(1) All known U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 in the previous marketing year,

(2) Importers of organic products declaring a transaction value greater than \$250,000 for the previous marketing year, and

(3) All voluntarily assessed entities who have remitted assessments subject to § 1255.52(d). Provided they are geographically qualified, entities that are a combination of a certified organic producer, certified organic handler, or

importer could seek nomination to the Board in any role (certified organic producer, certified organic handler, and importer) for which they meet the definitions provided at §§ 1255.9, 1255.10, and 1255.17. Entities that are a combination of a certified organic producer, certified organic handler, or importer could also vote in the nomination process described below for the certified organic producer, certified organic handler, and importer nominees, provided they are geographically qualified and meet the definitions provided at §§ 1255.9, 1255.10, and 1255.17.

(d) Subsequent certified organic producer nominations (for all geographic regions and the seat designated for a voluntarily assessed certified organic producer) shall be conducted as follows:

(1) For the Board seats allocated by geographic region, certified organic producers must be domiciled in the region for which they seek nomination. Nominees must specify for which region they are seeking nomination. The names of nominees shall be placed on a ballot by region. The ballots along with any background statements shall be mailed to all certified organic producers who are domiciled in that particular region with gross organic sales in excess of \$250,000 during the previous marketing year, and any certified organic producer in that region that has remitted a voluntary assessment pursuant to § 1255.52(d) during the previous marketing year and is currently paying into the program. Certified organic producers may vote in each region in which they produce organic products. The votes shall be tabulated for each region and the nominees shall be listed in descending order by number of votes received. The top two candidates for each position shall be submitted to the Secretary at least six months before the new Board term begins; and

(2) Voluntarily assessed certified organic producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the certified organic producer seat for which they are geographically qualified. For the Board seat allocated to a voluntarily assessed certified organic producer, the names of nominees shall be placed on a ballot. The ballot along with any background statements shall be mailed to all voluntarily assessed certified organic producers. The votes shall be tabulated and the nominees shall be listed in descending order by number of votes received. The top two candidates for this position shall be submitted to the Secretary at least six

months before the new Board term begins.

(e) Subsequent certified organic handler and product processor at large nominations shall be conducted as follows:

(1) The names of the nominees for the five “at-large” domestic certified organic handler seats and the two “at-large” product processor seats shall be placed on a ballot. The ballots along with any background statements would be mailed to all certified organic handlers with gross organic sales in excess of \$250,000, and any voluntarily assessed certified organic handlers who have remitted an assessment pursuant to § 1255.52(d) for the previous marketing year for a vote.

(2) The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top ten candidates for the certified organic handler positions and the top four candidates for the product processor positions would be submitted to the Secretary.

(f) Subsequent importer nominations shall be conducted as follows:

(1) The names of the nominees for the importer seat shall be placed on a ballot. The ballots along with any background statements shall be mailed to importers who imported a transaction value for organic products in excess of \$250,000, and any voluntarily assessed importers who have remitted an assessment pursuant to § 1255.52(d) for the previous marketing year for a vote.

(2) The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position would be submitted to the Secretary.

(g) Subsequent non-voting at-large public member nominations shall be conducted as follows:

(1) The names of the nominees for “at-large” non-voting public member seat would also be placed on a ballot. The ballots along with the background statements would be mailed to:

(i) All U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 in the previous marketing year,

(ii) Importers of organic products that declared a transaction value greater than \$250,000 for the previous marketing year, and

(iii) All voluntarily assessed entities who have remitted assessments subject to section 1255.52(d) (e.g. “opted into the program”).

(2) The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in

descending order by vote. The top two candidates would be submitted to the Secretary.

(h) Any person nominated to serve on the Board shall file with the Board at the time of the nomination a background questionnaire.

(i) From the nominations made pursuant to this section, the Secretary shall appoint the members of the Board on the basis of representation provided in § 1255.40.

(j) No two members of the Board shall be employed by a single corporation, company, partnership or any other legal entity.

(k) The Board shall recommend to the Secretary nominees for the at-large public member, and the Secretary shall appoint from those recommendations.

(l) The Board may recommend to the Secretary modifications to its nomination procedures as it deems appropriate. Any such modifications shall be implemented through rulemaking by the Secretary.

(m) The Board shall strive for diversity in its membership.

§ 1255.42 Term of office.

(a) With the exception of the initial Board, each Board member shall serve for a term of three years or until the Secretary selects his or her successor. Each term of office shall begin on January 1 and end on December 31. No member may serve more than two full consecutive three-year terms, except as provided in paragraph (b) of this section.

(b) For the initial Board, the terms of the Board members shall be staggered for two, three and four years as follows, so that the terms of approximately one-third of the Board members expire in any given year:

(1) 2-year term—Region #2 certified organic producer, Region #6 certified organic producer, 1 voluntarily assessed certified organic producer, 1 certified organic handler, and 1 product-processor.

(2) 3-year term—Region #1 certified organic producer, Region #4 certified organic producer, 1 at-large public member, 2 certified organic handlers, and 1 product-processor.

(3) 4-year term—Region #1 certified organic producer, Region #3 certified organic producer, Region #5 certified organic producer, 1 importer, and 2 certified organic handlers.

All subsequent terms shall be three-year terms.

(c) No single corporation, company, partnership or any other legal entity can be represented on the Board by an employee or owner for more than two consecutive terms.

§ 1255.43 Removal and vacancies.

(a) The Board may recommend to the Secretary that a member be removed from office if the member consistently fails or refuses to perform his or her duties properly or engages in dishonest acts or willful misconduct. If the Secretary determines that any person appointed under this subpart consistently fails or refuses to perform his or her duties properly or engages in acts of dishonesty or willful misconduct, the Secretary may remove the person from office. If a person loses or surrenders his or her valid organic certificate, the Secretary may remove the person from office. A person appointed under this subpart may be removed by the Secretary if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act.

(b) If a member resigns, is removed from office, or dies, or if any member of the Board ceases to work for or be affiliated with a certified organic producer, certified organic handler or importer, or if a certified organic producer representing regional producers, or if a voluntarily assessed entity no longer chooses to be assessed, such position shall become vacant.

(c) If a position becomes vacant, nominations to fill the vacancy will be conducted using the nominations process set forth in this Order or the Board may recommend to the Secretary that he or she appoint a successor from the most recent list of nominations for the position.

(d) A vacancy will not be required to be filled if the unexpired term is less than six months.

§ 1255.44 Procedure.

(a) A majority of the voting Board members (9) shall constitute a quorum.

(b) Each voting member of the Board shall be entitled to one vote on any matter put to the Board and the motion will carry only if supported by a majority of Board members, except for recommendations to change the assessment rate or to adopt a budget, both of which require affirmation by two-thirds of the total number of voting Board members (11).

(c) At an assembled meeting, all votes shall be cast in person, or as otherwise determined by the Board in bylaws.

(d) In lieu of voting at an assembled meeting and when in the opinion of the chairperson of the Board such action is considered necessary, the Board may take action only if supported by a majority of members (unless two-thirds is required under the Order) by mail, telephone, electronic mail, facsimile, or any other means of communication. In

that event, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at an assembled meeting. All votes shall be recorded in Board minutes.

(e) There shall be no proxy voting.

(f) The Board must give members and the Secretary timely notice of all Board, executive and committee meetings.

§ 1255.45 Reimbursement and attendance.

Board members shall serve without compensation, but shall be reimbursed for reasonable travel expenses, as approved by the Board, which they incur when performing Board business.

§ 1255.46 Powers and duties.

(a) The Board shall have the following powers and duties:

(1) To administer this subpart in accordance with its terms and conditions and to collect assessments;

(2) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules and regulations as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(3) To meet not less than annually, organize, and select from among the members of the Board a chairperson, vice chairperson, secretary/treasurer, other officers, and committees and subcommittees, as the Board determines appropriate;

(4) To employ or contract with persons, other than the Board members, as the Board considers necessary to assist the Board in carrying out its duties, and to determine the compensation and specify the duties of the persons;

(5) To provide notice of all Board meetings through a press release or other means and to give the Secretary the same notice of Board meetings (including committee, subcommittee, and the like) as is given to members so that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting of the Board to the Secretary;

(6) To develop and submit programs, plans and projects to the Secretary for the Secretary's approval, and enter into contracts or agreements related to such programs, plans and projects, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs, plans or projects of promotion, research, and information. The payment of costs for such activities shall be from funds collected pursuant

to this Order. Each contract or agreement shall provide that:

(i) The contractor or agreeing party shall develop and submit to the Board a program, plan or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan or project;

(ii) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Board of activities conducted, submit accounting for funds received and expended, and make such other reports as the Secretary or the Board may require;

(iii) The Secretary may audit the records of the contracting or agreeing party periodically; and

(iv) Any subcontractor who enters into a contract with a Board contractor and who receives or otherwise uses funds allocated by the Board shall be subject to the same provisions as the contractor.

(7) To prepare and submit for the approval of the Secretary fiscal year budgets in accordance with § 1255.50;

(8) To borrow funds necessary for startup expenses of the Order during the first year of operation by the Board;

(9) To invest assessments collected and other funds received pursuant to the Order and use earnings from invested assessments to pay for activities carried out pursuant to the Order;

(10) To recommend changes to the assessment rates as provided in this part;

(11) To cause its books to be audited by an independent auditor at the end of each fiscal year and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(12) To periodically prepare and make public reports of program activities and, at least once each fiscal year, to make public an accounting of funds received and expended;

(13) To maintain such minutes, books and records and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(14) To act as an intermediary between the Secretary and any organic industry participant;

(15) To receive, investigate, and report to the Secretary complaints of violations of the Order; and

(16) To recommend to the Secretary such amendments to the Order as the Board considers appropriate.

(b) When researching priorities for each marketing year the Board will provide public notice using local, state, or regional entities, mail and/or other methods to solicit public input from all covered entities and will have at least one meeting or conference call to determine the priorities for each marketing year.

§ 1255.47 Prohibited activities.

The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in:

(a) Any action that would be a conflict of interest;

(b) Using funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments or subdivision thereof (including the National Organic Standards Board), other than recommending to the Secretary amendments to the Order; and

(c) Any promotion that is false, misleading or disparaging to another agricultural commodity.

Expenses and Assessments

§ 1255.50 Budget and expenses.

(a) At least 60 calendar days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Board shall prepare and submit to the Department a budget for the fiscal year covering its anticipated expenses and disbursements in administering this part. The budget for research, promotion or information may not be implemented prior to approval by the Secretary. Each such budget shall include:

(1) A statement of objectives and strategy for each program, plan or project;

(2) A summary of anticipated revenue, with comparative data for at least one preceding fiscal year, which shall not include the initial budget;

(3) A summary of proposed expenditures for each program, plan or project. This shall include the following allocation of expenditures, clearly designated within the following buckets:

(i) The funds shall be allocated as follows: no less than 25 percent of the funds shall be allocated to research; 25 percent of the funds shall be allocated to information; 25 percent of the funds shall be allocated to promotion; and 25 percent of the funds shall remain discretionary; and

(ii) Of the funds allocated to research, a majority shall be allocated to agricultural research; and

(iii) Of the funds allocated to information, a majority shall be allocated to producer information; and

(iv) Regional certified organic producer Board members shall establish priorities, including regional considerations, for investments in agricultural research; and

(v) Any expenditures designated for the categories set forth in (i), (ii), and (iii) of this section that are not spent in a fiscal year shall carry over for the same category for the following fiscal year.

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding fiscal year, except for the initial budget.

(b) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in this Order.

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Department, including shifting funds from one program, plan or project to another. Shifts of funds that do not result in an increase in the Board's approved budget and are consistent with governing bylaws need not have prior approval by the Department.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Secretary finds reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board.

(e) With approval of the Department, the Board may borrow money for the payment of startup expenses subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed shall be expended only for startup costs and capital outlays and are limited to the first year of operation by the Board.

(f) The Board may accept voluntary contributions. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use. The Board may receive funds from outside sources with approval of the Secretary for specific authorized projects.

(g) The Board may also receive other funds provided through the Department or from other sources, with the approval of the Secretary, for authorized activities.

(h) The Board shall reimburse the Secretary for all expenses incurred by

the Secretary in the implementation, administration, enforcement and supervision of the Order, including all referendum costs in connection with the Order.

(i) For fiscal years beginning three years after the date of the establishment of the Board, the Board may not expend for administration, maintenance, and the functioning of the Board an amount that is greater than 15 percent of the assessment and other income received by and available to the Board for the fiscal year. For purposes of this limitation, reimbursements to the Secretary shall not be considered administrative costs.

(j) Any program, plan or project receiving funds under this section shall not expend for administration an amount that is greater than 15 percent of the total funds allocated to the program, plan or project.

(k) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal years excess funds in any reserve so established: *Provided*, that, the funds in the reserve do not exceed one fiscal year's budget of expenses. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this subpart.

(l) Pending disbursement of assessments and all other revenue under a budget approved by the Secretary, the Board may invest assessments and all other revenues collected under this part in:

(1) Obligations of the United States or any agency of the United States;

(2) General obligations of any State or any political subdivision of a State;

(3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System;

(4) Obligations fully guaranteed as to principal interest by the United States; or

(5) Other investments as authorized by the Secretary.

§ 1255.51 Financial statements.

(a) The Board shall prepare and submit financial statements to the Department on a quarterly basis, or at any other time as requested by the Secretary. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Department within 30

calendar days after the end of the time period to which it applies.

(c) The Board shall submit to the Department an annual financial statement within 90 calendar days after the end of the fiscal year to which it applies.

§ 1255.52 Assessments.

(a) The Board's programs and expenses shall be paid by assessments on assessed entities, other income of the Board, and other funds available to the Board.

(b) Subject to the offset specified in § 1255.54 each certified organic producer or certified organic handler with gross organic sales of greater than \$250,000 during the previous marketing year shall pay one-tenth of one percent of net organic sales to the Board. Each certified organic producer and certified organic handler shall remit to the Board the amount due no later than 90 days following the end of the marketing year in which the organic product was produced or handled and submit any necessary reports to the Board pursuant to § 1255.70. Quarterly payments may be accepted.

(c) Importers with greater than \$250,000 in transaction value of organic products imported during the prior marketing year shall remit an assessment of one-tenth of one percent of the transaction value of organic products to Customs at the time of entry into the United States and shall be remitted by Customs to the Board. If Customs does not collect an assessment from an organic importer, the importer is responsible for paying the assessment directly to the Board within 90 calendar days after the end of the year in which the organic products were imported and submit any necessary reports to the Board pursuant to § 1255.70. Quarterly payments may be accepted. Such importers that have \$250,000 or less in transaction value of organic products during the marketing year shall automatically receive a refund from the Board for the applicable assessments. The Board shall refund such importers their assessments as collected by Customs no later than 90 calendar days after the end of the marketing year. No interest shall be paid on the assessments collected by Customs or the Board.

(d) *Voluntary assessment.* (1) Certified organic producers and certified organic handlers with gross organic sales of \$250,000 or less in the prior marketing year may elect to participate in the Order as a voluntarily assessed entity by remitting an assessment of one-tenth of one percent of net organic sales. The certified organic producer and certified organic handler shall remit to the Board

the amount due no later than 90 days following the end of the marketing year in which the organic product was produced or handled and submit any necessary reports to the Board pursuant to § 1255.70. Quarterly payments may be accepted.

(2) Importers declaring \$250,000 or less in transaction value of organic products imported during the prior marketing year may elect to participate in the Order as a voluntarily assessed entity by remitting an assessment of one-tenth of one percent of the transaction value of organic products prior to the start of the marketing year. Quarterly payments may be accepted. If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment directly to the Board within 90 calendar days after the end of the year in which the organic products were imported. The importer would also submit any necessary reports to the Board pursuant to § 1255.70.

(e) If an entity is a combination of a certified organic producer, certified organic handler and/or an organic importer, such entity's combined gross organic sales and transaction value of organic products declared to Customs during the previous marketing year shall count towards the \$250,000 threshold.

(f) At least 24 months after the Order becomes effective and periodically thereafter, the Board shall review and may recommend to the Secretary, upon an affirmative vote of at least two-thirds of the voting members of the Board, a change in the assessment rate. A change in the assessment rate is subject to referendum.

(g) When a certified organic producer, certified organic handler or importer fails to pay the assessment within 90 calendar days of the date it is due, the Board may impose a late payment charge and interest. The late payment charge and rate of interest shall be prescribed in regulations issued by the Secretary. All late assessments shall be subject to the specified late payment charge and interest. Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collection procedures.

(h) The Board may accept advance payment of assessments from any certified organic producer, certified organic handler, or organic importer that will be credited toward any amount for which that person may become liable. The Board may not pay interest on any advance payment.

(i) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall receive

assessments and shall pay such assessments and any interest earned to the Board when it is formed.

§ 1255.53 Exemption from assessment.

(a) *Certified organic producers, certified organic handlers, and importers.* (1) Certified organic producers and certified organic handlers with gross organic sales of \$250,000 or less in the prior marketing year may apply to the Board, on a form provided by the Board, for a certificate of exemption prior to the start of the marketing year. This is an annual exemption and certified organic producers and certified organic handlers must reapply each year. Upon receipt of an application for exemption, the Board shall determine whether an exemption may be granted. The Board will issue, if deemed appropriate, a certificate of exemption to the eligible certified organic producer or certified organic handler. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

(2) Importers declaring \$250,000 or less in transaction value of organic products imported during the prior marketing year may apply to the Board, on a form provided by the Board, for a certificate of exemption prior to the start of the marketing year. This is an annual exemption and importers must reapply each year. Upon receipt of an application for exemption, the Board shall determine whether an exemption may be granted. The Board will issue, if deemed appropriate, a certificate of exemption to the eligible importer. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

(b) *Exporters.* Shipments of certified organic commodities by domestic producers and handlers to locations outside of the United States are exempt from assessment. The Board shall establish procedures for approval by the Secretary for refunding assessments that may be inadvertently paid on such sales and establish any necessary safeguards as appropriate. Safeguard procedures would be implemented by the Secretary through rulemaking. If the Board determined that exports should be assessed, it would make that recommendation to the Secretary. Any such action would be implemented by USDA through rulemaking.

(c) *Dual-covered commodities.* Certified organic producers; certified organic handlers, and importers of dual-covered commodities may apply to the Secretary, on a form provided by the Board, for a certificate of exemption any time initially, and annually thereafter prior to the January 1 start of the

marketing year. The exemption for dual-covered commodities is effective for one marketing year. Entities granted an exemption must reapply each year. Eligible applicants shall certify that they have remitted any and all assessments due for the dual-covered commodity pursuant to the provisions of an agricultural commodity promotion order issued under a commodity promotion law. Within 30 days of receipt of an application for exemption, the Secretary shall determine whether an exemption may be granted. The Secretary may request documentation providing proof of the remittance of the assessment for the dual-covered commodity. If all requirements have been met, the Secretary will issue a certificate of exemption to the eligible certified organic producer, certified organic handler, or importer effective for the marketing year. If the application is denied, the Secretary will notify the applicant, in writing, within 30 days of application. Such notification must detail the justification for the denial. Applicants notified of denial may reapply for an exemption for the forthcoming marketing year, so long as the reapplication is received prior to the beginning of such marketing year. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

§ 1255.54 Assessment offset.

The Board may, with the approval of the Secretary, authorize a credit to a certified organic producer and certified organic handlers of up to 25 percent of the amount to be remitted to the Board pursuant to § 1255.52 of this subpart to offset collection and compliance costs relating to such assessments and for fees paid to Qualified State Commodity Boards required by State law. This offset is available only for those monies that go to research and promotion, and not for dues or quality specifications.

Promotion, Research and Information

§ 1255.60 Programs, plans and projects.

(a) The Board shall develop and submit to the Secretary for approval programs, plans and projects authorized by this subpart. Such programs, plans and projects shall provide for promotion, research, information and other activities including consumer and industry information and advertising.

(b) No program, plan or project shall be implemented prior to its approval by the Secretary. Once a program, plan or project is so approved, the Board shall take appropriate steps to implement it.

(c) The Board must evaluate each program, plan and project authorized under this subpart to ensure that it

contributes to an effective and coordinated program of research, promotion, and information. The Board must submit the evaluations to the Secretary. If the Board finds that a program, plan or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan or project.

§ 1255.61 Independent evaluation.

At least once every five years, the Board shall authorize and fund from funds otherwise available to the Board, an independent evaluation of the effectiveness of all generic promotion, research and information activities undertaken under the Order. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this section.

§ 1255.62 Patents, copyrights, trademarks, inventions, product formulations, and publications.

Any patents, copyrights, trademarks, inventions, product formulations, and publications developed through the use of funds received by the Board under this subpart shall become part of the U.S. Government, as represented by the Board, and shall along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, inventions, publications, or product formulations, inure to the benefit of the Board, shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board, and may be licensed subject to approval by the Secretary. Upon termination of this subpart, section 1255.83 shall apply to determine disposition of such property.

Reports, Books, and Records

§ 1255.70 Reports.

(a) Certified organic producers, certified organic handlers and importers will be required to provide periodically to the Board such information as the Board, with the approval of the Secretary, may require. Such information may include, but not be limited to:

(1) For certified organic producers and certified organic handlers:

(i) The name, address and telephone number of the certified organic producer and/or certified organic handler and

(ii) The value of net organic sales of the organic products.

(2) For importers:

(i) The name, address and telephone number of the importer;

(ii) The transaction value of the organic products imported by type; and
 (iii) The country/countries of export.

(b) For certified organic producers and certified organic handlers, such information shall be reported to the Board no later than 90 days following the end of the year in which the organic product was produced or handled and shall accompany the collected payment of assessments as specified in § 1255.52. Quarterly payments may be accepted.

(c) Importers who paid their assessments through Customs would not have to submit such reports to the Board because Customs would collect this information upon entry. For importers who pay their assessments directly to the Board, such information shall accompany the payment of collected assessments within 90 calendar days after the end of the year in which the organic product was imported specified in § 1255.52. Quarterly payments may be accepted.

§ 1255.71 Books and records.

Each certified organic producer, certified organic handler and importer shall maintain any books and records necessary to carry out the provisions of this subpart and regulations issued thereunder, including such records as are necessary to verify any required reports. Such books and records must be made available during normal business hours for inspection by the Board's or Secretary's employees or agents. Certified organic producers, certified organic handlers and importers must maintain the books and records for two years beyond the fiscal year to which they apply.

§ 1255.72 Confidential treatment.

All information obtained from books, records, or reports under the Act, this subpart and the regulations issued thereunder shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members or certified organic producers, certified organic handlers and importers. Only those persons having a specific need for such information solely to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or at the request, of the Secretary, or to which

the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this part, together with a statement of the particular provisions of this part violated by such person.

Miscellaneous

§ 1255.80 Right of the Secretary.

All fiscal matters, programs, plans or projects, contracts, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1255.81 Referenda.

(a) *Initial referendum.* The Order shall not become effective unless the Order is approved by a majority of assessed entities voting in the referendum. A single assessed entity may cast one vote in the referendum. All currently certified domestic entities in the list that is maintained by the National Organic Program will be mailed a ballot. Importers of products with organic HTS codes from the last year will also be mailed a ballot. Requests for ballots shall include an affidavit attesting to (a) an importer's participation in the organic industry, and (b) a voluntarily assessed entity's commitment to be assessed for the majority of years until the next referendum. Bloc voting shall be prohibited.

(b) *Subsequent referenda.* (1) Every seven years, the Department shall hold a referendum to determine whether assessed entities favor the continuation, suspension, or termination of the Order. The Order shall continue if it is favored by a majority of the assessed entities voting. The Department will also conduct a referendum if 10 percent or more of all assessed entities request the Department to hold a referendum. Each ballot request shall include an affidavit attesting to:

(i) An importer's participation in the organic industry, and

(ii) A voluntarily assessed entity's commitment to be assessed for the majority of the next seven years. Bloc voting shall be prohibited.

(2) All assessed entities in good standing shall be eligible to vote in a

subsequent referendum. To be in good standing:

(i) A dual-covered entity must demonstrate that it has paid into the organic research and promotion program for a majority of the years since the most recent referendum; or

(ii) A voluntarily assessed entity must have paid into the organic research and promotion program for a majority of the years since the most recent referendum; or

(iii) An entity must have attained its organic certification since the most recent referendum and have paid into the organic research and promotion program for every year since entering the program; or

(iv) An assessed entity that does not meet any of the above descriptions must demonstrate that it has paid into the organic research and promotion program every year since the most recent referendum.

§ 1255.82 Suspension or termination.

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof, if the Secretary finds that this part or subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if the Secretary determines that this subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Act.

(b) The Secretary shall suspend or terminate this subpart at the end of the fiscal year whenever the Secretary determines that its suspension or termination is favored by a majority of assessed entities voting in the referendum.

(c) If, as a result of a referendum the Secretary determines that this subpart is not approved, the Secretary shall:

(1) Not later than one hundred and eighty (180) calendar days after making the determination, suspend or terminate, as the case may be, the collection of assessments under this subpart.

(2) As soon as practical, suspend or terminate, as the case may be, activities under this subpart in an orderly manner.

§ 1255.83 Proceedings after termination.

(a) Upon termination of this subpart, the Board shall recommend to the Secretary up to five of its members to serve as trustees for the purpose of liquidating the Board's affairs. Such persons, upon designation by the Secretary, shall become trustees of all of the funds and property then in the possession or under control of the Board, including claims for any funds

unpaid or property not delivered, or any other existing claim at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contracts or agreements entered into pursuant to the Order;

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and trustees, to such person or persons as the Secretary directs; and

(4) Upon request of the Secretary execute such assignments or other instruments necessary or appropriate to vest in such persons title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to the Order.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to the Order shall be subject to the same obligations imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to one or more organic organizations in the United States whose mission is generic organic

promotion, research, and information programs.

§ 1255.84 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary or of any other person, with respect to any such violation.

§ 1255.85 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct.

§ 1255.86 Separability.

If any provision of this subpart is declared invalid or the applicability of

it to any person or circumstances is held invalid, the validity of the remainder of this subpart, or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1255.87 Amendments.

Any changes to the assessment rate may be proposed by the Board and will be subject to a referendum. Any other amendments to this subpart may be proposed by the Board. A list of all amendments made since the last referendum will be sent to all assessed entities in advance of each subsequent referendum.

§ 1255.88 OMB control numbers.

The control numbers assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, are OMB control number 0505-0001 (Board nominee background statement) and OMB control number 0581-NEW.

Subpart B—[Reserved]

Dated: January 9, 2017.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

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Part IV

Architectural and Transportation Barriers Compliance Board

36 CFR Parts 1193 and 1194

Information and Communication Technology (ICT) Standards and
Guidelines; Final Rule

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1193 and 1194

RIN 3014-AA37

Information and Communication Technology (ICT) Standards and Guidelines

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: We, the Architectural and Transportation Barriers Compliance Board (Access Board or Board), are revising and updating, in a single rulemaking, our standards for electronic and information technology developed, procured, maintained, or used by Federal agencies covered by section 508 of the Rehabilitation Act of 1973, as well as our guidelines for telecommunications equipment and customer premises equipment covered by Section 255 of the Communications Act of 1934. The revisions and updates to the section 508-based standards and section 255-based guidelines are intended to ensure that information and communication technology covered by the respective statutes is accessible to and usable by individuals with disabilities.

DATES: This final rule is effective March 20, 2017. However, compliance with the section 508-based standards is not required until January 18, 2018. Compliance with the section 255-based guidelines is not required until the guidelines are adopted by the Federal Communications Commission. The incorporation by reference of certain publications listed in the final rule is approved by the Director of the Federal Register as of March 20, 2017.

FOR FURTHER INFORMATION CONTACT: Timothy Creagan, Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004-1111. Telephone: (202) 272-0016 (voice) or (202) 272-0074 (TTY). Or Bruce Bailey, Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004-1111. Telephone: (202) 272-0024 (voice) or (202) 272-0070 (TTY) Email addresses: 508@access-board.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose and Legal Authority

In this final rule, the Access Board is updating its existing Electronic and Information Technology Accessibility Standards under section 508 of the Rehabilitation Act of 1973, (“508

Standards”), as well as our Telecommunications Act Accessibility Guidelines under Section 255 of the Communications Act of 1934 (“255 Guidelines”). Given the passage of nearly two decades since their issuance, the existing 508 Standards and 255 Guidelines are in need of a “refresh” in several important respects. This final rule is intended to, among other things, address advances in information and communication technology that have occurred since the guidelines and standards were issued in 1998 and 2000 respectively, harmonize with accessibility standards developed by standards organizations worldwide in recent years, and ensure consistency with the Board’s regulations that have been promulgated since the late 1990s. The Revised 508 Standards and 255 Guidelines support the access needs of individuals with disabilities, while also taking into account the costs of providing accessible information and communication technology to Federal agencies, as well as manufacturers of telecommunications equipment and customer premises equipment.

The final rule also reflects a significantly revamped organizational structure relative to the existing standards and guidelines. In sum, the final rule eliminates 36 CFR part 1193 (which formerly housed the existing 255 Guidelines) and substantially revises 36 CFR 1194 by replacing the existing 508 Standards with two regulatory provisions—§§ 1194.1 and 1194.2—that direct readers to the four appendices accompanying part 1194, which, in turn, set forth the scoping and technical requirements for the Revised 508 Standards and 255 Guidelines. Appendix A provides general application and scoping for Section 508, while Appendix B does likewise for Section 255. Appendix C contains seven separate chapters setting forth the functional performance criteria and technical accessibility standards that apply to both 508-covered and 255-covered ICT. These chapters are, generally speaking, broken down by functional area (e.g., functional performance criteria, hardware, software, support documentation and services). Lastly, Appendix D republishes the existing 508 Standards, which, as discussed below, may be needed to evaluate Section 508-covered existing (legacy) ICT under the safe harbor provision.

In this preamble, the Board refers to provisions in the Revised 508 Standards and 255 Guidelines by their new section numbers under this final rule: E101–E103 (508 Chapter 1: Application and Administration); E201–E208 (508

Chapter 2: Scoping Requirements); C101–C103 (255 Chapter 1: Application and Administration); C201–C206 (255 Chapter 2: Scoping Requirements); 301–302 (Chapter 3: Functional Performance Criteria); 401–415 (Chapter 4: Hardware); 501–504 (Chapter 5: Software); 601–603 (Support Documentation and Services); and 701–702 (Chapter 7: Referenced Standards).

Additionally, the term “information and communication technology” (ICT) is used widely throughout this preamble. Unless otherwise noted, it is intended to broadly encompass electronic and information technology covered by Section 508, as well as telecommunications products, interconnected Voice over Internet Protocol (VoIP) products, and Customer Premises Equipment (CPE) covered by Section 255. Examples of ICT include computers, information kiosks and transaction machines, telecommunications equipment, multifunction office machines, software, Web sites, and electronic documents.

1. Legal Authority for the Revised 508 Standards

Section 508 of the Rehabilitation Act of 1973 (hereafter, “Section 508”), as amended, mandates that Federal agencies “develop, procure, maintain, or use” ICT in a manner that ensures Federal employees with disabilities have comparable access to, and use of, such information and data relative to other Federal employees, unless doing so would impose an undue burden. 29 U.S.C. 794d. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to publicly-available information and services unless doing so would impose an undue burden on the agency. *Id.* In accordance with section 508(a)(2)(A), the Access Board must publish standards that define electronic and information technology along with the technical and functional performance criteria necessary for accessibility, and periodically review and amend the standards as appropriate. When the Board revises its existing 508 Standards (whether to keep up with technological changes or otherwise), Section 508 mandates that, within six months, both the Federal Acquisition Regulatory Council (FAR Council) and Federal agencies incorporate these revised standards into their respective acquisition regulations and procurement policies and directives. Thus, with respect to procurement-related matters, the Access Board’s 508 Standards are not self-enforcing; rather, these standards take legal effect when adopted by the FAR Council.

2. Legal Authority for 255 Guidelines

Section 255 of the Communications Act (hereafter, “Section 255”), requires telecommunications equipment and services to be accessible to, and usable by, individuals with disabilities, where readily achievable. 47 U.S.C. 255. “Readily achievable” is defined in the statute as “easily accomplishable and able to be carried out without much difficulty or expense.” *Id.* In determining whether an access feature is readily achievable, the Federal Communications Commission (FCC), which has exclusive implementation and enforcement authority under Section 255, has directed telecommunications equipment manufacturers and service providers to weigh the nature and cost of that feature against the individual company’s overall financial resources, taking into account such factors as the type, size, and nature of its business operation. Section 255 tasks the Access Board, in conjunction with the FCC, with the development of guidelines for the accessibility of telecommunications equipment and customer premises equipment, as well as their periodic review and update. The FCC, however, has exclusive authority under Section 255 to issue implementing regulations and carry out enforcement activities. Moreover, when issuing implementing regulations, the FCC is not bound to adopt the Access Board’s guidelines as its own or to use them as minimum requirements.

B. Summary of Key Provisions

The Revised 508 Standards and 255 Guidelines replace the current product-based regulatory approach with an approach based on ICT functions. The revised technical requirements, which are organized along the lines of ICT functionality, provide requirements to ensure that covered hardware, software, electronic content, and support documentation and services are accessible to people with disabilities. In addition, the revised requirements include functional performance criteria, which are outcome-based provisions that apply in two limited instances: When the technical requirements do not address one or more features of ICT or when evaluation of an alternative design or technology is needed under equivalent facilitation.

Some of the key provisions and updates reflected in the Revised 508 Standards and 255 Guidelines (relative to the existing standards and guidelines) include:

1. New Regulatory Approach and Format

Technological advances over the past two decades have resulted in the widespread use of multifunction devices that called into question the ongoing utility of the product-by-product approach used in the Board’s existing 508 Standards and 255 Guidelines. Consequently, one of the primary purposes of the final rule is to replace the current product-based approach with requirements based on functionality, and, thereby, ensure that accessibility for people with disabilities keeps pace with advances in ICT. To ensure that compliance under both laws, to the maximum extent possible, can be measured against a common set of technical requirements, the implementing regulations have been consolidated into a single part: 36 CFR part 1194. The two sections in this part (§§ 1194.1 and 1194.2), in turn, direct readers to the four separate appendices (Appendices A–D) that set forth the scoping and technical requirements under Sections 508 and 255, respectively. As discussed below, this is a new organizational format for the 508 Standards and 255 Guidelines that mirrors the formatting of other standards and guidelines issued by the Access Board over the past decade.

The new organizational format in the Revised 508 Standards and 255 Guidelines—which sets forth scoping and technical requirements in four appendices—is modeled after the regulatory approach first used Access Board’s 2004 Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Accessibility Guidelines. Appendix A applies only to Section 508-covered ICT and consists of 508 Chapter 1, which sets forth general application and administration provisions, while 508 Chapter 2 contains scoping requirements (which, in turn, prescribe which ICT—and, in some cases, how many—must comply with the technical specifications). Appendix B, which applies to 255-covered ICT only, is organized similarly with 255 Chapter 1 setting forth general application and administration provisions and 255 Chapter 2 containing scoping requirements. Appendix C sets forth technical specifications that apply equally to ICT covered under Sections 508 or 255. Appendix C includes five chapters, each of which (with the exception of the final chapter) address a separate ICT functional area. These chapters are: Chapter 3: Functional Performance Criteria; Chapter 4: Hardware; Chapter 5: Software; Chapter 6: Support Documentation and Services;

and Chapter 7: Referenced Standards. Lastly, in Appendix D, the existing 508 Standards are republished in full (albeit with a revised section numbering system) for reference when evaluating Section 508-covered existing (legacy) ICT under the “safe harbor” provision. See discussion *infra* Section IV.B (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 2: Scoping Requirements—E202 General Exceptions).

2. Broad Application of Web Content Accessibility Guidelines 2.0

The Revised 508 Standards and 255 Guidelines incorporate by reference the Web Content Accessibility Guidelines (WCAG) 2.0, a globally-recognized and technologically-neutral set of accessibility guidelines for Web content. For Section 508-covered ICT, all covered Web and non-Web content and software—including, for example, Web sites, intranets, word processing documents, portable document format documents, and project management software—is required, with a few specific exceptions, to conform to WCAG 2.0’s Level A and Level AA Success Criteria and Conformance Requirements. By applying a single set of requirements to Web sites, electronic documents, and software, the revised requirements adapt the existing 508 Standards to reflect the newer multifunction technologies (e.g., smartphones that have telecommunications functions, video cameras, and computer-like data processing capabilities) and address the accessibility challenges that these technologies pose for individuals with disabilities. For Section 255-covered ICT, electronic content and software that is integral to the use of telecommunications and customer premise equipment is required to conform to WCAG 2.0’s Level A and Level AA Success Criteria and Conformance Requirements. There are several exceptions related to non-Web documents and software.

3. Harmonization With International Standards

From the outset, one of the Access Board’s primary goals in this rulemaking has been to increase harmonization with international standards relating to ICT accessibility that have been developed worldwide over the past decade. Some of these standards (such as WCAG 2.0) are incorporated by reference in the Revised 508 Standards and 255 Guidelines. For other standards (such as EN 301 549, which is the European accessibility

standard for public ICT procurement), harmonization comes in the form of ensuring that the relevant accessibility specifications in such standard and the final rule can both be met simultaneously without conflict. Harmonization with international standards and guidelines creates a larger marketplace for accessibility solutions, thereby attracting more offerings and increasing the likelihood of commercial availability of accessible ICT options.

4. Delineation of Covered Electronic "Content"

The Revised 508 Standards specify that all types of public-facing content, as well as nine categories of non-public-facing content that communicate agency official business, have to be accessible, with "content" encompassing all forms of electronic information and data. The existing standards require Federal agencies to make electronic information and data accessible, but do not delineate clearly the scope of covered information and data. As a result, document accessibility has been inconsistent across Federal agencies. By focusing on public-facing content and certain types of agency official communications that are not public facing, the revised requirements bring needed clarity to the scope of electronic content covered by the 508 Standards and, thereby, help Federal agencies make electronic content accessible more consistently.

5. Expanded Interoperability Requirements

The existing standards require ICT to be compatible with assistive technology—that is, hardware or software that increases or maintains functional capabilities of individuals with disabilities (e.g., screen magnifiers or refreshable braille displays). However, in the past the existing requirement resulted in ambiguity of application. For example, some agencies interpreted the provisions of existing 36 CFR 1194.21 (which addresses software applications and operating systems) as applicable to assistive technology itself. The ensuing confusion led, in some cases, to unnecessary delay in procurements intended to provide reasonable accommodations to employees under Section 501, creating a hardship for both agencies and their employees with disabilities. The final rule provides more specificity about how operating systems, software development toolkits, and software applications should interact with assistive technology. The final rule also specifically exempts assistive technology from the interoperability provisions. The Board expects the final

rule to improve software interoperability with assistive technology, allowing users better access to the functionalities that ICT products provide.

6. Extended Compliance Date and Incorporation of Safe Harbor Provision for Section 508-Covered Legacy ICT

Federal agencies will have one year from publication of this final rule to comply with the Revised 508 Standards. This extended period for compliance is responsive to some agencies' concerns about the time it will take them to make ICT compliant with the Revised 508 Standards. In addition, the Revised 508 Standards include a "safe harbor" provision for existing (i.e., legacy) ICT. Under this safe harbor, unaltered, existing ICT (including content) that complies with the existing 508 Standards need not be modified or upgraded to conform to the Revised 508 Standards. This safe harbor applies on an element-by-element basis in that each component or portion of existing ICT is assessed separately. Corresponding definitions have also been added for "existing ICT" and "alteration." By incorporating a safe harbor for legacy ICT into the Revised 508 Standards provision, the Board is being responsive to agencies' concerns about the potential resources required to remediate existing ICT, including agency Web sites or other public-facing legacy documents. Notably, the extended compliance date and safe harbor provision apply only to Section 508-covered ICT; these provisions do not apply to telecommunications equipment and customer premises equipment covered by Section 255. Since compliance with the Revised 255 Guidelines is not required unless and until they are adopted by the FCC, matters addressed in these two provisions fall within the commission's province.

C. Summary of Final Regulatory Impact Analysis

Consistent with the obligation under Executive Orders 12866 and 13563 that Federal agencies promulgate regulations only upon a reasoned determination that benefits justify costs, the final rule has been evaluated from a benefit-cost perspective in a final regulatory impact analysis (Final RIA) prepared by the Board's consulting economic firm. The focus of the Final RIA is to define and, where possible, quantify and monetize the potential incremental benefits and costs of the Revised 508 Standards and 255 Guidelines. We summarize its methodology and results below. A complete copy of this regulatory

assessment is available on the Access Board's Web site (<https://www.access-board.gov/>), and also on the Federal Government's online rulemaking portal (<https://www.regulations.gov/>).

To estimate likely incremental compliance costs attributable to the final rule, the Final RIA estimates, quantifies, and monetizes costs in the following broad areas: (1) Costs to Federal agencies and contractors related to policy development, employee training, development of accessible ICT, evaluation of ICT, and creation of accessible electronic documents; (2) costs to Federal agencies of ensuring that speech-output enabled hardware with closed functionality has braille instructions (e.g., small braille label or sign) indicating how to initiate the speech mode of operation; and (3) costs to manufacturers of telecommunications equipment and customer premises equipment of ensuring that their respective Web sites and electronic support documentation conform to accessibility standards, including WCAG 2.0.

On the benefits side, the Final RIA estimates likely incremental benefits by monetizing the value of three categories of benefits expected to accrue from the Revised 508 Standards: (a) Increased productivity of Federal employees with certain disabilities who are expected to benefit from improved ICT accessibility; (b) time saved by members of the public with certain disabilities when using more accessible Federal Web sites; and (c) reduced phone calls to Federal agencies as members of the public with certain disabilities shift their inquiries and transactions online due to improved accessibility of Federal Web sites. The Final RIA, for analytical purposes, defines the beneficiary population as persons with vision, hearing, speech, learning, and intellectual disabilities, as well as those with manipulation, reach, or strength limitations. The Final RIA does not formally quantify or monetize benefits accruing from the Revised 255 Guidelines due to insufficient data and methodological constraints.

Table 1 below summarizes the results from the Final RIA with respect to the likely monetized benefits and costs, on an annualized basis, from the Revised 508 Standards and 255 Guidelines. All monetized benefits and costs are incremental to the applicable baseline, and were estimated for a 10-year time horizon (starting in 2018 since the final rule requires Federal agencies to comply one year after its publication) and converted to annualized values using discount rates of 7 and 3 percent. Three scenarios of incremental benefits and costs are presented using alternative

parameters that are assumptions-based. These scenarios include: A low net benefit scenario (using parameters which results in lower benefits and

higher costs), an expected scenario (consisting of expected values for assumed parameters), and a high net benefit scenario (using parameters

which results in higher benefits and lower costs).

TABLE 1—ANNUALIZED VALUE OF MONETIZED BENEFITS AND COSTS UNDER THE FINAL RULE, 2018–2027
[In 2017 dollars]

Type of benefits or costs	Scenario	7% Discount rate (in millions)	3% Discount rate (in millions)
Monetized incremental benefits to Federal agencies and members of the public with certain disabilities (under Revised 508 Standards).	Low Net Benefit Scenario	\$32.0	\$34.0
	Expected Scenario	72.4	77.0
	High Net Benefit Scenario	187.4	199.0
Monetized incremental costs to Federal agencies (under Revised 508 Standards)	Low Net Benefit Scenario	276.2	287.4
	Expected Scenario	172.8	181.1
	High Net Benefit Scenario	111.5	117.2
Monetized incremental costs to telecommunications equipment and CPE manufacturers (under Revised 255 Guidelines).	Low Net Benefit Scenario	9.5	9.6
	Expected Scenario	9.5	9.6
	High Net Benefit Scenario	9.5	9.6

While the Final RIA monetizes likely incremental benefits and costs attributable to the final rule, this represents only part of the regulatory picture. Today, though ICT is now woven into the very fabric of everyday life, millions of Americans with disabilities often find themselves unable to use—or use effectively—computers, mobile devices, Federal agency Web sites, or electronic content. The Board's existing standards and guidelines are greatly in need of a “refresh” to keep up with technological changes over the past fifteen years. The Board expects this final rule to be a major step toward ensuring that ICT is more accessible to and usable by individuals with disabilities—both in the Federal workplace and society generally. Indeed, much—if not most—of the significant benefits expected to accrue from the final rule are difficult, if not impossible, to quantify, including: Greater social equality, human dignity, and fairness. Each of these values is explicitly recognized by Executive Order 13563 as important qualitative considerations in regulatory analyses.

Moreover, American companies that manufacture telecommunications equipment and ICT-related products will likely derive significant benefits from the Access Board's concerted efforts to harmonize the accessibility requirements in the Revised 508 Standards and 255 Guidelines with voluntary consensus standards. Given the relative lack of existing national and globally-recognized standards for accessibility of mobile technologies, telecommunications equipment manufacturers will, we believe, greatly benefit from harmonization of the Revised 255 Guidelines with consensus standards. Similar benefits will likely accrue more generally to manufacturers of all ICT-related products as a result of harmonization.

It is also equally important to note that some potentially substantial incremental costs arising from the final rule are not evaluated in the Final RIA, either because such costs could not be quantified or monetized (due to lack of data or for other methodological reasons) or are inherently qualitative. For example, due to lack of information, the Final RIA does not assess the cost impact of new or revised requirements in the Revised 255 Guidelines on computer and telecommunications equipment manufacturers. A more in-depth discussion of the Final RIA can be found in Section V.A (Regulatory Process Matters—Final Regulatory Impact Analysis).

II. Rulemaking History

A. Existing 508 Standards and 255 Guidelines (1998–2000)

The Access Board issued the existing 255 Guidelines for telecommunications equipment and customer premises equipment in 1998. Telecommunications Act Accessibility Guidelines, 63 FR 5608 (Feb. 3, 1998) (codified at 36 CFR part 1193). Two years later, in 2000, the Board published the existing 508 Standards. Electronic and Information Technology Accessibility Standards, 65 FR 80499 (Dec. 21, 2000) (codified at 36 CFR part 1194). In this preamble, all citations to 36 CFR part 1193 refer to the existing 255 Guidelines in force since 1998, while all citations to 36 CFR part 1194 refer to the existing 508 Standards in force since 2000.

The existing 508 Standards require Federal agencies to ensure that persons with disabilities—namely, Federal employees with disabilities and members of the public with disabilities—have comparable access to, and use of, electronic and information technology (regardless of the type of medium) absent a showing of undue

burden. 36 CFR part 1194. Among other things, these standards: Define key terms (such as “electronic and information technology” and “undue burden”); establish technical requirements and functional performance criteria for covered electronic and information technologies; require agencies to document undue burden determinations when procuring covered products; and mandate accessibility of support documentation and services. Generally speaking, the existing 508 Standards take a product-based regulatory approach in that technical requirements for electronic and information technology are grouped by product type: Software applications and operating systems; Web-based intranet and Internet information and applications; telecommunications products; self-contained, closed products; and desktop and portable computers.

The existing 255 Guidelines require manufacturers of telecommunications equipment and customer premises equipment to ensure that new and substantially upgraded existing equipment is accessible to, and usable by, individuals with disabilities when readily achievable. 36 CFR part 1193. The existing guidelines, as with the 508 Standards, define key terms (such as “telecommunications equipment” and “readily achievable”) and establish technical requirements for covered equipment, software, and support documentation. These guidelines also require manufacturers of covered equipment to consider inclusion of individuals with disabilities in their respective processes for product design, testing, trials, or market research.

B. TEITAC Advisory Committee (2006–2008)

In the years following our initial promulgation of the existing 508

Standards and 255 Guidelines, technology has continued to evolve at a rapid pace. Pursuant to our statutory mandate, the Access Board deemed it necessary and appropriate to review and update the existing 508 Standards and 255 Guidelines in order to make them consistent with one another and reflective of technological changes. In 2006, the Board formed the Telecommunications and Electronic and Information Technology Advisory Committee (hereafter, “TEITAC Advisory Committee”) to assist in the process of revising and updating the existing 508 Standards and 255 Guidelines. *See* Notice of Establishment, 71 FR 38324 (July 6, 2006). The TEITAC Advisory Committee’s 41 members comprised a broad cross-section of stakeholders representing industry, disability groups, and Government agencies. This Advisory Committee also included international representatives from the European Commission, Canada, Australia, and Japan. The TEITAC Advisory Committee recognized the importance of standardization across markets worldwide and coordinated its work with standard-setting bodies in the U.S. and abroad, such as the World Wide Web Consortium (W3C®), and with the European Commission. The TEITAC Advisory Committee addressed a range of issues, including new or convergent technologies, market forces, and international harmonization.

In April 2008, the TEITAC Advisory Committee issued its final report to the Access Board (hereafter, “TEITAC Report”). *See* Advisory Committee Report, U.S. Access Board (Apr. 2008), <http://www.access-board.gov/teitac-report> (last accessed Aug. 23, 2016). This TEITAC Report provided a set of recommended updates to the existing 508 Standards and 255 Guidelines, which, the committee noted, were intended to balance two competing considerations: The need for clear and specific standards that facilitate compliance, and the recognition that static standards “consisting of design specification[s] and fixed checklists” would tend to “stifle innovation” and “delay the availability of technology advancements to people with disabilities.” *Id.* at Section 1. To address these considerations, the TEITAC Advisory Committee recommended that the Access Board jettison its existing product-based regulatory approach in favor of technical requirements to achieve accessibility based on ICT functions or features. *Id.* The Committee also noted the importance of harmonizing with international

standards to both spur development of accessible ICT products and reduce manufacturers’ costs in the global market. *Id.* at Sections 4 & 4.3. To that end, the Committee worked to harmonize its recommendations with the then-draft WCAG 2.0. *Id.* at Sections 4.3 & 8.2. All told, the TEITAC Report provided a comprehensive recommended set of technical requirements applicable to a broad range of ICT functions and features, including: Closed functionality; hardware with and without speech output; user interfaces; electronic content; processing and display of captions and audio description; RTT; authoring tools; and, product support documentation and services.

C. First Advance Notice of Proposed Rulemaking (2010)

1. General

Following publication of the TEITAC Report, the Access Board worked to develop a proposed rule that would “refresh” the existing its existing 508 Standards and 255 Guidelines. In March 2010, we issued an Advance Notice of Proposed Rulemaking (2010 ANPRM) inviting public comment on an initial set of draft revisions to the standards and guidelines. *See* Advance Notice of Proposed Rulemaking, 75 FR 13457 (proposed Mar. 22, 2010); *see also* Draft Information and Communication Technology (ICT) Standards and Guidelines, U.S. Access Board, <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/background/draft-rule-2010> (last accessed Aug. 23, 2016).

In sum, the 2010 ANPRM proposed a set of accessibility requirements that largely tracked the TEITAC Report’s recommendations. While the majority of the proposed requirements in the draft rule were not substantively changed from the existing 508 Standards and 255 Guidelines, there were some notable proposed substantive revisions. Two of the most significant were the proposals to require that Federal agencies make electronic content of specified official communications accessible, and to harmonize with WCAG 2.0 by restating the Level AA Success Criteria and Conformance Requirements in regulatory (mandatory) terms in the draft rule. Additionally, the 2010 ANPRM—in keeping with the TEITAC Report—also sought to substantially update the structure and organization of the existing regulations. In the draft rule, the proposed standards and guidelines shared a common set of functional performance criteria (Chapter 2) and technical design criteria

(Chapters 3–10), but had separate introductory chapters (Chapters 1 and 2), which outlined the respective scoping, application, and definitions for the revised 508 Standards and 255 Guidelines.

2. Public Hearings and Comments

The Access Board held two public hearings on the 2010 ANPRM—March 2010 (San Diego, CA) and July 2010 (Washington, DC). We also received 384 written comments during the comment period. Comments came from industry, Federal and state governments, foreign and domestic companies specializing in information technology, disability advocacy groups, manufacturers of hardware and software, trade associations, institutions of higher education, research and trade organizations, accessibility consultants, assistive technology industry and related organizations, and individuals.

In general, commenters agreed with our approach to addressing the accessibility of ICT through functionality rather than discrete product types. Commenters also expressed strong support for our efforts to update the existing 508 Standards and 255 Guidelines, as well as our decision to follow the TEITAC Advisory Committee’s recommendation to require harmonization with WCAG 2.0. However, many commenters expressed concern that the 2010 ANPRM was not user-friendly, *e.g.*, that it was too long (at close to 100 pages), organized in a confusing manner, and suffered from some internal inconsistencies. For example, commenters noted confusion by virtue of the fact that some chapters focused on functional features of accessibility while others addressed specific types of technology, or that the meaning of “ICT” seemed to vary depending on the context of the specific chapter. Other commenters opined that deviations from WCAG 2.0 phrasing in the draft rule created ambiguities, particularly for those well familiar with WCAG 2.0.

D. Second Advance Notice of Proposed Rulemaking (2011 ANPRM)

1. General

By the following year, in 2011, the Access Board was poised to invite public comment on a revised version of the draft rule. The Board acknowledged that, based on comments to the 2010 ANPRM, the draft rule needed to be reorganized and made more concise. More importantly, we needed to obtain further comment on major issues and harmonize with the European Commission’s ICT standardization

efforts that were already underway at that time. Consequently, the Board issued a second Advance Notice of Proposed Rulemaking (2011 ANPRM). See Advance Notice of Proposed Rulemaking, 76 FR 76640 (proposed Dec. 8, 2011); Draft Updated Standards and Guidelines (2011), U.S. Access Board, <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/draft-rule-2011>.

In the 2011 ANPRM, the Access Board substantially revamped the structure and organization of the draft rule. To address comments criticizing the length and organization of the 2010 ANPRM as unwieldy, the revised draft rule consolidated and streamlined provisions into six chapters (from ten), consolidated advisories, and reduced the page count from close to 100 to less than 50. We also made revisions to improve the clarity of various proposed provisions and ensure a consistent organizational structure throughout this draft rule. See, e.g., U.S. Access Board, Information and Communication Technology Standards and Guidelines; Proposed Rule (NPRM), 80 FR 10880, 10884–93 (Feb. 27, 2015) (providing detailed comparison of 2010 and 2011 ANPRMs). Additionally, to address commenters' collective concern that rephrasing of WCAG 2.0 requirements introduced ambiguities, the revised draft rule proposed to apply WCAG 2.0's requirements through incorporation by reference rather than restating its requirements in the technical provisions for Web and non-Web content, documents, and user applications.

In issuing the 2011 ANPRM, the Access Board also took notice of the standardization work going on in Europe at the time, stating:

[T]he Board is interested in harmonizing with standards efforts around the world in a timely way. Accordingly, the Board is now releasing this second Advance Notice of Proposed Rulemaking (2011 ANPRM) to seek further comment on specific questions and to harmonize with contemporaneous standardization efforts underway by the European Commission.

2011 ANPRM, 76 FR at 76642.

2. Public Hearings and Comments

Hearings were held in January 2012 in Washington, DC and in March 2012 in San Diego, CA. Additionally, 91 written comments were received in response to the 2011 ANPRM. Comments came from industry, Federal and state governments, foreign and domestic companies specializing in information technology, disability advocacy groups, manufacturers of hardware and

software, trade associations and trade organizations, institutions of higher education and research, accessibility consultants, assistive technology industry and related organizations, and individual stakeholders who did not identify with any of these groups.

In general, commenters continued to agree with our approach to address ICT accessibility by focusing on features, rather than discrete product types. Commenters supported the conciseness of the proposed provisions in the 2011 ANPRM, and asked for further streamlining where possible. Commenters also generally voiced strong support for the Board's decision to incorporate by reference WCAG 2.0 and apply it to all types of covered ICT; several commenters did, however, question the propriety of applying WCAG 2.0 to non-Web ICT.

E. Notice of Proposed Rulemaking (2015 NPRM)

1. General

In 2015, the Access Board formally commenced the rulemaking process by issuing a notice of proposed rulemaking to update the existing 508 Standards and 255 Guidelines. See Notice of Proposed Rulemaking; Information and Communication Technology Standards and Guidelines, 80 FR 10879 (proposed Feb. 27, 2015) (hereinafter, NPRM). This proposed rule—while making editorial changes and other updates in response to comments on the 2011 ANPRM—retained the same overall structure and approach to referencing WCAG 2.0.

2. Hearings and Comments

Hearings were held on March 5, 2015 in San Diego, CA, on March 11, 2015 in Washington, DC, and April 29, 2015 in Salt Lake City, UT. Additionally, 137 written comments were received in response to the NPRM. Comments came from industry, Federal and state governments, disability advocacy groups, manufacturers of hardware and software, trade associations and trade organizations, institutions of higher education and research, and individuals who did not identify with any of these groups.

Overall, we received about 160 comments in response to the NPRM, including written comments and oral testimony from witnesses at the three public hearings. These commenters represented, when excluding multiple submissions, about 140 different entities or individuals. By general category, these NPRM commenters can be broken down as follows: Individuals (59); disability advocacy organizations (59); ICT companies (10); accessible ICT

services providers (11); trade associations representing ITC and telecommunications companies (11); individuals or groups identifying themselves as ICT subject matter experts (13); academicians (6); state or local governmental agencies (7); standards development organizations (3); international disability advocacy organizations (9); and, anonymous (4).

In general, commenters spoke positively about the proposed rule, and noted that it was much improved from earlier iterations in the 2010 and 2011 ANPRMs. By a wide margin, the single most commented-upon aspect of the proposed rule (and the issue on which commenters expressed the greatest unanimity) was timing. Characterizing refresh of the 508 Standards and 255 Guidelines as “long overdue,” these commenters urged the Access Board to issue its final rule as expeditiously as possible. On substantive matters, a large number of commenters addressed some aspect of the requirements for electronic content, with the bulk of these comments relating to Section 508-covered content. Another technical area receiving sizeable comment was our proposal that, under both Sections 508 and 255, WCAG 2.0 and PDF/UA–1 serve as the referenced technical standards for accessibility of electronic content, hardware, software, and support documentation and services. Additionally, real-time text (RTT) was a subject of great interest to NPRM commenters, with most commenters representing disability advocacy organizations and academicians supporting the Board's RTT proposal, while ITC manufacturers and trade groups expressed opposition. Further, the issue of harmonization with EN 301 549 received considerable comment. In general, ITC industry-related commenters urged the Board to harmonize more closely with this European specification. Disability advocacy organizations and consumer-related commenters, on the other hand, viewed the proposed rule and EN 301 549 as well harmonized already and expressed concern that further harmonization would be improvident because, in their view, EN 301 549 set forth weaker accessibility requirements in some areas.

Lastly, the Board received multiple comments from individuals or entities addressing various types of electromagnetic sensitivities. These commenters requested that the final rule require accommodations for people with electromagnetic intolerances, so that they might use Federal buildings and Federally-funded facilities. The Board acknowledges the challenges faced by

individuals with electromagnetic sensitivities, and notes that electromagnetic sensitivities may be considered a disability under the ADA if the sensitivity so severely impairs the neurological, respiratory, or other functions of an individual that it substantially limits one or more of the individual's major life activities. However, most of the accommodations suggested by these commenters are beyond the scope of this rulemaking or our statutory jurisdiction. Moreover, none of our prior rulemaking notices (*i.e.*, 2010 ANPRM, 2011 ANPRM, and NPRM) proposed technical specifications relating to electromagnetic sensitivities. Thus, were the Board to address electromagnetic sensitivity issues posed by ITC, this complex area would require thorough research and notice-and-comment rulemaking before being addressed through rulemaking.

F. Harmonization With European Activities

1. History

While the Access Board was in the process of updating its existing 508 Standards and 255 Guidelines, a similar process began in Europe to create the first European set of ICT accessibility standards. As a result of the 2005 EU–US Economic Initiative, the Access Board and the European Commission began to work closely on the issue of Information and Communication Technology standards. *See, e.g.*, European Comm., Implementation of the Economic Initiative of the June 2005 EU–US Summit: Joint EU–US Work Programme (Nov. 2005), available at http://trade.ec.europa.eu/doclib/docs/2006/june/tradoc_127643.pdf.

In 2005, the European Commission issued Mandate 376, which sought the assistance of several private European standards organizations in the development of European accessibility guidelines for public ICT procurements. *See* European Comm., M 376—Standardisation Mandate to CEN, CENELEC, and ETSI in Support of

European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain (Dec. 7, 2005), available at http://www.etsi.org/WebSite/document/aboutETSI/EC_Mandates/m376en.pdf. Specifically, Mandate 376 requested that the three European standards setting bodies—European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI)—perform two main tasks: Development of a set of functional European accessibility requirements for public procurement of ICT products and services; and creation of an electronic toolkit for use by public procurers.

In early 2014, the three European standardization organizations completed their development process by formally adopting and publishing the first European set of specifications on e-accessibility for public ICT procurements, EN 301 549. *See* ETSI/CEN/CENELEC, EN 301 549 V1.1.1 (2014–02), Accessibility Requirements Suitable for Public Procurement of ICT Products and Services in Europe (Feb. 2014), available at http://www.etsi.org/deliver/etsi_en/301500_301599/301549/01.01.01_60/en_301549v010101p.pdf.¹ The functional accessibility requirements specified in EN 301 549 are “closely harmonized” with the then-current draft revisions Section 508 Standards (*i.e.*, the 2011 ANPRM). Accessible ICT Procurement Toolkit—Frequently Asked Questions, Mandate 376, <http://mandate376.standards.eu/frequently-asked-questions#difference> (last accessed Aug. 23, 2016). Unlike the 508 Standards, however, EN 301 549—by its own terms—establishes only non-binding, voluntary accessibility requirements for public ICT procurements. *Id.*

In October 2016, the European Parliament and Council of the European Union issued Directive 2016/2102, which generally requires EU member states to “ensure that public sector

bodies take the necessary measures to make their Web sites and mobile applications more accessible [to persons with disabilities] by making them perceivable, operable, understandable and robust.” Directive 2016/2102 on the Accessibility of the Web sites and Mobile Applications of Public Sector Bodies, Article 4 (Oct. 26, 2016), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L2102&from=EN>. Directive 2016/2102 further provides that, as a general matter, EN 301 549 V1.1.2 (2015–04) serves as the relevant accessibility standard absent future adoption of technical standards or publication of references to harmonized standards by the European Commission. *Id.* at Article 6. EN 301 549 is thus now available to government officials in EU member states who may use it as technical specifications or award criteria in public procurements of ICT products and services.

2. Comparison of Final Rule With EN 301 549

In the final rule, the Board has made multiple changes that are similar to EN 301 549. Both the final rule and EN 301 549 address the functions of technology, rather than categories of technologies. Similarly, both offer technical requirements and functional performance criteria for accessible ICT. For example, our use of the phrase “information and communication technology” (ICT) in the final rule, as a replacement of the existing term “electronic and information technology,” originates in the common usage of ICT throughout Europe and the rest of the world. Moreover, both documents are organized in similar ways, in that they both have initial scoping and definitions chapters, followed by separate chapters containing technical requirements and functional performance criteria.

Organizationally, the documents differ in several respects. These general differences are outlined in Table 2 below:

TABLE 2—FORMAT DIFFERENCES BETWEEN THE FINAL RULE AND EN 301 549

Differences	EN 301 549 V1.1.2 (2015–04)	Final Rule
Number of chapters	13	6
Note: EN 301 549 breaks out several sections as separate chapters which are combined in the Board's final rule.	Chapter 2—References	Chapter 1—Application and Administration.
	Chapter 3—Definitions and Abbreviations	Chapter 2—Scoping Requirements.
	Chapter 1— Scope	

¹ Subsequently, in 2015, the three European standards bodies issued an updated version of EN 301 549, which contained minor editorial changes only relative to the 2014 version. *See* ETSI/CEN/

CENELEC, EN 301 549 V1.1.2 (2015–04), Accessibility Requirements Suitable for Public Procurement of ICT Products and Services in Europe (Apr. 2015), available at <http://>

www.etsi.org/deliver/etsi_en/301500_301599/301549/01.01.02_60/en_301549v010102p.pdf.

TABLE 2—FORMATTING DIFFERENCES BETWEEN THE FINAL RULE AND EN 301 549—Continued

Differences	EN 301 549 V1.1.2 (2015–04)	Final Rule
	Chapter 9—Web (lists each WCAG 2.0 Level AA success criteria). Chapter 10—non-Web Documents (lists each success criteria in WCAG 2.0 Level AA using non-Web phrasing as needed. “Empty clause” is used for the four problematic success criteria, to align sub-provision numbering with other chapters.). Chapter 4—Functional Performance Chapter 5—Generic requirements (e.g., closed functionality, biometrics, operable parts). Chapter 6—ICT with two-way voice communications. Chapter 7—ICT with video capabilities Chapter 8—Hardware Chapter 11—Software Chapter 12—Documentation and support services. Chapter 13—ICT providing relay or emergency services. Annex A (informative)—WCAG 2.0 Annex B (informative)—Relationships between requirements and functional performance statements. Annex C (normative)—Determination of compliance. Section 8.3.2 Clear floor or ground space Section 8.3.2.1 Change in level Section 8.3.2.2 Clear floor or ground space	We use incorporation by reference to include the WCAG 2.0 Level AA success criteria. For non-Web documents, we are explicit with the word substitution necessary, and provide an exception for the four problematic success criteria. Chapter 3—Functional Performance Criteria. Chapter 4—Hardware Chapter 5—Software Chapter 6—Support Documentation and Services No comparable chapter. No comparable chapter. We are using incorporation by reference, and not reprinting the entire standard. No comparable chapter. Similar comparisons are found in the TEITAC Report. Not within the scope of Section 508 or Section 255, Section 508 compliance is determined by each Federal agency. Not within the scope of Section 508 or Section 255. Most similar to “303 Changes in Level” and “305 Clear Floor or Ground Space” from the 2010 ADA Standards for Accessible Design.
Unique chapters		
	Section 6.2 Real-time text (RTT) functionality 6.5 Video communication	412.5 Real-Time Text Functionality is reserved. 412.7 Video Communication. Their 6.5 is a prescriptive standard while our 412.7 is a performance standard.
Differing treatment of similar concepts		

III. Major Issues

A. 508 Standards: Covered Electronic Content

The NPRM delineated specific types of electronic content that Federal agencies would need to make accessible consistent with the technical requirements of the proposed rule. As explained in the NPRM, the Board proposed these provisions to further clarify the requirement in the existing 508 Standards that Federal agencies make electronic information and data accessible to employees and members of the public. NPRM, 80 FR 10880, 10893 (Feb. 27, 2015). The Board noted confusion over what type of content was covered under the broad language of the existing 508 Standards, and the difficulty that Federal agencies displayed in effectively meeting their obligations to provide accessible electronic content. *Id.*

The NPRM specifically proposed that two discrete groups of content be covered by the refresh of the 508 Standards. First, in proposed E205.2, the Board proposed that all public-facing content comply with applicable technical requirements for accessibility. Public-facing content refers to electronic information and data that a Federal agency makes available directly to the general public. NPRM, 80 FR at 10893. The requirement to make accessible public-facing content is discussed below in Section IV.B. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 2: Scoping Requirements—E205.4) of this preamble. Second, in proposed E205.3, the Board proposed that non-public-facing electronic content covered by the 508 Standards be limited to the following eight categories of official agency communications: (1) Emergency notifications; (2) initial or final decisions adjudicating an administrative

claim or proceeding; (3) internal or external program or policy announcements; (4) notices of benefits, program eligibility, employment opportunity, or personnel action; (5) formal acknowledgements of receipt; (6) survey questionnaires; (7) templates and forms; and (8) educational and training materials.

We sought comment in the NPRM on whether the proposed eight categories of non-public-facing content were sufficiently clear, and whether they provided sufficient accessibility without unnecessarily burdening agencies. *Id.* at 10894. The Board further requested comment on whether a ninth category for “widely disseminated” electronic content should be included in the final rule. *Id.*

Nine commenters responded to the proposed provision regarding non-public-facing electronic content (proposed E205.3). Commenters included two Federal agencies, one

state/local agency, one disability advocacy organization, one accessible ICT services provider, two ICT subject matter experts, and two individuals.

In general, commenters agreed with the proposed approach requiring that only certain categories of non-public-facing content be made accessible, and most commenters found the categories to be sufficiently clear. One commenter, a state/local agency, objected to the Access Board's statement in the preamble of the NPRM that only "final electronic documents that are ready for distribution" would be subject to accessibility requirements under proposed E205.3, and indicated that documents in all stages of preparation should be covered. NPRM, 80 FR at 10894. Another commenter, an ICT subject matter expert, requested clarification of the internal and external program and policy announcements category and suggested including an additional category for announcements sent to all employees. An accessible ICT services provider was the only commenter to object to the eight categories, finding them too confusing and too difficult to implement. That commenter preferred that the requirement for accessibility of non-public-facing content be tied to the extent of the content's distribution, and suggested that any document distributed to 50 or more individuals be made accessible.

Three other commenters responded to the NPRM's question five as to whether a "widely disseminated" category should be added. *Id.* at 10895. One Federal agency opposed inclusion of this category, asserting that it would cause confusion. One ICT subject matter expert and one Federal agency generally liked the idea of such a category, but acknowledged that definitional challenges would make it difficult to implement.

The Federal agency supporting inclusion of the "widely disseminated" category indicated that the eight proposed categories would not sufficiently encompass the internal Web pages available to employees, and suggested that the problem could be solved with the addition of a ninth category for internal Web pages. This commenter asserted that without such a category for internal Web pages, agencies would need to develop systems to categorize internal Web page content, ensure that employees with disabilities could navigate to the covered content, and find a way to create an integrated accessible experience across internal Web sites where some content is accessible and some is not.

Upon careful consideration of the comments, we have decided to retain the proposed eight categories in the final rule and have added a ninth category for intranet content, as described below. Most commenters concurred with the proposed approach providing categories for non-public-facing content, and indicated that the categories were clearly described. The Board, therefore, finds no reason to alter the eight proposed categories, and has retained them, as proposed, in the final rule. However, the Board did not intend for the use of these categories to exclude some intranet content; all intranet content is currently covered under the existing 508 Standards. 36 CFR 1194.22 (providing technical requirements for "[W]eb-based intranet . . . information and applications"). Therefore, in the final rule, the Board has added a ninth category to final E205.3, requiring that "intranet content designed as a Web page" also conform to accessibility requirements to ensure that the final rule does not inadvertently result in a reduction in accessible intranet content. The Board agrees with commenters that a "widely disseminated" standard would be difficult to define and implement in a consistent manner across agencies, and would likely cause confusion. The Board thus declines to add such a category to the final rule.

B. Application of WCAG 2.0 to Non-Web ICT

The NPRM proposed to apply WCAG 2.0 equally to both Web and non-Web documents and software. NPRM, 80 FR at 10880. A discussion of the scoping of these requirements under the Revised 508 Standards and 255 Guidelines can be found below in Section IV.B (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 2: Scoping Requirements) and Section IV.D (Summary of Comments and Responses on Other Aspects of the Proposed Rule—255 Chapter 2: Scoping Requirements). In the NPRM preamble, we explained that applying WCAG 2.0 "outside the Web browser environment not only ensures greater accessibility for persons with disabilities, but also minimizes the incremental burden on regulated entities by simplifying compliance through incorporation of a technologically neutral consensus standard." *Id.* at 10895.

Since the establishment of the TEITAC Advisory Committee, the general consensus has been that the success criteria in WCAG 2.0 provided sufficient requirements to address the accessibility of non-Web documents and non-Web software applications. *Id.* In

the TEITAC Report and the 2010 ANPRM, the Board restated and recast each WCAG 2.0 success criterion using phrasing appropriate for non-Web documents and software. 2010 ANPRM, 75 FR at 13457.

In response to concerns raised by commenters, in the 2011 ANPRM the Board proposed to incorporate by reference WCAG 2.0 and proposed a direct reference to WCAG 2.0 for non-Web content and software, instead of rewriting each criterion. 2011 ANPRM, 76 FR at 76640. This approach stimulated the formation of an industry ad hoc working group aimed at determining the practicality of using WCAG 2.0 for this purpose. This working group analyzed each WCAG 2.0 Success Criterion to determine its suitability for application to non-Web documents and software. W3C® Web Accessibility Initiative, W3C® Working Group Note—Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (Sept. 5, 2013), <https://www.w3.org/TR/wcag2ict/>.

The working group determined that of the 38 Level A and Level AA Success Criteria in WCAG 2.0, 26 do not include Web-related terminology that would cause the reader to question whether they are applicable to non-Web documents and non-Web software. *Id.* Therefore, these Success Criteria can be applied directly as written to non-Web documents and software. Of the remaining 12 Success Criteria, the working group found that 8 could be applied as written if certain Web-specific terms or phrases, *e.g.*, "Web page" are replaced with non-Web-specific terms or phrases, *e.g.*, "non-Web documents" and "non-Web software." *Id.* The remaining four Success Criteria posed problems in being applied to non-Web content because they refer to "sets of Web pages." *Id.* Applying these four criterion to non-Web documents and software would require interpretation that could inadvertently change the meaning of the requirements. *Id.* In their report, the working group concluded that circumstances in which those four Success Criteria could be applied outside the context of Web content would be "extremely rare." *Id.*

Relying on the working group's findings, in the NPRM the Board proposed to directly apply WCAG 2.0 to all non-Web documents and software. NPRM, 80 FR at 10895. Sixteen commenters responded to the proposal of applying WCAG 2.0 to non-Web content. Six commenters (five ICT companies and trade associations, and an ICT subject matter expert) strongly

advocated for returning to the previous approach of reprinting three variants of WCAG 2.0 in the 508 Standards and rewriting the requirements with non-Web specific terminology. These commenters asserted that agencies would not be able to consistently apply the WCAG 2.0 success criteria to non-Web documents without separate chapters. They were also concerned that by incorporating WCAG 2.0 by reference, conformity assessment would become a single check-off item in that agencies would not ensure compliance with each success criteria unless they were specifically laid out in the regulatory text. Ten commenters (four disability advocacy organizations, three academics, two individuals, and one ICT company) generally supported applying WCAG 2.0 to non-Web content. One of these commenters explained that referencing WCAG 2.0 as a whole is not problematic because as a single standard, one must comply with all of the provisions to comply with the standard. This commenter explained that there is much overlap between Web and non-Web content, for example an eBook is a document that also has Web components, software, and media. This incorporation of WCAG 2.0 for non-Web content as well as Web content allows the user to evaluate all content with one standard.

Based on the comments received and the findings of the working group, we have decided that agencies are better served by 508 Standards that incorporate WCAG 2.0 by reference than they would be if the final rule were to contain three different versions of WCAG 2.0 for Web content, non-Web documents, and non-Web software. The value of a single standard cannot be underestimated. We attempted to restate the WCAG 2.0 criteria in the 2010 ANPRM, and the approach was widely criticized by commenters. Therefore, in the final rule we retain the approach proposed in the NPRM of incorporating by reference WCAG 2.0 for non-Web documents and non-Web software.

To address concerns expressed by some commenters and the working group regarding the application of a few WCAG 2.0 Success Criteria to non-Web documents and non-Web software, in the final rule we have excepted non-Web documents and non-Web software from compliance with these criteria. Specifically, non-Web documents and non-Web software need not comply with WCAG 2.0 Success Criteria 2.4.1 Bypass Blocks, 2.4.5 Multiple Ways, 3.2.3 Consistent Navigation, and 3.2.4 Consistent Identification. Additionally, we added new provisions to instruct the reader when applying WCAG 2.0 to

non-Web documents and non-Web software to replace the term “Web page” with the term “document” or “software.” We added this exception and new provisions where applicable throughout the final rule text. (E205.4, E205.2.1, E207.2, E207.2.1, C203.1, C203.2.1, C205.2, 501.1, 504.2, 504.3, 504.4, and 602.3).

C. Incorporation by Reference of PDF/UA–1

The NPRM proposed to incorporate by reference (IBR) PDF/UA–1 and allow compliance with this standard as an alternative to compliance with WCAG 2.0. This proposal was in response to commenters to the 2010 and 2011 ANPRMs that asserted that PDF/UA–1 was an international accessibility standard intended for developers using PDF writing and processing software. These commenters asserted that the use of PDF/UA–1 would provide definitive terms and requirements for accessibility in PDF documents and applications that generate PDFs. The Board was persuaded by these comments and proposed to incorporate PDF/UA–1 by reference in the NPRM (proposed E102.6 and C102.6). The Board included it as an alternative to compliance with WCAG 2.0 for electronic content and support documentation for both the 508 Standards and the 255 Guidelines (proposed E205.4, C203.1, and 602.3). By including alternative compliance with PDF/UA–1, the Board intended to give agencies flexibility in meeting accessibility requirements for PDFs. This approach assumed that PDF/UA–1 was fully sufficient to meet the accessibility requirements of PDF users with disabilities.

Ten commenters addressed the proposal to allow conformance with PDF/UA–1 as an alternative to WCAG 2.0. Three commenters, two ICT companies and one accessible ICT services provider, explained that the PDF/UA–1 standard has limitations and does not include requirements for contrast, embedded videos, captioning, or other related requirements for the accessibility of multimedia. These commenters recommended requiring conformance with provisions of WCAG 2.0 in addition to compliance with PDF/UA–1, to ensure that PDF documents are fully accessible. Four commenters (one Federal agency and three ICT companies and trade associations) also noted the shortcomings of PDF/UA–1 as an alternative to WCAG 2.0 conformance and recommended removing the proposed alternative from the final rule. These commenters recommended that the Board instead indicate in an advisory that use of PDF/

UA–1 is a method of achieving conformance to WCAG 2.0. The Federal agency commenter explained that the PDF/UA–1 standard is copyrighted, expensive, and the format is not easy for subject matter experts to work with. Additionally, this commenter explained that the WCAG 2.0 guidelines are sufficient to communicate accessibility conformance. The remaining commenters (two individuals and a disability advocacy organization) recommended clarification of the application of the proposed standard to non-Web documents and asserted a preference for requiring HTML documents instead of accessible PDFs, noting that accessible PDFs are not as useful as HTML documents.

The Board is persuaded by the majority of commenters that PDF/UA–1 should not serve as a referenced accessibility standard for electronic content and support documentation in the final rule. The intent of the proposed IBR of PDF/UA–1 in the NPRM was to make conformance assessment of PDF documents easier, assuming that, in the future, PDF/UA–1 would become widely adopted. WCAG 2.0 strongly informed the development of PDF/UA–1. With the exception of the contrast requirement, PDF/UA–1 includes most accessibility requirements relevant to the PDF format, including textual equivalence for static graphical elements. However, PDF/UA–1 does not address scripting or the use of PDF files as a container for video. Therefore, the end user would still have to reference WCAG 2.0 for some requirements to ensure that a PDF file is fully accessible. Because WCAG 2.0 can be used as a sole standard for PDF compliance, and PDF/UA–1 cannot, the Board finds WCAG 2.0 to be appropriate as the sole standard for PDF files. Therefore, in the final rule, we have removed the reference to PDF/UA–1 from E205.4, C203.1, and 602.3. It is important to note, however, that even without this reference, PDF/UA–1 can still be useful to agencies conducting assessments of PDF files to ensure WCAG 2.0 conformance.

Although we have decided not to include PDF/UA–1 in the final rule as an alternate conformance standard for PDF, we have determined that PDF/UA–1 remains an appropriate standard for authoring tools. Therefore, in the final rule, we added a new provision expressly specifying that authoring tools capable of exporting PDF files must conform to PDF 1.7 (the current standard for PDF, also referred to as ISO 32000–1) and be capable of exporting PDF files that conform to PDF/UA–1 (final 504.2.2). This provision is

discussed in more detail in Section IV. (Summary of Comments and Responses on Other Aspects of the Proposed Rule).

D. Real-Time Text

The NPRM proposed to require that ICT providing real-time voice communication support real-time text (RTT) functionality and ensure the compatibility of multiline displays and features capable of text generation. (proposed 410.6). More importantly, the NPRM sought to ensure the interoperability of RTT across platforms. To accomplish this goal, the NPRM proposed to incorporate by reference specific standards for RTT interoperability in certain environments typically used in the United States (proposed E102.5, E102.8.1, C102.5, and C102.8.1). The NPRM proposed that when ICT interoperates with Voice over Internet Protocol (VoIP) products or systems using Session Initiation Protocol (SIP), the transmission of RTT must conform to the Internet Engineering Task Force's RFC 4103 standard for RTP Payload for Text Conversation. Where ICT interoperates with the Public Switched Telephone Network (PSTN), RTT would be required to conform to the Telecommunications Industry Association's TIA 825-A standard for TTY signals at the PSTN interface (also known as Baudot).

In developing the proposed rule, the Board took note of the approach to RTT in the EN 301 549 Standard. Section 6.2 of EN 301 549, entitled "Real-time text (RTT) functionality," addresses ICT with two-way voice communication. Section 6.2.3, entitled "Interoperability," lists five different standards for RTT operating in three different environments: The publicly switched telephone network; VoIP using SIP; and other ICT using RTT conforming to the IP Multimedia Sub-System (IMS) set of protocols specified in section 6.2.3(c). A sixth standard was proposed in section 6.2.3(d) for ICT operating in an unspecified environment, specifically that ICT is permitted to interoperate with "a relevant and applicable common specification for RTT exchange that is published and available."

In the preamble to the NPRM, we asked nine questions about text-based communications and the different standards the Board was considering incorporating. NPRM, 80 FR at 10880, questions 1–2, 8–13 and 36. Seven of the questions addressed RTT functionality and standards, and two of the questions sought information on costs. Seventeen commenters responded to the topic of RTT. While most of these

commenters acknowledged the importance of RTT as a replacement for outdated Text Telephone (TTY) technology, there was minor disagreement from industry trade associations about whether RTT technology was sufficiently mature for deployment to replace TTYs. Most commenters from industry, academia, and disability rights organizations agreed that RTT could be deployed, but disagreed about which standard to use for RTT operating in different systems. ICT manufacturers and ICT industry associations urged the Board not to adopt any specific standard for RTT, requesting that the final rule leave open the ability to use some future technology that may provide better functionality than existing environments. In response to the Board's questions in the NPRM, several commenters supported broad deployment of RTT at all times, both in the Federal sector and in the private marketplace; however, one ICT industry commenter questioned the need or demand for the technology. In response to our questions on cost, commenters from the ICT industry stated that RTT would not be cost-effective and would limit manufacturers flexibility. On the other hand, commenters from academia, research entities, and disability rights organizations described the benefits resulting from the implementation of RTT and the inherent cost savings in decreased use of relay services mandated under the ADA.

In April 2016, during the pendency of the Access Board's ICT rulemaking, the Federal Communications Commission (FCC) published a Notice of Proposed Rulemaking (FCC NPRM) seeking comment on proposals to replace the FCC rules requiring support for TTY technology with rules requiring support for RTT technology. *See* Transition from TTY to Real-Time Text Technology; Proposed Rule, 81 FR 33170 (proposed May 25, 2016); *see also* FCC, Transition from TTY to Real-Time Text Technology; Petition for Rulemaking to Update the Commission's Rules for Access to Support the Transition from TTY to Real-Time Text Technology, and Petition for Waiver of Rules Requiring Support of TTY Technology, Notice of Proposed Rulemaking, CG Docket No. 16–145, GN Docket No. 15–178, FCC 16–53 (released Apr. 29, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-53A1.pdf. As discussed above in Section I.A. (Executive Summary—Purpose and Legal Authority), the FCC is responsible for enforcing Section 255 and issuing implementing regulations; it is not

bound to adopt the Access Board's guidelines as its own or to use them as minimum requirements. As the FCC had issued a notice of its intent to regulate in this area, the Board determined that it would reserve the issue of RTT in the final rule to be addressed in a future rulemaking.

In December 2016, shortly before publication of this final rule, the FCC issued a report and order establishing rules to facilitate telecommunication service providers' transition from TTY to RTT. *See* FCC, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 16–145; GN Docket No. 15–178, FCC 16–169 (released Dec. 16, 2016) (hereafter, "FCC RTT Order"), available at <https://www.fcc.gov/document/adoption-real-time-text-rtt-rules>. The FCC RTT Order establishes, among other things, requirements that: Facilitate telecommunications service providers' transition from TTY technology to RTT technology that permits simultaneous voice and text on the same call using the same device; achieve interoperability adhering to RFC 4103 as a safe harbor standard; provide backwards compatibility with TTYs for a specified period; and support RTT transmissions to 911 call centers and telecommunications relay centers. *Id.* The FCC RTT Order also incorporates a notice seeking input on the integration of these services into telecommunications relay services, and on the possible addition of RTT features for people with cognitive disabilities and people who are deaf-blind. *Id.* The Access Board continues to monitor these proceedings and will update the 508 Standards and 255 Guidelines as appropriate.

E. Functional Performance Criteria

1. Limited Vision and Limited Hearing

The NPRM proposed to revise the existing functional performance criteria (FPC) for users with limited vision. The NPRM proposed that where technology provides a visual mode of operation, it must provide one mode of operation that magnifies, one mode that reduces the field of vision, and one mode that allows user control of contrast. As explained in the NPRM, the proposed FPC for limited vision was a significant departure from the FPC for limited vision in the existing 508 Standards and 255 Guidelines, which focused on accommodating a specific visual acuity.² NPRM, 80 FR 10880, 10898 (Feb. 27, 2015).

² The existing 508 Standards require that technology provide at least one mode of operation and information retrieval not requiring visual acuity greater than 20/70 in both audio and enlarged print

In proposed 302.2, the Board replaced the visual acuity thresholds with requirements for magnification, reduction of field of vision, and user control of contrast to provide criteria that would address a range of limited vision disabilities. NPRM, 80 FR at 10898 (noting that commenters to the 2010 and 2011 ANPRMs recommended that the FPC include features that would address accessibility for users with limited vision). The Board took a similar approach to the FPC for limited hearing (proposed 302.5), proposing that where technology provides an auditory mode of operation, it must provide at least one mode that improves clarity, one mode that reduces background noise, and one mode that allows user control of volume. *Id.* at 10944.

We sought comment in the NPRM with respect to the proposed FPC for limited vision. *Id.* at 10913. In question 17 the Board asked whether the requirements for magnification, reduction of field of vision, and user control of contrast should be more specific. *Id.* The Board further requested that commenters provide a scientific basis for any recommended thresholds. *Id.* The Board received 11 comments on the proposed FPC for limited vision (proposed 302.2), including comments from three ICT companies, three ICT trade associations, an accessible ICT services provider, a state/local government, an ICT subject matter expert, an individual, and a coalition of disability rights organizations.

The individual commenter and the ICT subject matter expert generally concurred with proposed 302.2, but did suggest possible improvements. The individual commenter suggested adding a “control of color” criteria so that users could choose a black background with white text. The ICT subject matter expert asserted that the Board should include specific thresholds for the criteria, but did not provide suggestions for specific thresholds supported by research or data. The state/local government indicated that the proposed FPC did not adequately address the needs of people with limited vision, but did not offer specific suggestions for improving the provision.

The coalition of disability rights organizations appreciated the Board’s effort with respect to the limited vision FPC, but felt that the proposed provision missed the mark. The group

pointed out that the proposed provision assumed a lack of accessibility, and without a baseline, could result in unnecessary magnification of content that is already sufficiently large, or reduction of a field of vision that is already sufficiently small for limited vision users. The group suggested that the Board alter the provision to require one mode readable by a user with 20/40 vision acuity, one mode that is usable with a 10-degree field of vision, and one mode that provides high contrast.

The ICT companies and trade associations asserted that the proposed FPC for limited vision was too prescriptive, and was inconsistent with the level of specificity contained in the proposed FPCs for other disabilities. These commenters further noted that the FPC for limited vision imposed criteria not required by the technical requirements. In addition, the ICT companies expressed concern that mandating specific criteria in the FPC would stifle innovation. One ICT company described how certain products could provide accessibility for people with limited vision without meeting the proposed criteria. Some industry commenters noted that the proposed limited vision FPC was not technology-neutral and pointed to EN 301 549 as a more useful model. These industry commenters noted that EN 301 549 allows manufacturers the flexibility to include the limited vision accessibility features that are most applicable to a particular type of technology. EN 301 549 clause 4.2.2. ICT industry commenters further noted the benefits to manufacturers of harmonizing with international standards.

Upon consideration of the comments regarding proposed 302.2, the Board agrees that the proposed language of the limited vision FPC is too prescriptive and risks ineffective implementation in the absence of specific baselines for the proposed criteria. The Board is persuaded that the technology-neutral approach advanced throughout this refresh of the 508 Standards and 255 Guidelines is equally appropriate with respect to the FPC. The Board thus finds that harmonization with the language of EN 301 549 is a reasonable approach to the limited vision FPC, and adopts this suggestion for the language of 302.2 in the final rule. Therefore, we have revised final 302.2 to require ICT that provides a visual mode of operation also provide “at least one visual mode of operation that enables users to make better use of their limited vision.”

The proposed rule included a proposed FPC for limited hearing that

closely mirrored the structure of the proposed limited vision FPC. In proposed 302.5, the Board proposed a limited hearing FPC that would have required ICT that provides an auditory mode of operation to also provide at least one mode of operation that improves clarity, one mode that reduces background noise, and one mode that allows user control of volume. ICT industry commenters, and a coalition of disability rights organizations, responded with the same issues that they presented with respect to the proposed limited vision FPC. Specifically, they posited that the proposed limited hearing FPC would not necessarily provide a better functional experience for users with limited hearing. An accessible ICT services provider, as well as an ICT trade association and two ICT companies, noted that the requirements for reduction of background noise and improvement of clarity would be difficult to define, measure, and achieve. As with the proposed FPC for limited vision, ICT industry commenters indicated that harmonization with the language of EN 301 549 would be technology-neutral and would give manufacturers the flexibility to develop accessibility features appropriate for their specific technology. EN 301 549 clause 4.2.5.

Upon consideration of the comments, and in the interest of creating a consistent regulatory structure with respect to all of the FPC in the final rule, the Board agrees that harmonization with the international standard is appropriate for the limited hearing FPC. Therefore, in the final rule, we have revised 302.5 to require that where ICT has an audible mode of operation, it must include “at least one mode of operation that enables users to make use of limited hearing.”

2. Limited Cognitive Abilities

The existing 255 Guidelines contain a FPC that expressly addresses operability of ICT by persons with cognitive, language, and learning disabilities. 36 CFR 1993.41(i) (requiring that ICT operate in “at least one mode that minimizes the cognitive, memory, language, and learning skills required of the user.”). The existing 508 Standards do not include a comparable provision. 36 CFR 1194.31 (listing six FPC, none of which address limited cognition). During its review, the TEITAC Advisory Committee recommended eliminating this requirement citing a lack of common standards or testable metrics. NPRM, 80 FR at 10910. The TEITAC Advisory Committee suggested that the Board eliminate the limited cognition

output, working together or independently. 36 CFR 1194.31(b). The limited vision FPC in the existing 255 Guidelines is similar; it requires that the technology provide a mode that permits operation by users with visual acuity that ranges between 20/70 and 20/200, without relying on audio output. 36 CFR 1193.41(b).

FPC until more research could be done. *Id.* The Board thus did not include the provision in the 2010 and 2011 ANPRMs. *Id.* After considering comments received in response to the ANPRMs, the Board concurred that more research was needed before it could propose a meaningful FPC for limited cognitive ability. *Id.* Therefore, in the NPRM, we did not propose to include an FPC for limited cognition in the Revised 508 Standards or Revised 255 Guidelines. *Id.*

A total of 11 commenters addressed the NPRM's failure to include provisions specifically addressing ICT operability by persons with cognitive, language, or learning disabilities. These commenters included four individuals who identified themselves as either having a learning or cognitive disability, or having a family member with a learning or cognitive disability, one accessibility ICT services provider, one ICT subject matter expert, four disability advocacy organizations, and a coalition of disability rights organizations.

The overarching sentiment that the commenters expressed was that the proposed rule marginalized cognitive, language, and learning disabilities. Disability advocacy organizations, as well as individual commenters, provided general background information on the incidence of cognitive, language, and learning disabilities in the United States. They noted the significant portion of the United States population that is affected by a cognitive disability, and further noted that the incidence of cognitive disability in the United States is growing as the population ages. Individual commenters described challenges using ICT that they or their family members face as a result of their cognitive disabilities.

Five commenters (including disability advocacy organizations, an ICT subject matter expert, an accessible ICT services provider, and a coalition of disability rights organizations) criticized the Board for not including an FPC expressly directed to the needs of individuals with cognitive or learning disabilities. These commenters urged inclusion of a new provision in the final rule similar to § 1193.41(i) of the existing 255 Guidelines. Some of these commenters noted that while the Access Board's proposed revision of the 508 Standards and 255 Guidelines was silent on cognitive accessibility, the European ICT accessibility standard, EN 301 549, addresses cognitive accessibility and provides adjustable timing, error indication and suggestion, and logical focus order as examples of relevant design features for people with

cognitive disabilities. EN 301 549 clause 4.2.10.

One individual commenter suggested that the Board rewrite proposed Chapter 3 to model all FPC on the underlying accessibility principles of WCAG 2.0. W3C®, An Introduction to Understanding WCAG 2.0, (Mar. 17, 2016), <https://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html>. The commenter suggested that by eliminating references to specific disabilities, the FPC should equally address all disabilities, including cognitive disabilities.

After careful consideration of the comments, we are persuaded that the final rule should include an FPC for limited cognitive abilities. In light of the significant portion of the United States population that has cognitive, language, or learning disabilities, the Board finds that it would be inappropriate to exclude the needs of this population from the Revised 508 Standards and 255 Guidelines. U.S. Census, Sex By Age By Cognitive Difficulty, 2010–2014 American Community Survey 5-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_B18104&prodType=table (last visited on Aug. 8, 2016) (estimating that in 2014 almost 5 percent of the civilian non-institutionalized U.S. population 5 years old and older had a cognitive disability). The existing 255 Guidelines contain an FPC for limited cognition. While evaluation of accessibility under this existing provision has posed some challenges, the Board nonetheless concludes that, given the significant population of Americans with limited cognitive, language, or learning abilities, it is important and appropriate to include an FPC addressing their accessibility needs in Chapter 3—which applies under both the Revised 508 Standards and 255 Guidelines. Moreover, in an effort to maintain a consistent regulatory structure for the FPC in the final rule, the language for this FPC in the final rule seeks to harmonize with the FPC for limited cognition in EN 301 549. Therefore, in the final rule, we have added a new section 302.9, which requires that ICT provide “features making its use by individuals with limited cognitive, language, and learning abilities simpler and easier.”

IV. Summary of Comments and Responses on Other Aspects of the Proposed Rule

Overall, we received 162 comments in response to the NPRM, including written comments submitted to the online docket (<https://>

www.regulations.gov/docket?D=ATBCB-2015-0002) and oral statements at three public hearings. In addition to comments received on the major issues discussed in the preceding section, commenters also expressed views on a variety of other matters related to the proposed rule. The Access Board's response to significant comments on these other matters are discussed below on a chapter-by-chapter basis following the organization of the final rule. Also addressed below are requirements in the final rule that have been substantively revised from the proposed rule. Provisions in the final rule that neither received significant comment nor materially changed from the proposed rule are not discussed in this preamble.

A. 508 Chapter 1: Application and Administration

Chapter 1 of the Revised 508 Standards contains a general section that defines equivalent facilitation, addresses application of referenced standards, and provides definitions of terms used in the Standards. In the final rule, the provisions expressly incorporating the ten referenced standards into the Revised 508 Standards have been relocated from proposed E102 to a new Chapter 7, which provides a centralized IBR section pursuant to regulations issued by the Office of the Federal Register (OFR) that govern incorporations by reference in the **Federal Register**. This reorganization of IBR provisions is discussed at greater length in Section IV.I (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 7: Referenced Standards). We have also made minor changes to 508 Chapter 1 in response to comments to improve clarity, accuracy, and ease of use. These changes are described below.

E101.3 Conventional Industry Tolerances

The NPRM proposed this section in the interests of being explicit about dimensions. We did not receive any comments on this provision but have decided, for the purpose of clarity and consistency with the Board's other rulemakings, to add “with specific minimum or maximum end points” to E101.3 in the final rule.

E102 Referenced Standards

This section has been significantly reorganized and revised in the final rule. The general statements in the first two sentences regarding the application of referenced standards remain essentially unchanged from the proposed rule. However, the subsequent

provisions in the proposed rule that expressly IBR the ten referenced standards into the Revised 508 Standards (*i.e.*, proposed E102.2–E102.10) have been moved in the final rule to a centralized IBR section—new Chapter 7. This reorganization of IBR provisions was made to comply with OFR regulations that govern incorporations by reference. *See* 1 CFR part 51. Comments related to proposed incorporations by reference into the Revised 508 Standards are discussed below in Section IV.I (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 7: Referenced Standards).

E103.4 Defined Terms

We identified seven comments regarding proposed E103.4. These commenters asked the Board to clarify the definitions of (or provide examples for) the following terms: “authoring tool,” “application,” “document,” “operable part,” “platform software,” “public facing,” and “software.” Two commenters, an ICT company and an industry trade association requested the Access Board to fully align the definition of “authoring tool” to the definition in EN 301 549.

After review of the comments, we have determined that we would be providing clearer information by including more terms, and we therefore added definitions for “document,” “non-Web document,” “non-Web software,” and “Web page” to the list of defined terms in E103.4 in the final rule. The definitions provided for these terms closely track the definitions used in WCAG 2.0 and EN 301 549. For similar reasons of completeness, we also added the terms “software tools” and “variable message signs.” Additionally, based on commenter concerns, we amended the definitions of “software” and “operable part” in the final rule. The definition of “software” clarifies the term by giving the examples of applications, non-Web software, and platform software. The definition of “operable part” now makes clear that the term applies to physical parts (hardware). Finally, the Board added definitions for “alteration” and “existing ICT,” which are new terms used in the safe harbor provision applicable to existing 508-covered ICT (E202.2). Additional discussion of these new terms appears below in section IV.C (508 Chapter 2: Scoping Requirements in the discussion of the safe harbor provision at E202.2).

In response to the requests to align the definition for “authoring tool” to EN 301 549, the Board regards the two definitions as being equivalent, but has decided to retain the definition from the

proposed rule due to editorial consideration. The main difference between the approach taken in the proposed rule and that of EN 301 549 is that the EN 301 549 definition for “authoring tools” includes three notes containing advisory guidance. Our practice is to provide advisory guidance in supplemental materials.

B. 508 Chapter 2: Scoping Requirements

508 Chapter 2 addresses application and scoping of the Revised 508 Standards, including exceptions. We have made multiple significant changes to this chapter. We added a ninth category to E205.3, official agency communications that are non-public-facing electronic covered content, and clarified the application of WCAG 2.0 to non-Web documents and software. We made corresponding changes to E205.4 and E207.2, including adding E205.4.1 and E207.3, which specify the word substitution necessary to apply WCAG 2.0 to non-Web content. These changes are discussed above in Section III.B. (Major Issues—Application of WCAG 2.0 to Non-Web ICT). In addition, we made editorial changes for consistency and clarity. These editorial changes and the responses to other comments received are discussed below.

E202 General Exceptions

In response to some agencies’ concerns regarding the time and resources that might be needed to remediate existing (legacy) ICT, the Board has incorporated a “safe harbor” provision into the Revised 508 Standards (E202.2). Under this provision, legacy ICT that complies with the existing 508 Standards and has not been altered after the compliance date (*i.e.*, one year after publication of the final rule) need not be modified or upgraded to conform to the Revised 508 Standards. However, when existing ICT is altered after the compliance, such alterations must comply with the Revised 508 Standards. Application of the safe harbor provision will allow Federal agencies to focus their ICT accessibility efforts primarily on new ICT.

This safe harbor provision applies on an “element-by-element” basis in that each component or portion of existing ICT is assessed separately. In specifying “components or portions” of existing ICT, the safe harbor provision independently exempts those aspects of ICT that comply with the existing 508 Standards from mandatory upgrade or modification after the final rule takes effect. This means, for example, that if two paragraphs of text are changed on an agency Web page, only the altered

paragraphs are required to comply with the Revised 508 Standards; the rest of the Web page can remain “as is” so long as otherwise compliant with the existing 508 Standards.

Additionally, to further clarify the specific circumstances under which existing ICT must be made to comply with the Revised 508 Standards, the Board has added definitions for “alteration” and “existing ICT” in E103.4. “Existing ICT” is defined as ICT that has been procured, maintained or used on or before the compliance date (which is one year after publication of the final rule). The Access Board has intentionally omitted the term “developed” from this definition because existing ICT that has been developed—but not yet used or procured—still presents an opportunity to incorporate requisite accessibility.

“Alteration,” in turn, is defined as a change to existing ICT that affects interoperability, the user interface, or access to information or data. In defining “alteration,” the Board seeks to distinguish between changes to existing (compliant) ICT that trigger compliance obligations under the Revised 508 Standards, and those that do not. For example, since correction of a typographical error on a Web page does not affect interoperability, user interface, or access to information and data, this type of change would not trigger compliance obligations under the Revised 508 Standards. However, changing the footer portion of an agency Web site through a content management system (CMS) would affect access to information and data (*i.e.*, the information in the footer). In that case, changes to the footer would need to conform to the Revised 508 Standards; however, other page content that was not affected by the footer revision would not need to be upgraded or modified. In another example, a typical software security patch does not affect interoperability, user interface, or access to information and data; therefore, deployment of such software security patches would not be considered “alterations” under the safe harbor provision.

The safe harbor provision is applicable only to existing ICT covered by Section 508, and does not extend to Section 255-covered telecommunications equipment or CPE. Because the FCC has exclusive authority to implement and enforce Section 255, compliance with the Revised 255 Guidelines is not required until they are adopted by the FCC through a separate rulemaking. As such, application of the revised guidelines to existing ICT

covered by Section 255 also lies within the province of the Commission.

Agencies and the public may need to refer to the existing 508 Standards to determine whether existing ICT complies with its accessibility requirements once the final rule takes effect. To that end, the existing 508 Standards have been republished as an appendix (Appendix D) to part 1194 for reference when evaluating legacy ICT under the safe harbor provision. In Appendix D, while the text and structure of each provision remains the same as in the existing 508 Standards, the numbering convention for each provision has been modified to comply with publication requirements for matter located in regulatory appendices.

The NPRM proposed five other general exceptions that apply to ICT that: Is an integral part of a national security system (proposed E202.2); is acquired by a contractor incidental to a contract (proposed E202.3); is located in maintenance spaces (proposed E202.4); would require a fundamental alteration to be accessible (E204.5); or, is not commercially available (proposed E202.6). These five exceptions closely parallel equivalent requirements in existing 508 Standards (36 CFR 1194.3(a), 1194.3(b), 1194.3(f), 1194.3(e), and 1194.2(b), respectively).

We received six comments expressing concern or requesting changes to proposed E202. Two commenters (a disability advocacy organization and an ICT subject matter expert) requested deletion of proposed E202.2, which exempts national security systems as defined by 40 U.S.C 1103(a). These commenters asserted that ICT that is part of a National Security System should be required to conform to the maximum extent possible, instead of being exempted entirely from compliance. Two commenters (a disability advocacy organization and an ICT subject matter expert) also requested that the exception for ICT acquired incidental to a contract in proposed E202.3 be removed, asserting it would discourage contractors from hiring employees with disabilities. Additionally, an individual commented that proposed E202.3 needed a major change because it has not been successful in the past in getting software manufacturers to make accessible software. This individual requested that the final rule require refunds if a future version of software failed to meet accessibility requirements. The Board also received three comments (one ICT company and two industry trade associations) seeking expansion of proposed E202.4, which exempts certain functions of ICT located in maintenance

or monitoring spaces, to include a “back office exemption” for maintenance functions and maintenance spaces.

After carefully considering the comments received, we have decided not to make any changes to these five general exceptions in proposed E202, except to shift the numbering of the provisions to accommodate the incorporation of a safe harbor provision at E202.2 that applies to legacy 508-covered ICT. The exception proposed for National Security Systems (final E202.3) is taken directly from the statute authorizing the 508 Standards (Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794d). Additionally, the statutory definition of “information technology,” which excludes equipment that is acquired by a Federal contractor incidental to a contract, prohibits the Access Board from requiring such ICT to comply with the Revised 508 Standards and 255 Guidelines. 40 U.S.C. 11101(6), stating that “[t]he term ‘information technology’ . . . does not include any equipment acquired by a Federal contractor incidental to a Federal contract.”

E202.4 in the proposed rule (final E202.5) was a change to existing 508 Standards § 1194.3(f) in that the exception was narrowed to apply only to those status indicators and operable parts that are available from maintenance spaces. Since it is the usual case that rack-mounted equipment is operated remotely, this change makes it clear that the Revised 508 Standards do not preclude this usual business practice.

In response to the commenters’ requests seeking expansion of proposed E202.4 for a complete “back office exemption,” the Board, after careful consideration, declines to make a change. People with disabilities frequently perform “back office” IT work and the majority of these job functions can be addressed with assistive technology. The Board is sensitive to concerns raised by some commenters, that ICT will often not be accessible when there is a physical problem or failure with the equipment. We note that we did not provide a complete exception for maintenance functions in the proposed rule, as it only intended the requirements concerning the accessibility of operable parts to apply to the normal operation of ICT by end-users. In order to ensure clarity in the final rule, in addition to the edit to the definition for “operable part” mentioned above, we have revised 407.1 in the final rule to make the application of these Standards to normal operation explicit. This is discussed in further detail below in Section IV.F.

(Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 4: Hardware—407). In addition, we note that the exception for maintenance spaces which are frequented only by service personnel for maintenance, repair, or occasional monitoring is consistent with the ADA and ABA Accessibility Guidelines. 36 CFR part 1191 (stating that “Spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment shall not be required to comply with these requirements or to be on an accessible route”). Therefore, in the final rule, we have not made any changes to proposed E202.4, with the exception of its renumbering (final E202.5).

E203 Access to Functionality

The NPRM proposed to require that all ICT be accessible to and usable by individuals with disabilities, either directly or by use of assistive technology. This section was based on the existing 508 Standards (36 CFR 1194.1 and 1194.2(a)). We received ten comments regarding this proposed requirement; three individuals, a disability advocacy organization, three trade associations, and three ICT companies.

An ICT company and an ICT trade association expressed concern with the proposed requirements and requested clarification on the minimum required abilities assumed for operational functions of certain products. The specific example provided was that it would be very difficult for a person who is blind to have a job operating a large volume xerographic services machine, because that person would not be able to visually monitor the complex equipment. An ICT subject matter expert in the field of geographic information systems raised concerns and recommended that the Board expand the exceptions in proposed E203 to include rich content like maps that represent information and data visually because they do not know of any other means to convey the information and data. Another commenter raised concerns about the inability to make inherently visual representations, such as motion pictures, fully accessible to a person who is blind even when assistive technologies are used. Finally, a disability advocacy organization recommended that this provision be amended to require that people with disabilities be provided training to evaluate, install, and configure assistive technology.

The Board has reviewed the comments received and find that the commenters’ concerns requesting

clarification of the minimum required abilities for operation functions are misplaced. The 508 Standards apply to all ICT; deliberately, they do not make assumptions regarding physical, cognitive, or sensory abilities associated with performing job tasks. Presumably, a job operating a large volume copier would include the requirement to confirm by visual inspection that output hard copy was correct. The fact that there may be specific performance requirements for certain jobs is not a sufficient justification to exempt the core functions of the ICT from the Revised 508 Standards. In response to the commenter's request for an exception for ICT that cannot be adequately represented through assistive technology, the Board notes that the intent of the 508 Standards is to provide comparable access. In the Board's experience, the scope and nature of accessibility improves over time as technology advances. The Board has concluded that these issues are well addressed by the technical and functional performance requirements, and has declined to narrow the scoping or expand the available exceptions as suggested. Finally, in response to the request that the final rule require training, we find that such a requirement is outside the scope of these Standards and have declined to make this suggested change.

We have considered the commenters' suggestions regarding section E203, but as described above, found no reason to make substantive changes. We have made a few editorial changes to E203 in the final rule for clarity. The most significant of these editorial changes is in the title of E203.2, which is now "User Needs" instead of "Agency Business Needs."

E204 Functional Performance Criteria

The NPRM proposed that where the requirements in Chapters 4 and 5 do not address one or more features of ICT, the features not addressed shall conform to the functional performance criteria (FPC) in Chapter 3. Many comments were received regarding the individual FPC referenced in proposed E204. As the technical criteria are provided in Chapter 4, these comments are addressed below in Section IV.F. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 4: Hardware). Some of the concerns with the FPC for limited vision, limited hearing, and limited cognition are addressed in the Major Issues section of this preamble, at Section III.E. (Major Issues—Functional Performance Criteria).

We identified 22 comments concerned with proposed E204. Several of these comments indicated that the applicability of proposed E204.1 should be further clarified. An ICT company asserted that as written, proposed E204.1 could be interpreted as requiring the applicability of the FPC to be considered on a feature-by-feature basis. Specifically, this commenter explained that for software products that typically include a long list of "features," such a feature-by-feature evaluation would be quite onerous. Additionally, one commenter provided suggested text for inclusion in advisories in the final rule.

We concur with the commenter that proposed E204.1 could be misinterpreted. We intended for the functionality of the ICT to be considered holistically, and not on a feature-by-feature basis. The final rule revises this requirement and substitutes "functions" for "features," to avoid this confusion. The Board regards this change as editorial, as it seeks to clarify the intent of the proposed provision, and makes the text of the provision consistent with the chapter title and phrasing used elsewhere in the Revised 508 Standards. In response to the commenter's request for advisories, as described above, advisories are no longer published in the final rule; however, the Board intends to provide further guidance on the applicability of final E204.1 in its technical assistance.

E205.2 Public Facing

Three commenters raised concerns with proposed E205.2, specifically in regards to the application of this provision to social media platforms. One individual questioned whether social media constituted public-facing content under proposed E205.2. Another individual questioned whether third-party content added by members of the public to agency controlled social media sites would constitute public-facing content under proposed E205.2. The third commenter, a disability advocacy organization, recommended that agencies be precluded from using any social media platforms that are not compliant with the final rule.

In the NPRM preamble, we described public-facing content and included social media pages as an example of such content. 80 FR 10880, 10893 (Feb 27, 2015). The Board refers commenters on this topic to the discussion in the NPRM, as its position on this matter has not changed. Additionally, we note that under Section 508 of the Rehabilitation Act (as amended), agencies have responsibility for all content that they develop, procure, maintain, or use. 29 U.S.C. 794d. Agencies are therefore

responsible for third-party content added to and maintained on their sites, and will need to develop policies and practices to ensure the accessibility of that third-party content. This is consistent with other policies and practices agencies employ regarding personally identifiable information, security, obscenities, or other concerns presented by third-party content. If an agency invokes an exception and uses inaccessible ICT to provide information and data to the public, the statute requires that the agency provide the same information and data to individuals with disabilities by an alternative means. *Id.* (stating that "the Federal department or agency shall provide individuals with disabilities covered by paragraph (1) with the information and data involved by an alternative means of access that allows the individual to use the information and data"). Under current law, an agency is not prevented from using an inaccessible social media platform under a provided exception, as long as the agency provides individuals with disabilities an alternative means of accessing the same information and data. Accordingly, the Board has not made a change to this requirement.

E205.3 Agency Official Communication

In addition to the changes made to E205.3, discussed above in Section III.A. (Major Issues—508 Standards: Covered Electronic Content), a commenter expressed confusion and questioned what the difference was between a questionnaire and a survey. The Board notes it was not our intention for this item to refer to two different types of communication. Therefore, in the final rule we have amended this item from "questionnaire or survey" to "survey questionnaire."

E205.4 Accessibility Standards

The NPRM generally proposed to replace the existing technical standards for Web, software, applications, and electronic content with incorporation by reference of the Level A and Level AA Success Criteria and Conformance requirements of WCAG 2.0, which appear at proposed E205.4. There is no direct analogy in the WCAG 2.0 Success Criteria for section 1194.22(d) of the existing 508 Standards, which states: "documents shall be organized so they are readable without requiring an associated style sheet." 36 CFR 1194.22(d).

Three individual commenters expressed concern that eliminating the requirements of section 1194.22(d) of the existing 508 Standards would

significantly reduce the level of user control over customized styling (including features such as magnification, color, and contrast), which is critical to some users with low vision. Section 1194.22(d) of the existing 508 Standards requires documents to be organized so that they are readable without an associated style sheet. This enables persons with low vision to remove style sheets from Web pages so that they can change aspects of text style, such as spacing, font, color, borders, and width of reading areas. A disability advocacy organization indicated that replacing the current requirement with referenced provisions of WCAG 2.0 Levels A and AA would result in scenarios problematic for some users with low vision, such as limiting the maximum required magnification to 200 percent while permitting horizontal scrolling (WCAG Success Criteria 1.4.4). In addition, WCAG 2.0 Levels A and AA will provide for a sole fixed contrast setting instead of permitting user control over the degree of contrast (WCAG Success Criteria 1.4.3), which presents a challenge for some individuals.

We have considered commenter concerns regarding the loss of user control over customized styling, and acknowledge that some individuals who elect to use ICT without assistive technology may be affected by the loss of the requirements in section 1194.22(d) of the existing 508 Standards. However, the Board finds that the existing section 1194.22(d) requirement is detrimental to the use of assistive technology, which has well-supported the use of stylesheets for several years. All users, including users of screen reading software and other assistive technology, rely on the presence of Cascading Style Sheets (CSS) in order to format text for a variety of devices and Web browsers. In complex Web applications, CSS is also used dynamically to hide content that is not relevant to the user's current transaction and to selectively show content based on the user's choices. The need for content authors to maintain support for section 1194.22(d) had the effect of slowing the adoption of robust accessible Web content. Further, mainstream adoption of contemporary technologies (for example, ARIA or Accessible Rich Internet Applications) depends on CSS being supported. Implementation of these newer, more advanced approaches is not compatible with 1194.22(d). For these reasons, the Board declines to reintroduce the requirements of section 1194.22(d) in the Revised 508 Standards. The Board is

also not persuaded that amending the language of select WCAG 2.0 Success Criteria, such as 1.4.4 (Resize Text) is a prudent approach. Requiring, for example, 400 percent magnification might allow a select number of users with low vision to use ICT without assistive technology; however, the overall consistency of the requirements, an important goal of harmonization with international standards, would be lost.

Another individual commenter suggested that the technical requirements relating to text featured in software under proposed 502.3.6 be made applicable to text in all content generally, under E205.4. The Board is not persuaded to adopt the recommendation to apply proposed 502.3.6 to all content, including Web content. Adding such a requirement to the WCAG 2.0 criteria would create harmonization issues internationally as well as among Federal agencies. The technical requirement for "boundary of text rendered on the screen" is a detail that is readily available in client-side software, but is not always available in a Web browsing environment.

The Board carefully considered the public comments and it finds that incorporation of the WCAG 2.0 standard, without modification, adequately addresses the needs of the majority of users with low vision. The Board also notes that W3C® has formed a task force charged with investigating the issue of accessibility requirements related to low vision and with creating recommendations. Low Vision Accessibility Task Force, <http://www.w3.org/WAI/GL/low-vision-a11y-tf/>, (last visited Aug. 23, 2016). The Board is following that work and may incorporate their recommendations in future rulemaking.

Conforming Alternate Version

The NPRM proposed that a Web page could conform to WCAG 2.0 either by satisfying all success criteria under one of the levels of conformance or by providing a "conforming alternate version." Because WCAG 2.0 always permits the use of conforming alternate versions, the Access Board sought input on whether there were any concerns that the unrestricted use of conforming alternate versions of Web pages may lead to the unnecessary development of separate Web sites or unequal services for individuals with disabilities, and whether the Board should restrict the use of conforming alternate versions beyond the explicit requirements of WCAG 2.0. NPRM, 80 FR at 10897.

Eleven commenters responded to the proposed provision allowing conforming alternate versions. Seven of

the commenters (four ICT companies and trade associations, two disability advocacy organizations, and one individual) supported the approach to conforming alternate versions proposed in the NPRM. Four commenters (two individuals, one state government agency, and an ICT trade association) opposed the approach from the NPRM.

Under WCAG 2.0, in order for a non-conforming Web page to be included within the scope of conformance by using a conforming alternate version, the alternate version must: Conform at the designated level (*i.e.*, WCAG 2.0 Level AA success criteria); provide the same information and functionality in the same language; and be as up-to-date as the non-conforming content or page. In addition to these requirements, at least one of the following must be true: (1) The conforming version can be reached from the non-conforming page via an accessibility-supported mechanism; (2) the non-conforming version can only be reached from the conforming version; or (3) the non-conforming version can only be reached from a conforming page that also provides a mechanism to reach the conforming version. W3C®, Understanding WCAG 2.0: Understanding Conforming Alternate Versions, Dec. 2012, <http://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conforming-alt-versions-head>.

The W3C® explains that providing a conforming alternate version is intended to be a "fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible." *Id.* While some commenters expressed specific concern that the use of conforming alternate versions could still create separate, unequal Web sites for people with disabilities, the Access Board has concluded that when the requirements for a conforming alternate version are viewed in conjunction with the W3C®'s guidance, it is clear that they are meant to be used only in the limited circumstances where the primary Web page or content cannot be made accessible for all users, typically due to a technical or legal limitation.

In the Revised 508 Standards, the Board has decided to retain the incorporation by reference to WCAG 2.0's conforming alternate version, as proposed in the NPRM. WCAG 2.0's conforming alternate versions provision provides a much clearer standard than the vague language of the existing 508 Standards. Section 1194.22(k) of the existing 508 Standards states that "[a] text-only page, with equivalent information or functionality, shall be

provided to make a Web site comply with the provisions of this part, when compliance cannot be accomplished in any other way. The content of the text-only page shall be updated whenever the primary page changes.” While on its face, the existing 508 Standards may seem to more strictly limit the use of alternate pages, in practice it is difficult to determine when compliance cannot be accomplished in any other way, and thus, it is easy for agencies to justify the use of text-only pages. Such alternate text-only sites often are poorly maintained, lack the same information and functionality available on the non-conforming Web page, and have out-of-date content. As explained above, the WCAG 2.0 requirement for a conforming alternate version significantly exceeds the expectations for text-only pages, and would not permit these deficiencies. Therefore, the Board has concluded that agencies using the Revised 508 Standards for conforming alternate versions under WCAG 2.0 will not create Web sites that suffer from these same problems, because the requirements for conforming alternate versions under WCAG 2.0 are so rigorous.

Despite WCAG 2.0’s requirement that conforming alternate versions follow far more robust standards than the text-only pages permissible under the existing 508 Standards, some commenters have expressed concern that agencies may choose to use conforming alternate versions even in circumstances in which compliance could be achieved on the primary Web page. The Access Board expects that the stringent requirements for the use of conforming alternate versions under the Revised 508 Standards will prevent this abuse. The Board expects that an agency that decides to use a conforming alternate version of a Web page as opposed to making the main page accessible will typically do so when, as the W3C® explains, certain limited circumstances warrant or mandate their use. For example, W3C® has noted that a conforming alternate version may be necessary: (1) When a new emerging technology is used on a Web page, but the new technology cannot be designed in a way that allows assistive technologies to access all the information needed to present the content to the user (e.g., virtual reality or computer-simulated reality); (2) when it is not possible to modify some content on a Web page because the Web site owner is legally prohibited from modifying the Web content; or (3) to provide the best experience for users with certain types of disabilities by

tailoring a Web page specifically to accommodate those disabilities. *Id.*

The Access Board does not anticipate that an agency would choose to maintain a separate conforming alternate version of a Web page for people with disabilities without a compelling reason, as maintaining separate sites in most, if not all circumstances, would be expensive and overly time-consuming. The Board notes that meeting the stringent criteria for a conforming alternate version under WCAG 2.0 is, in most cases, impractical if the primary page can be made accessible. The Access Board further notes that agencies will have a disincentive to allow conforming alternate versions of Web pages to become out-of-date, as this blatant failure to meet the requirements of WCAG 2.0 for conforming alternate versions could be evidence of noncompliance under the Revised 508 Standards. If the Board finds that use of conforming alternate versions, in practice, does not provide people with disabilities a Web experience equivalent to that of people without disabilities, the Board will consider whether rulemaking is appropriate to restrict the use of conforming alternate versions.

E206 Hardware

We received one comment on this provision from a disability advocacy organization which asserted that proposed E206 did not sufficiently include mobile phones and tablets. The Board disagrees with the commenter and finds that these products are hardware, and are therefore subject to the hardware requirements in Chapter 4 of the final rule.

E207 Software

We received one comment on this provision from a disability advocacy organization that indicated that proposed E207 did not sufficiently encompass mobile applications. The Board disagrees with the commenter and finds that such mobile “apps” are software applications and are therefore subject to the software requirements in Chapter 5 of the final rule.

The W3C® has formed a task force charged with investigating and making recommendations on the issue of accessibility requirements specific to mobile content. Mobile Accessibility Task Force, <http://www.w3.org/WAI/GL/mobile-a11y-tf/> (last visited Aug. 23, 2016). The Board is following that work and may incorporate its recommendations in future rulemaking.

Additionally, the final rule contains an exception to E207.1 and E207.2 that excludes assistive technology software

that supports the accessibility services of the platform. This exclusion appeared in the proposed rule as an exception to proposed 501.1. One commenter noted that the exception might be overlooked until after assistive technology was evaluated for conformance to WCAG 2.0. In response to the commenter’s concern, in the final rule, the Board has moved this exception from chapter 5 to E207.1 and E207.2. The Board regards the relocation of this exception as an editorial clarification since we never intended for assistive technology to be reviewed against the WCAG 2.0 Success Criteria. Moving the exception from Chapter 5 to Chapter 2 makes this clear, but requires that the exception be repeated in multiple places.

C. 255 Chapter 1: Application and Administration

Chapter 1 of the Revised 255 Guidelines includes a general section, defines equivalent facilitation, addresses application of referenced standards, and provides definitions of terms used in the guidelines. Most of the comments received on 508 Chapter 1, discussed above in Section IV.A. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 1: Application and Administration), are also applicable to 255 Chapter 1. These are noted below with the applicable section numbers. Additionally, we have made minor changes specific to the 255 Chapter 1 in response to comments to improve clarity, accuracy, and ease of use. These changes are described below.

C101.1 Purpose

An ICT trade association raised a concern that inclusion of the phrase “and related software,” could be interpreted to go beyond the scope of Section 255 to cover software other than that essential to telecommunications functions. The Board agrees with the commenter that the inclusion of this phrase is problematic. The Communications Act defines telecommunications equipment to include “software integral to such equipment including upgrades.” 47 U.S.C. 153(45). The FCC, in its 1999 Report and Order implementing its regulations under Section 255, went on to find that customer premises equipment likewise includes software integral to the operations and functions of the equipment. FCC 99–181, adopted July 14, 1999; Released Sept. 29, 1999, pp. 41–42. The Board has concluded that the inclusion of the term “and related software” in proposed C101.1 is unnecessary and confusing, and has deleted it from the provision in the final

rule. The Board has also made changes to several definitions in the final rule, discussed below, to conform to the terminology of Section 255 and the FCC implementing regulations.

C101.3 Conventional Industry Tolerances

For the same reasons discussed above in Section IV.A. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 1: Application and Administration—E101.3), we have added “with specific minimum or maximum end points” to C101.3 in the final rule.

C102 Reference Standards

This section has been significantly reorganized and revised in the final rule. The general statements in the first two sentences regarding the application of referenced standards remain essentially unchanged from the proposed rule. However, the subsequent provisions in the proposed rule that expressly IBR the ten referenced standards into the Revised 255 Guidelines (*i.e.*, proposed C102.2–C102.10) have been moved in the final rule to a centralized IBR section—new Chapter 7 (Referenced Standards). This reorganization of IBR provisions was made to comply with OFR regulations that govern incorporations by reference. *See* 1 CFR part 51. Comments related to proposed incorporations by reference into the Revised 255 Guidelines are discussed below in Section IV.I (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 7: Referenced Standards).

C103.4 Defined Terms

In addition to the corresponding changes made to C103.4 that were described above in the Section IV.A. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 1: Application and Administration—E103.4), we have made a few additional changes based on public comments that are only applicable to the Revised 255 Guidelines.

We added a definition for “manufacturer” to final C103.4, and amended the definitions for “customer premises equipment” and “telecommunications equipment” to conform to the language of Section 255 and the FCC implementing regulations.

Finally, we received comments asking why the definitions for “closed functionality” and “ICT” in proposed C103.4 included examples that were not telecommunications equipment. The

Board concurs with commenters’ concerns that the examples included with those definitions in proposed C103.4 were confusing because they were not telephony products, and thus not within the scope of the 255 Guidelines. Therefore, in the Revised 255 Guidelines the Access Board has amended the definitions for “closed functionality” and “ICT” by removing the examples.

D. 255 Chapter 2: Scoping Requirements

Chapter 2 of the Revised 255 Guidelines addresses application and scoping. Most of the comments received on 508 Chapter 2, discussed above in Section IV.B. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 2: Scoping), are also applicable to 255 Chapter 2. The applicable 255 Chapter paragraph numbers are referenced below. Additionally, we have made minor changes specific to the Revised 255 Chapter 2 in response to comments to improve clarity, accuracy, and ease of use. These changes are described below.

C201.5 Design, Development, and Fabrication

An ICT subject matter expert was concerned that proposed C201.5 did not include the language from existing § 1193.23(b) that directs telecommunications manufacturers to consider using people with disabilities in the design and development process. As the Board explained in the preamble of the NPRM, we did not retain this provision in the Revised 255 Guidelines because “consider” is not mandatory language and therefore is more appropriate for inclusion in advisory material providing guidance on best practices. 80 FR 10912 (Feb. 27, 2015). The Access Board is not persuaded by this commenter that the final rule should include this requirement and, as discussed above, advisory material is not included in the final rule. Therefore, this requirement has not been changed in the final rule.

C205 Software

In the final rule we have relocated an exception that excludes assistive technology software from proposed 501.1 to final C205. This relocation was necessary to avoid confusion and is described in detail above in Section IV.B. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 2: Scoping—E207).

E. Chapter 3: Functional Performance Criteria

Chapter 3 of the final rule contains functional performance criteria, which are outcome-based provisions that apply when applicable technical requirements (*i.e.*, Chapters 4 and 5) do not address one or more features of ICT. All sections of this chapter are referenced by scoping provisions in Revised 508 Chapter 2 and in Revised 255 Chapter 2. The functional performance criteria are also used to determine equivalent facilitation under both the Revised 508 Standards and the Revised 255 Guidelines (final E101.2 and C101.2).

We have made minor changes to Chapter 3 in response to comments to improve clarity, accuracy, and ease of use. These changes are described below. In addition, two of the provisions in the final rule, 302.2 and 302.5, have been significantly amended in response to comments and a new provision, and 302.9 has been added to the final rule. These provisions are discussed above in Section III.E. (Major Issues—Functional Performance Criteria).

New Functional Performance Criteria Recommended

We received two comments (a coalition of disability rights organizations and an academic research institution) suggesting that the Board add three new functional performance criteria (FPC) to the final rule addressing depth perception, the use of ICT without gestures, and the use of ICT without human skin contact. The purpose of these recommendations was to anticipate possible developments in technology that would require the use of functions not currently addressed in the Revised 508 Standards and 255 Guidelines. Each of these suggestions are discussed below.

The requested addition for a FPC addressing depth perception would require that one visual mode of operation be provided that does not require binocular perception of depth. This commenter did not indicate what functions of ICT would require binocular perception of depth, or where this criterion might apply, other than to suggest that at some point in the future binocular perception of depth might be required to access functions of some ICT.

Similarly, the addition of a “use of ICT without gestures” FPC was suggested by a commenter without a rationale for where the criterion might be used. The functional limitations suggested by the criterion are already addressed in the FPC for limited vision. For example, a gesture-based system

would not be usable by persons with no vision, since they would be unable to perceive where their gestures were to be located or performed without vision. Therefore, providing a mode of operation that does not require user vision would address those functional needs. The commenter did not apply this suggested FPC to any existing technology or technology known to be in development.

Finally, a commenter suggested a new FPC for the use of ICT without human skin contact. It is the Board's understanding that this suggestion is not technically feasible with modern touch screens which rely on capacitive touch. Capacitive touchscreen displays rely on the electrical properties of the human body to detect when and where on a display the user touches. Because of this, capacitive displays can be controlled with very light touches of a finger and generally cannot be used with a mechanical stylus or a gloved hand. See "What is 'capacitive touchscreen'?", <http://www.mobileburn.com/definition.jsp?term=capacitive+touchscreen> (last visited Aug. 3, 2016). While resistive, or pressure sensitive touch screens, are available for such functions as signing an ATM screen, they can only recognize one activation point at a time. This technical limitation precludes the use of resistive touch screens for common gestures used with personal devices (for example, pinch-to-zoom on a smart phone). See "Okay, but how do touch screens actually work?" at Science Line, the Shortest Distance Between You and Science, <http://scienceline.org/2012/01/okay-but-how-do-touch-screens-actually-work/>, (last visited Aug. 3, 2016). Most touch screen technology today uses capacitive touch.

After consideration, the Board declines to adopt any of the suggested FPC. No specific examples of real-world applications were provided for any of the suggested FPC. The suggested FPC would not have any close correlation to technical criteria in the final rule, and the access barriers theoretically covered by the suggested FPC are substantially addressed by the other FPC in the final rule. Additionally, the suggested FPC lack the necessary research and public input to determine the need and benefit of such additional criteria. Therefore, at this time, the Board declines to adopt the commenters' suggested functional performance criteria.

Section 301 General and 302 Functional Performance Criteria

We received a number of comments from a variety of stakeholders who sought clarification from the Board on the relationship between the FPC and

the technical requirements. This issue has been extensively discussed and commented on during the history of this rulemaking. In the 2010 ANPRM, the Board recommended that for ICT meeting the technical requirements, the FPC did not need to be considered at all. After numerous commenters opposed this approach as being too limiting, and likely to lead to the procurement of ICT that is not actually usable by individuals with disabilities, the Board proposed in the 2011 ANPRM that ICT must conform to the FPC, even when the technical criteria are met. In response to the 2011 ANPRM, commenters noted that required conformance to the FPC would be unduly burdensome and costly, and would greatly increase the time for accessible ICT procurement, without notably improving the likelihood that accessible ICT would be procured. Accordingly, in the NPRM, we proposed that the FPC need only be met when the features of the ICT are not addressed by the provisions in Chapters 4 or 5.

Fifteen general comments were received on Chapter 3. These comments encompassed a wide variety of responses to the proposed FPC. Four commenters from disability advocacy organizations praised the approach taken by the Board in the proposed rule of requiring compliance with the FPC when the technical requirements in Chapters 4 and 5 are not applicable. Two commenters, one from an ICT trade association, and one from coalition of disability rights organizations, suggested that we adopt an approach similar to that taken in EN 301 549, where the FPC are expressed using very broad and conditional language. Three commenters, one from an accessible ICT services provider, one from a state/local agency, and one ICT company, urged the Board to reinstate the proposed approach from the 2011 ANPRM and require the use of the FPC and the technical requirements for all ICT. One commenter who self-identified as an individual with a disability recommended that we revise the language of the FPC to focus only on functional limitations, and not use disability-specific terminology. All other commenters approved of the approach proposed in the NPRM of identifying specific functional limitations using disability-specific language and noted that this approach was understandable, usable, and important in providing context for accessible solutions. Along with this support, one commenter from an ICT trade association suggested that the Access Board change the approach of

describing the FPC to necessary to ensure accessibility, rather than providing more technical requirements. In the final rule, we have retained the approach proposed in the NPRM and provide disability-specific context for the functional performance criteria.

Finally, five commenters, two from disability rights organizations, two ICT companies, and an ICT trade association, requested further clarification on our proposed approach. The most specific comment came from an ICT trade association which expressed confusion about how to interpret and apply the FPC in Chapter 3 for individuals with low and limited vision in conjunction with the scoping requirement for access to "all ICT functionality" as required by proposed E203 and C201.3. This commenter requested clarification on how persons with limited or low vision were supposed to access functions on ICT such as copiers, for example, when checking copy output quality, or attempting to change paper trays. The comment also raised the concern that some functions, by their nature, such as visual inspection for copy quality, assume a certain level of ability. In response, in the final rule, we have revised the text of the provision for operable parts (final 407.1) to clarify that maintenance functions are separate and distinct from normal operations and are not covered by the provisions in Chapters 3 and 4. Only the functions of ICT used in normal operation must be made accessible. The discussion of 407.1 is found below in Section IV.F. (Summary of Other Comments and Responses on Other Aspects of the Proposed Rule—Chapter 3: Hardware). We also retained the proposed provision on status indicators (final 409.1), which requires that information on the status of ICT hardware, such as the need for maintenance, be provided visually, and by touch or sound. The discussion on 409.1 is found below in Section IV.F. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 4: Hardware—409).

After review of all of these comments, we have decided to retain the proposed approach in the final rule of requiring the FPC where the requirements in Chapters 4 and 5 do not address one or more functions of ICT. The Board has also retained the requirement that the FPC are used when evaluating an alternative design or technology under equivalent facilitation (final E101.2 and C101.2). The approach taken in the final rule reflects the longstanding, established practice in the Federal Government of the application of the FPC when technical requirements do

not sufficiently address the features of the particular ICT at issue. It also allows for balance between providing for accessible ICT while encouraging flexibility and innovation in the development of accessible ICT. We did make changes to some of the individual FPC. The major changes are discussed above in Section III.E. (Major Issues—Functional Performance Criteria); other changes are discussed below.

302.1 Without Vision

We received three comments on this section. One of the commenters was from a disability rights organization, one was from a coalition of disability rights organizations, and one was an individual who self-identified as having a disability. One commenter commended us on the functionality and usability of the FPC addressing the functional needs of users with no vision, and had no recommendations for change. The remaining two commenters, a self-identified individual with a disability and a disability rights organization, expressed concern that the requirement was too limited and could lead some agencies to provide only an audio solution, which would not provide access for individuals who are deaf-blind. These commenters recommended that the Board add language requiring the support of auxiliary aids, such as refreshable braille devices, in order to ensure that all potential users without vision could have access. In the final rule, we have declined to modify the criterion because mandating a specific solution such as a refreshable braille keyboard would restrict the development of other potential solutions and would be costly. The Board concluded that retaining the NPRM's open ended approach is the best way to maximize potential solutions for this population of users. In addition, the Revised 508 Standards work in tandem with customized solutions developed as appropriate to accommodate the needs of individuals under Sections 501 and 504 of the Rehabilitation Act. The Revised 508 Standards ensure that all functionality of ICT is accessible to and usable by individuals with disabilities either directly or by supporting the use of assistive technology (final E203).

302.3 Without Perception of Color

We received four comments on this provision. All four commenters generally approved of the proposed provision. Three of these commenters, one from an ICT trade association and two ICT companies, requested guidance on allowable alternatives to color. In response, the Board notes that the

supporting materials for the WCAG 2.0 Success Criteria contain technical assistance on the use of color. The remaining commenter, a coalition of disability rights organizations, recommended that we add the word “visual” to clarify the mode of operation. We agree with this comment and have added the word “visual” to describe the mode of operation in the final rule.

302.6 Without Speech

In response to a comment made by a coalition of disability rights organizations, the Board added the phrase where “speech is used for input, control or operation” to clarify in the final rule when this FPC is applied.

302.7 With Limited Manipulation

Three commenters (an accessible ICT services provider, a coalition of disability rights organizations, and an ICT company) requested changes to proposed 302.7. The accessible ICT services provider asserted that the provision was insufficient to address the needs of users with limited manipulation in a touch screen environment because it did not address motions that required more than one finger, such as a pinch zoom gesture, or a twisting motion that required only a single control, but might not work for individuals with some types of limited manipulation abilities. A provision in Chapter 4 addresses this concern by requiring at least one mode of operation operable with one hand that does not require tight grasping, pinching or twisting of the wrist (final 407.6). In addition, there is an exception for input controls for devices for personal use that have input controls that are audibly discernible without activation and operable by touch (final Exception 407.3). The ICT company recommended that we reference the FPC from EN 301 549 clause 4.2.7 “Usage with limited manipulation or strength.” We decline to adopt the recommendation to use the language in EN 301 549 because it combined the functions of limited manipulations with limited strength, which the Board has determined are distinct functions that should be treated separately. Finally, the coalition of disability rights groups recommended that we clarify the text of the provision to make it easier to understand. In response to this comment, we have added the phrase “simultaneous manual operations” to clarify the limitation on this FPC.

F. Chapter 4: Hardware

Chapter 4 contains requirements for hardware that transmits information or

has a user interface. Examples of such hardware include computers, information kiosks, and multi-function copy machines. Chapter 4 in the final rule has been substantially reorganized from the proposed rule in response to comments to improve clarity, accuracy and ease of use. The changes are described below.

401 General

An ICT trade association asserted that the Twenty-First Century Communications and Video Accessibility Act (CVAA) was the latest word from Congress, that the Board should avoid mandating technical requirements, and that the Board was exceeding its jurisdiction. As discussed above in Section I.A. (Executive Summary—Purpose and Legal Authority), both the 508 Standards and the 255 Guidelines are within the Board's purview, and the Board has not introduced any conflict with the CVAA.

402 Closed Functionality

ICT with closed functionality has limited functionality by design or choice, which limits or prevents a user from adding assistive technology. The NPRM proposed that ICT with closed functionality with a display screen must be capable of providing speech output (proposed 402).

We received numerous comments on this section. One commenter, a coalition of disability rights organizations, expressed confusion over the concept of closed functionality in software. Closed functionality as it relates to software is discussed at length in Section IV.G (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 5: Software) of this preamble, below, and is not addressed here. The provisions in Chapter 4 only pertain to closed functionality with regard to hardware. The same commenter also recommended that the provisions related to closed functionality be separated into a standalone chapter. The Board has not accepted this recommendation. We proposed that approach in the 2010 ANPRM and it was overwhelmingly rejected by commenters who disagreed with the approach and found it awkward to use. Therefore, in the final rule we have retained the approach from the NPRM.

This commenter, and many others representing disability rights organizations and ICT companies, also expressed concern with the structure and organization of the various provisions related to ICT with closed functionality. One commenter, a disability rights organization, suggested that provisions on transactional outputs

(proposed 409) were in the wrong place and recommended that we combine the section for transactional outputs into the section on closed functionality as a subset of speech-output enabled ICT (final 402.2). Several commenters from industry (a trade association for information technology companies and a large manufacturer of business software and hardware) suggested edits to speech-output enabled ICT consistent with Section 707.5.2 of the 2010 ADA Standards.

The Board agrees that the clarity and coherence of these provisions could be improved by reorganization and has significantly revised the final rule to relocate requirements related to hardware with closed functionality to 402. We moved two exceptions that address audible output on devices with closed functionality from the proposed section on transactional outputs into the section on speech output in the final rule (proposed 409.1 Exceptions 1, 3; final 402.2 Exceptions 5, 6) and we have deleted an exception for duplicative information as unnecessary (proposed 409.1 Exception 2). Additionally, the Board has revised the provision for transactional outputs to clarify that the speech output shall be required to provide all information necessary to verify a transaction (proposed 409.1; final 402.2.2).

We also received numerous comments on technical requirements related to closed functionality. We received comments from copier manufacturers who suggested that a speech output requirement was not needed for any ICT with closed functionality that provides copying functions, because the needs of users with visual impairments were already addressed by provisions in the NPRM requiring magnification (proposed 302.2) and supporting the use of assistive technology (proposed E203). The Board disagrees with this suggestion as we have determined that it is too restrictive and has the potential of leading to a lack of access for users with visual limitations. Therefore, we have not made this recommended change in the final rule (final 302.2). If ICT is capable of attaching assistive technology, then by definition it is not considered to have closed functionality, and the provisions on speech-output for closed functionality do not apply (proposed E103; final E103; proposed C103; final C103). In addition, we have concluded that magnification alone may be insufficient to address the functional needs of users with disabilities, and the functional performance requirement for limited vision has been revised accordingly (proposed 302.2; final 302.2; and Section III.E.1. (Major

Issues—Functional Performance Criteria—Limited Vision and Limited Hearing).

Numerous commenters (disability advocacy organizations, individual commenters, and industry) recommended that the Board add a requirement to explicitly address the needs of individuals who are both deaf and blind. At the present time, the only technology that addresses these concerns is in the form of dynamic braille displays, which are prohibitively expensive, costing as much as \$3,000 to \$5,000 to produce a single line of refreshable braille, and up to \$55,000 to produce a full page of refreshable braille, and require significant modifications in order to be incorporated into existing ICT. The Board has concluded that the many examples of ICT with speech output currently available with minimal hardware requirements are sufficient and appropriate to meet the needs of this population, and accordingly no language has been added on this issue.

We received numerous comments on user control from industry, requesting that we clarify when a particular language, such as English was required (proposed 402.2.1). We have determined it is unnecessary to address the use of languages other than English because business requirements would dictate what languages would be used for interface and speech output. If the interface of the ICT was in a language other than English, then the speech output would also be in that language. Similarly, if the interface does not support multiple languages, then the speech output would not have to support multiple languages.

Several commenters (a coalition of disability rights organizations and an academic research institution), supported the requirement for stopping and resuming audio (proposed 402.2.1), stressing that such a feature is essential when audio information is lengthy. An ICT company recommended that the Board reference the provision of EN 301 549 clause 5.1.34. The Board disagrees with this recommendation because the EN provision duplicates the proposed requirement, and also includes additional notes that are confusing and could be interpreted as inconsistent with the basic requirement. The provision in the final rule is renumbered due to restructuring, but is otherwise unchanged from the proposed rule (proposed 402.2.1; final 402.2.4).

We received a significant number of comments on the proposed provision requiring braille instructions on hardware. Five commenters from industry, (three ICT trade associations

and two ICT companies), all stated that it would be difficult for global manufacturers to use braille, and suggested that the Board follow the example in EN 301 549 and require tactile indicators instead. On the other side of the issue, three commenters (a coalition of disability rights organizations, a state/local government, and an academic research institution) all supported the proposed provision, and requested that we retain it (proposed 402.2.2; final 402.2.5).

Based on the prior experience with requiring braille instructions under the ADA and ABA Accessibility Guidelines mentioned above, and the favorable response for tactile instructions, the Board has decided to retain the provision. The braille instructions need not be lengthy, so this is an appropriate requirement for copiers and similar types of ICT, in helping provide equal access to users with low vision. We have declined to follow the approach of providing tactile indicators as indicated in EN 301 549, clause 8.5 “Tactile indication of speech mode” in v.1.1.2 (2015–04) since the EN provision as written allowed for the use of braille, but also permits other unspecified tactile indicators. Instead, we have retained the approach from the NPRM, which specifies a known and predictable method of communicating tactile instructions (final 402.2.5).

Industry commenters also objected to the proposed requirement for English braille, arguing that global markets may spur the manufacture of devices for markets where English is not used as the primary language. In response to this concern, we have revised the final rule to specify the use of contracted braille instead of Grade 2 (English) braille. The Board has also modified the reference to provision 703.3.1 of the ADA and ABA Accessibility Guidelines (proposed 402.2.2; final 402.2.5). Finally, several commenters from industry (ICT trade associations and ICT companies), and a coalition of disability rights organizations asserted that personal use devices do not need braille instruction for initiating the speech mode, and noted that the physical space available on a personal use device would be insufficient to accommodate braille instructions. In response to these comments, we have added an exception from the braille requirement for personal use devices (final 402.2.5 Exception).

The NPRM included a provision requiring volume control for ICT that provides private listening (proposed 402.3.1). Commenters from both industry and disability advocacy organizations recommended that this

provision should be consistent with the provision addressing magnetic coupling (proposed 410.3). The Board agrees that the regulatory language could be strengthened to clarify the relationship between private listening and magnetic coupling. Accordingly, we have revised the provision on magnetic coupling to clarify that the requirement to provide effective magnetic coupling applies where ICT delivers output by means of an “audio transducer held up to the ear” (proposed 410.3; final 412.3).

Numerous industry commenters expressed concerns with the proposed requirement that, where ICT provides non-private listening, incremental volume control shall be provided with output amplification up to a level of at least 65 dB, and where ambient noise level of the environment is above 45 dB, a volume gain of at least 20 dB above the ambient level shall be user selectable (proposed 402.3.2). These commenters all criticized the proposed provision on technical grounds as being imprecise and incapable of determination. We were persuaded by these criticisms and have removed the requirement in the final rule.

These commenters also raised concerns with a requirement for non-private listening that requires automatic volume reset to a default level after every use, on the grounds that the proposed rule was unclear what constituted a “use” of the equipment (proposed 402.3.2). We have declined to make a change in response to this concern. Manufacturers have the ability to determine what constitutes a “use” in the context of their device. For example, a device like a walkie-talkie might reset only when turned off and on, whereas a copier machine might reset automatically after several minutes of inactivity (final 402.3.2).

The NPRM proposed in 402.4 to address the size, font, and contrast requirements for characters displayed on a screen. We received comments from a range of stakeholders (ICT trade associations and companies, two state/local, a coalition of disability rights organizations and an academic research institution). Commenters from industry objected to the size and contrast requirements as being vague and needing additional explanation. On the other hand, commenters from the state agencies, disability advocacy organizations, and academia supported the provision as being useful in providing criteria for a more accessible font style and size. The disability advocacy organizations wanted an additional requirement to specify a font size in at least one mode where ICT did not have a screen enlargement feature.

We have declined to change the provision (final 402.4). The language of the provision is derived from 707.7.2 in the ADA and ABA Accessibility Guidelines. This language has proven over time to strike a fair balance as a minimum standard that is technically feasible for a broad range of devices. While the Board agrees that a more specific contrast requirement would be beneficial, there is not yet an industry consensus standard for measuring contrast as delivered. We considered the metric for contrast as specified by WCAG 2.0 Level AA Success Criterion 1.4.3 but determined that it is inapplicable here, since it only applies to source content and is not appropriate for displays, as addressed in this provision.

In the NPRM preamble we provided variable message signs (VMS) as an example of ICT with closed functionality that would be covered by Section 402 but noted that we were not aware of any VMS technology that provides audible output. We also noted that there is one voluntary consensus standard that addresses the needs of persons with low vision. In Question 18, the Board sought comment on whether it should reference the requirements for VMS in ICC A117.1–2009 Accessible and Usable Buildings and Facilities, if there were technologies that would allow blind users to receive audible messages generated by VMS, and if VMS cannot be speech output enabled, should it at least require VMS to be accessible to people with low vision. NPRM, 80 FR 10880, 10915 (Feb 27, 2015). Several commenters, with a wide variety of backgrounds, agreed that the ICC A117.1–2009 requirements are appropriate to address the needs of many users with low vision, and that we should use those requirements even if VMS cannot be speech output enabled. The few commenters responding to our questions about technologies that might generate an audible version of VMS affirmed that the commercially available products are not sufficiently mature to justify mandating their use.

Consequently, in the final rule we now reference the ICC A117.1–2009 standard and have added an exception to 402.2 Speech Output Enabled for VMS (final 402.2 Exception 1). The Board has also added a new requirement for characters on variable message signs (final 402.5) that references the requirements for VMS in ICC A117.1–2009.

Two commenters (a coalition of disability rights organizations and an academic research institution) requested that the Board add a requirement for audio cutoff. The intention of the recommendation was to ensure privacy

for users of headsets. When users plugged their audio connectors into a standard connection port of ICT that delivers output through an external speaker that broadcasts information in public, the sound from the speakers would be cut off. The Board has declined to add a requirement for audio cutoff as it has determined that it is overly prescriptive, and the objective is already addressed in the final rule by 405, which addresses privacy of input and output for all individuals.

We received a detailed comment from an ICT company who suggested the addition of more requirements for products with closed functionality. The commenter recommended that the Board add five provisions from EN 301 549 onto the existing requirement for closed functionality (proposed 402). Two of the EN provisions, addressing privacy and spoken language, are dependent on unspecified external conditions such as privacy policies and undefined terms such as “indeterminate language” and are unenforceable. EN 301 549 clause 5.1.3.9 and clause 5.1.3.14. Accordingly, the Board has declined to add them to the final rule. The commenter also proposed that the Board adopt a formula for minimum text size as used in EN 301 549, clause 5.1.4. The Board has determined that this is unnecessary and would be redundant of the final rule’s provision addressing minimum text size (final 402.4), which we have decided is straightforward and capable of being tested. The remaining two suggested provisions also had existing parallel provisions in the final rule: a provision on audible signals (EN 301 549, clause 5.1.5) has a parallel provision in 411 of the final rule; and a provision on tactilely discernible controls and keys (EN 301 549, clause 5.1.6, clause 5.1.6.1, and clause 5.1.6.2) is addressed in the final rule provision for tactilely discernible controls and keys (final 407.3). Accordingly, we did not add any of these recommended EN provisions to the final rule.

406 Standard Connections

The NPRM proposed that where data connections used for input and output are provided, at least one of each type of connection shall conform to industry standard non-proprietary formats (proposed 406). Several industry commenters recommended that we use the exact wording from EN 301 549, which specifies the direct or indirect use of commercially available adapters (EN 301 549, clause 8.1.2). The proposed requirement closely corresponds to § 1194.26(d) of the existing 508 Standards and § 1193.51(a) of the existing 255 Guidelines; the

intent of this requirement is to support compatibility with assistive technology hardware. Because hardware used with assistive technology may require a different adapter from a commercially available one, the Board has concluded that it is important to retain the flexibility to allow for both non-proprietary and proprietary connections. For all these reasons, we have retained the phrasing used in the proposed rule (proposed 406; final 406).

407 Operable Parts

The NPRM contained a lengthy section addressing accessibility features of operable parts. We received several comments from industry (ICT trade association and an ICT company) requesting that we delete the provision requiring that keys and controls contrast visually from background surfaces, (proposed 407.2) as being imprecise and incapable of being measured. We have declined to delete this requirement because contrast on controls and keys is an important feature in providing access to the labels on the keys for persons with low vision. The language of the provision is derived from 707.7.2 in the ADA and ABA Accessibility Guidelines. The language has proven to strike a fair balance as a minimum standard and being technically feasible for a broad range of devices. While the Board would prefer to have a more specific contrast requirement, there is not yet an industry consensus standard for measuring contrast as delivered. The metric for contrast as specified by WCAG 2.0 Level AA Success Criterion 1.4.3 is inapplicable here, since it only applies to source content and is not appropriate for displays, as addressed in this provision. Accordingly, we have retained the provision without change from the proposed rule (proposed 407.2; final 407.2).

The NPRM proposed that at least one tactilely discernible control be provided for each function. Devices for personal use with input controls that were audibly discernible without activation and operable by touch were exempted from this requirement. Several commenters (a disability advocacy organization, two ICT trade organizations, and three ICT companies) recommended providing an exception for tactile discernibility for products that are discernable audibly or products that used other non-tactile methods to be discernable without vision. We have determined that these suggestions would make the exception overly broad. For example, tactile discernibility is essential for devices located in public spaces, such as an information transaction machine, where ambient

sound may interfere with an individual's ability to perceive instructions given solely in the form of audible output. Likewise, an exception that permitted a device to rely solely on gesture controls might not be accessible to individuals who are blind or who are unable to gesture. We have retained the exception proposed in the NPRM, which is limited to personal use devices that are discernable audibly without activation (proposed 407.3; final 407.3).

The NPRM proposed that input controls be tactilely discernible and operable by touch and, where provided, that key surfaces outside active areas of the display screen shall be raised above the surrounding surface. A number of commenters (an ICT company, two ICT trade associations, and a disability advocacy organization), opposed the requirement. The commenter from the disability advocacy organization stated that raised keys would be difficult to use for some individuals with disabilities and potentially decrease accessibility. Industry commenters argued that requiring raised keys would add to the cost of designing and fabricating ICT. In response to these concerns, we have deleted the requirement that key surfaces be raised above their surroundings in the final rule. The provision in the final rule now simply requires input controls to be operable by touch and tactilely discernible without activation (proposed 407.3.1; final 407.3.1).

The proposed rule required alphabetic keys, where provided, to be arranged in a QWERTY layout, with the "f" and "j" keys tactilely distinct from the other keys. The provision further required that, where an alphabetic overlay was provided on numeric keys, the overlay must conform to the ITU-T Rec. E. 161. We received a number of comments from industry (three ICT companies and two ICT trade associations) raising concerns that some culture-dependent keyboards contained slight deviations from the strict "QWERTY" arrangement. The intent of this provision is to ensure that individuals who are blind have a point of orientation when encountering an unfamiliar device that uses alphabetic key entry. We have determined that QWERTY key arrangement, commonly used by touch typists, is the best for this purpose. However, in response to comments, we changed the reference for the required keyboard layout from "QWERTY" to "QWERTY-based" keyboards, which provides enough flexibility to be applied for settings where English is not the preferred language (proposed 407.3.2; final 407.3.2).

The proposed rule also included a provision on numeric keys, in addition to the provision on alphabetic keys discussed above. One commenter objected to the language of the provisions in the proposed rule and discussed the difficulty of requiring the "f" and "j" keys to be tactually discernable when a numeric keyboard is used for alphabetic key entry. We reviewed the language of the two provisions and saw that while the proposed provision had one sentence addressing use of alphabetic keys and a second sentence addressing the use of an alphabetic overlay on a numeric keyboard for alphabetic key entry, it was confusing. To clarify this distinction, in the final rule we have moved the requirement for alphabetic overlay for numeric keys from the provision on alphabetic keys to the associated provision on numeric keys (proposed 407.3.2 and 407.3.3; final 407.3.2 and 407.3.3).

The proposed rule had a provision requiring a fixed or adjustable key repeat rate, when a keyboard had the key repeat feature. We received several comments from industry (an ICT trade association and an ICT company), suggesting that the provision was unnecessary since a comparable key repeat requirement was also proposed for software (proposed 502.4; final 502.4). The key repeat provision for hardware is found in the existing 508 Standards § 1194.23(k)(3) and we have determined that it continues to be useful for individuals with manual dexterity issues. We disagreed with the assertion by the commenters that a hardware provision for key repeat was unnecessary and could be adequately addressed solely by a provision addressing software. Accordingly, we made no change in the final rule (proposed 407.4; final 407.4).

The proposed rule included a provision related to timed responses, which proposed that a user be alerted visually, as well as by touch or sound, when a timed response was required. In addition, the user was to be provided the opportunity to request an extension of time to complete their response. We received several comments from industry (an ICT trade association and an ICT company), suggesting that the provision be deleted because a similar requirement was proposed for software (WCAG 2.0 Success Criterion 2.2.1 Timing Adjustable). The requirement for hardware to give the user the ability to extend the time for a response is found in the existing 508 Standards § 1194.22(p) and we have determined that this is an important feature for a number of users, including individuals

with manual dexterity issues, among others. We disagreed with the assertion by the commenters that a hardware provision for key repeat was unnecessary and could be adequately addressed solely by a provision addressing software. Accordingly, we made no change in the final rule (proposed 407.5; final 407).

The proposed rule had several requirements related to reach height which address how a user in a wheelchair can reach the operable parts of controls and keys of stationary ICT from a forward or side position. The NPRM was an expansion of requirements in the existing 508 Standards § 1194.25(j), which address only side approaches to stationary ICT, to include both forward and side approaches. These revisions add flexibility for users and for manufacturers and designers of ICT (proposed 407.12; final 407.8).

A commenter addressing this reach height asked whether a paper tray on a copier could be used as a reference point for the location of any controls. A paper tray is not used as a reference point in determining either the leading edge or reference plane of stationary ICT. Access to a paper tray is considered a maintenance function, so it is not addressed by the reach requirements. We have revised the language in the final rule to clarify that the operable parts requirements apply to “operable parts used in the normal operation of ICT” (proposed 407; final 407). Normal operation, such as using keys to input data or create content or operate ICT such as a multifunction copier, is different from maintenance functions, such as changing toner on a printer. Placing paper on the surface of a copier for making copies is considered normal operation. However, replacing paper in a paper tray is considered a maintenance function, not a normal daily operation, so access to a copier paper tray is not covered under this provision.

The NPRM proposed requirements for display screens on stationary ICT (proposed 408). In the preamble to the NPRM, we sought comment on whether to add a requirement that the viewing angle of display screens be adjustable. 80 FR 10880, 10919 (Feb. 27, 2015), question 23. In response to this question, eight commenters (two ICT trade association, three ICT companies, an accessible ICT services provider, a state/local agency, and an ICT subject matter expert) all recommended against adding a provision for a tilted display screen, citing concerns that the provision would be too prescriptive and would introduce maintenance and cost

issues to the upkeep of the ICT. In response to these comments, we have decided against adding such a provision to the final rule.

409 Status Indicators

The NPRM proposed that all status indicators should be visually discernible and discernible by either touch or sound. The provision contained examples of the types of controls or keys that should be discernible. A commenter (ICT company) found this approach confusing and asked whether discernibility was a feature that needed to be available all the time, or whether it only needed to be discernible when a change of status occurred. In response, the Board removed the reference to examples of types of controls and keys. We did not specify a limitation on when discernibility was required, but have determined that a single notification of a change of state is sufficient (proposed 407.6; final 409).

411 Audible Signals

The NPRM proposed that audio signaling shall not be used as the only means of conveying information, indicating and action, or prompting a response (proposed 407.8). We received comments from a coalition of disability rights organizations which strongly supported this provision. We also received a comment from an ICT company who expressed confusion as to the meaning of the term, “audio signaling.” In response to these comments, we have replaced the term “Audio Signaling” with “Audible Signals or Cues,” in the final rule. This section was elevated and renumbered from a sub-provision in the proposed rule.

412 ICT With Two-Way Communication

In the proposed rule, this section contained provisions for Real-Time Text Functionality (proposed 410.6). Those provisions are now reserved, pending the outcome of rulemaking by the Federal Communications Commission (FCC) as discussed in Section III.D (Major Issues—Real-Time Text). The majority of the remaining provisions in this section address features of two-way communication such as volume gain, minimized interference, and magnetic coupling. There were numerous comments on this section, resulting in the edits discussed below.

In the proposed rule, the Board referenced FCC regulations at 47 CFR 68.317 in anticipation of a pending rulemaking by the FCC on volume control covering all types of

communication technology that provides two-way voice communication, to facilitate hearing aid compatibility (proposed 410.2). Currently 47 CFR 68.317 only addresses volume gain for analog and digital wireline telephones. As noted by several commenters from ICT trade associations, it does not address volume gain for wireless devices (e.g., mobile phones). We have amended the provisions on volume gain to distinguish between volume gain requirements for wireline telephones and non-wireline devices. The Board will consider further updates to these requirements at such time as the FCC completes its rulemaking on this issue.

The proposed rule contained two separate provisions addressing magnetic coupling and minimizing interference (proposed 410.3 and 410.4). We received two comments, one from an ICT trade association and one from a coalition of disability rights organizations, urging that the two provisions be combined since they address related features of ICT with two-way voice common to wireless or wireline devices. The ICT trade association stated that the phrase “to the lowest extent possible” was too subjective and should be removed, leaving the citation to the referenced standard in the provisions. In the final rule, the requirements for magnetic coupling and minimizing interference have been combined into a single provision that clarifies that, where ICT delivers output by a handset or other audio transducer that is typically held to the ear, it shall reduce interference with hearing technologies and provide a means for effective magnetic wireless coupling (final 412.3).

One commenter from an ICT trade association recommended that the Board reference the European standard ETSI ES 200 381–2 in addition to ANSI C63.19–2011 to address minimized interference on wireless handsets. We have reviewed ETSI ES 200 381–2 and determined that it covers only a subset of the frequency ranges covered by ANSI C63.19–2011, because it has a smaller operating range for devices (698 MHz to 3 GHz) compared to ANSI C63.19–2011 (698 MHz to 6 GHz). If the ETSI standard were applied by this rule, manufacturers of devices currently producing products with the broader ANSI frequency ranges could potentially reduce the ranges offered by the products, thereby reducing accessibility (proposed 410.4.1; final 412.3.1).

The NPRM included a proposed requirement for digital encoding of speech (proposed 410.5). In response to

comments from industry (ICT trade associations and an ICT company), we have updated the referenced standards cited for digital encoding of speech to the current versions, ITU-T Recommendation G.722.2 and IETF RFC 6716 (also known as the Opus Codec). In addition, we have deleted the exception because the updated standards address the technical basis for the exception, and therefore it is not needed (final 412.4).

414 Audio Description Processing Technologies

In response to a comment from an ICT trade association, we have revised this provision in the final rule to clarify that the standard referenced in this section, ATSC A/53 Digital Television Standard, Part 5 (2010) only applies to ICT in the form of digital television tuners. We added a separate provision to require that ICT other than digital television tuners provide audio description processing (proposed 412; final 414).

415 User Controls for Captions and Audio Description

The NPRM proposed that ICT provide user controls for the selection of captions in at least one location that is comparable in prominence to the location of user controls for volume. It further proposed that ICT provide user controls for selection of audio description in at least one location that is comparable in prominence to the location of controls for program selection. An exception was provided for devices for personal use, which were not required to comply with the proposed provision (proposed 413).

Commenters from a coalition of disability rights organizations strongly supported this requirement but expressed concern over the exception, fearing that the language “personal use” could be interpreted so broadly as to exempt many devices from coverage. Commenters from industry objected to the language “comparable in prominence” because they found it imprecise and incapable of being tested. They asked that we either define the term or remove it. Commenters from industry also objected to the requirement to provide a physical button arguing that it would significantly impact the design of hardware devices such as remote controls.

After review of the comments, we have revised the exception to make it available when captions and audio descriptions can be enabled through system-wide platform settings. We further revised the requirement for caption selection to state that where

operable parts are provided for volume control, ICT shall also provide operable parts for caption selection. The requirement for selection of audio description was likewise revised to state that where ICT provides operable parts for program selection, it shall also provide operable parts for the selection of audio description. We have concluded that these changes will provide users of captions and audio description with comparable access to those controls, without being overly prescriptive of technological solutions (final 415).

G. Chapter 5: Software

Chapter 5 contains the technical requirements for programs, procedures, rules, and computerized code that directs the use and operation of ICT, and instruct ICT to perform a given task or function. Software includes applications (including mobile apps) and operating systems, as well as processes that transform or operate on information and data. The NPRM proposed that software with a user interface, including client-side and Web applications conform to WCAG 2.0 Level AA. We have retained this requirement in the final rule. Traditional client-side software must also conform to final 502 and 503. Software, including Web applications, that are authoring tools must conform to the requirements of final 504.

Many commenters expressed concern with the complexity of the proposed rule. They urged us to adopt WCAG 2.0, and only WCAG 2.0, as the complete and sufficient set of accessibility requirements for software. Chapter 2 of the final rule incorporates WCAG 2.0 Level AA into the software requirements, and while some of what Chapter 5 requires is parallel or redundant to WCAG 2.0 Success Criteria, Chapter 5 includes requirements that go beyond WCAG 2.0, provide additional detail, or parallels those of the existing 508 Standards. The authors of WCAG 2.0 were informed by the existing 508 Standards, but since WCAG 2.0 only addresses Web content, it has natural technical limitations with its scope. Most subject experts agree that there would be a significant accessibility gap if software were only bound to Success Criteria from WCAG 2.0, and the requirements of this chapter address that gap. Accordingly, no change was made in this approach from the proposed rule to the final rule.

A state/local agency asked why the Board was not making additional references to technology standards, and asked specifically about WAI-ARIA, ATAG 2.0, and UAAG 2.0, and EPUB3.

The Board agrees that these are all useful resources, but as discussed below, we have concluded that these additional standards are too detailed and prescriptive as compared to what is being addressed with our Revised 508 Standards and 255 Guidelines.

WAI-ARIA 1.0 (Accessible Rich Internet Applications 1.0, Mar. 20, 2014, <http://w3.org/TR/2014/REC-wai-aria-20140320>) is a completed W3C® Recommendation but WAI-ARIA 1.1 is still under development and we cannot cite it until it is formally completed. (Accessible Rich Internet Applications 1.1 Working Draft, July 21, 2016, <http://w3.org/TR/wai-aria-1.1>). It contains specifications for Web technologies like HTML5, SVG, and Ajax (short for asynchronous JavaScript and XML). WAI-ARIA can be used to create Web applications that conform to WCAG, but is not required for WCAG conformance. WAI-ARIA is a valuable specification, but the technology it addresses is too narrow for our Standards and Guidelines to require its use at this time.

Authoring Tool Accessibility Guidelines (ATAG) 2.0 is a completed W3C® Recommendation. (ATAG 2.0, Sept. 24, 2015, <http://w3.org/TR/ATAG20>). The Board relied on ATAG 2.0 in developing the requirements for authoring tools included in Revised 508 Standards and 255 Guidelines (proposed 504; final 504). Since ATAG 2.0 applies to software, many of its requirements are redundant to our requirements in 502 and 503. ATAG 2.0 is very narrowly focused on Web content and is very prescriptive. For these reasons, and because of the limited use of ATAG 2.0 in the Federal sphere, the Board has declined to reference it. We have worked to ensure that there are not any conflicts between our requirements and ATAG 2.0. Authoring tools that provide Level AA conformance to ATAG 2.0 will conform to these Standards and Guidelines.

User Agent Accessibility Guidelines (UAAG) 2.0 was published as a “working group note” and there are no plans to move it forward as a W3C® Recommendation. (UAAG 2.0, Dec. 15, 2015, <http://w3.org/TR/UAAG20>). This last step would be necessary for it to be characterized as an industry consensus standard so it is not appropriate to reference at this time. As an accessibility metric for certain types of software (*i.e.*, Web browsers, media players, document readers and other applications that render Web content), UAAG 2.0 does not have any conflicts with the requirements of these Revised 508 Standards and 255 Guidelines.

EPUB® is the distribution and interchange format standard for digital

publications and documents based on open Web standards, and EPUB 3.0.1 is the current and stable version of the EPUB standard. *See* EPUB 3.0.1, International Digital Publishing Form, <http://idpf.org/epub/301> (last visited Aug. 23, 2016). EPUB3 is an excellent file format for electronic documents and accessibility features were integrated throughout in the development of the specification. There are several popular (and accessible) platforms for reading EPUB3 content, but the software currently available for interactively editing EPUB3 content is limited. The EPUB3 format is fundamentally accessible; however, it is possible to create content that technically is in the EPUB3 file format, but not sufficiently accessible. One example would be an EPUB3 file with poor quality alternative text associated with images. WCAG 2.0 Level AA provides an appropriate rubric for assessing the accessibility of EPUB3 documents and this rule would not gain substantively from a reference to EPUB3.

501 General

As with the other chapters, Chapter 5 begins with a reference back to the scoping provisions. We heard from several commenters that people unfamiliar with standards might miss the incorporation by reference of WCAG 2.0 and that they, and others, prefer the formatting approach used by EN 301 549 where the WCAG 2.0 Success Criteria are restated as needed for each section. These commenters were concerned that the provisions of Chapter 5 were all that a software developer might pay attention to. The Board is preparing advisory material to this effect to help users of this rule avoid that oversight.

An ICT company and an ICT trade association urged the Board to modify the exception for Web applications from technical requirements in Chapter 5, which is conditional on those Web applications being fully conformant with WCAG 2.0 Level AA. These commenters urged the Board to exempt all Web applications from proposed sections 502 and 503, regardless of conformance with WCAG 2.0. They reasoned that for non-conformant Web applications, complying with these sections would not necessarily address the non-compliant aspect of the application and would introduce additional testing and compliance issues. Their position is that a conformity assessment against WCAG 2.0, perhaps using a format similar to the current Voluntary Product Accessibility Template® developed by the Information Technology Industry

Council, is complete and sufficient for a Web application, so also assessing against final sections 502 and 503 would be superfluous or even onerous. One commenter gave the example of Web software missing a single text equivalent and thus being subject to the requirements of Chapter 5.

The Board supports having a single conformance model for accessible Web applications and agrees that WCAG 2.0 Level AA is generally sufficient for assessing the accessibility of Web applications. The value of a single unified standard for the accessibility of Web content outweighs the value of additional requirements particular only to certain kinds of Web applications.

However, we have declined to extend an absolute exception from the requirements of Chapter 5 for Web applications without regard to their conformance to WCAG 2.0. The Board recognizes that in some cases, reviewing those non-conforming Web applications against 502 and 503 would not identify additional accessibility concerns. In other cases, a Web application's failing against a particular WCAG 2.0 requirement, for example Success Criteria 4.1.1 Parsing, will have accessibility issues mitigated by addressing requirements from 502 and 503. Therefore, the Board has retained the exception as only being applicable to Web applications that meet WCAG 2.0 Level AA.

In addition, we have narrowed the exception to Web applications that are not isolated from the operating system or the platform they run on. During its examination of this exception, the Board became concerned that certain Web applications that had access to platform accessibility services (and which conformed to WCAG 2.0) were not always compatible with certain assistive technology (such as screen reading software). We concluded that the Exception to 501.1 should be somewhat narrowed from that of the proposed rule, to exclude only Web applications that do not have access to platform accessibility services. This qualification is important because major developers are working hard to make the distinction between desktop and Web applications less apparent to the end-user. As this class of Web applications mature, it is reasonable to anticipate that they might gain the ability to use the accessibility features of the underlining platform they run on. Accordingly, the 501.1 Exception has been changed in the final rule to only be for those Web applications that conform to WCAG 2.0 Level AA and do not have access to platform accessibility

services (directly or through included components).

An ICT company and an ICT trade association disagreed with inclusion of Exception 2 in proposed 501.1, which proposed to exempt assistive technology from the technical requirements in Chapter 5 when assistive technology supports platform accessibility services. These commenters asserted that assistive technology software should be held to the same requirements as mainstream software, and further recommended that the Board adopt an approach similar to EN 301 549, which does not distinguish between assistive technology and other software, and imposes additional requirements on assistive technology.

The purpose of Section 508 is to provide people with disabilities comparable access to ICT. Having additional requirements for assistive technology, or even just holding assistive technology to the same technical requirements as mainstream software, can be counter-productive to that purpose. For example, requiring an on-screen keyboard that is used by a sighted switch user to also be compatible with screen reading software could impose technical challenges that would decrease its utility or pose a barrier to product development. The Board does not want the 508 Standards to create an impediment to Federal agencies procuring assistive technology they need for their employees with disabilities. However, we are aware that in order for mainstream software to work with all assistive technology, the assistive technology must use the accessibility services of the platform. We have retained this requirement as the basis on which assistive technology can obtain the exception from the requirements of Chapter 5. The exception for assistive technology was moved from Chapter 5 to Chapter 2 (final E207.1; E207.2; C205.1; and C205.2) to better ensure that assistive technology developers would not be asked for unnecessary conformity assessment reviews.

502 Interoperability With Assistive Technology

The NPRM proposed that users have control over documented accessibility features (proposed 502.2.1) and that software not disrupt documented accessibility features (proposed 5.2.2.2). An ICT company and an ICT trade association recommended adding an exception to this latter requirement for "when requested to do so by the user during the operation of the software."

We have not changed the requirement from the proposed rule. The suggested

edit is not necessary since if the user is changing the setting, then the accessibility feature could not be reasonably characterized as having been disrupted. User selection and control of accessibility features is not the same as disrupting the accessibility features. If an agency were to disable platform settings that provide accessibility (thereby violating 502.2.2) then the agency would have the responsibility under 508 for demonstrating equivalent facilitation. This is similar to causing software to be closed to the addition of assistive technology, changing the nature of the platform to be functionally indistinguishable from closed hardware, and the requirements of 402 would be applicable.

The NPRM proposed that platform developers provide accessibility services (proposed 5.2.3) and the sub-provisions listed the requirements for software running on those platforms. The Board has changed the phrasing of 502.3 in the final rule to be more consistent with other parts of the rule but the requirements are fundamentally the same as with the proposed rule. As discussed above in Section IV.A. (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 1: Application and Administration—E103.4), in the final rule we have added a definition for “software tools” which is software used for developing software. We also made editorial changes based on input from commenters.

The sub-provisions of 502.3 come from the existing 508 Standards and other accessibility standards and specify details that the Board concluded are important for software accessibility. The authors of WCAG 2.0 included requirements from § 1194.21 of the existing 508 Standards where they could (for example, an explicit requirement for keyboard accessibility is in WCAG 2.0 but was not in WCAG 1.0), but some requirements are not applicable to all technologies and therefore are not explicit in WCAG 2.0. For example, the requirement for row and column headers of data tables to be programmatically determinable (final 502.3.3) is explicit in the existing 508 Standards, and is in WCAG 1.0, but not explicit in WCAG 2.0 because WCAG 2.0 is written to be technology neutral. The Board’s approach in the final rule is consistent with EN 301 549 and other standards for software accessibility.

The numbering of sub-provisions in 502.3 of the final rule has been changed significantly from the proposed rule. Commenters requested that programmatically determinable object

details be separated from the requirement to set or change that object information, values, text, and other details. The proposed rule had nine sub-provisions under proposed 502.3 whereas the final rule now has fourteen, but the requirements are substantially unchanged. Another commenter suggestion was to clarify that by “table” we meant “data table,” so the Board has made that explicit in the final rule.

There was a recommendation from a disability advocacy organization that the event notification provision “should be made to assure that a screen reader can retain control of the reading cursor” but did not offer a specific text change. As part of renumbering and separating the requirements, we have added a separate requirement for modification of focus cursor (final 502.3.13) which addresses this commenter’s concern. An ICT company and an ICT trade association recommended adding a requirement to this section, “Execution of Available Actions.” The proposed rule contained an equivalent requirement (the second of two sentences in proposed 502.3.7) and in the final rule it is a separately numbered provision (final 502.3.11) requiring that: “Applications shall allow assistive technology to programmatically execute available actions on objects.” This provision is intended to address scenarios such as when a person is using screen reading software and encounters a button control with four options. The person should not only hear the description of the control, but also be able to select any one of those four options through the usual keystrokes used with the screen reading software.

Section 502.4 in the final rule is unchanged from the proposed rule. It lists seven requirements from ANSI/HFES 200.2, Human Factors Engineering of Software User Interfaces. In the NPRM preamble the Board asked if the cost was excessive or if there was another authoritative standard we could use. An ICT company and an ICT trade association confirmed the resource as being unique. These two commenters and a Federal agency characterized the standard as relatively expensive and asked if the Board could instead excerpt the seven cited requirements in full. As noted in the preamble to the proposed rule, the seven cited requirements mostly predate the existing 508 Standards and are common features of operating systems. For people familiar with accessibility features, the requirements are readily apparent just from the titles cited in the final rule. Therefore, the final rule retains a reference to the ANSI/HFES 200.2 standard.

One ICT company recommended adding some additional requirements for assistive technology interoperability that parallel clauses 11.3.2.2 and 11.3.2.3 in EN 301 549. The Board declines to follow this recommendation as we have determined that 502.3 in the final rule already contains equivalent technical requirements for assistive technology interoperability, and is simpler and more practical to apply relative to the EN approach, without compromising accessibility.

503 Applications

The proposed rule included a general requirement that applications must permit users to set their preferences from platform settings for color, contrast, font type, and focus cursor (proposed 503.2). For example, a user with low vision might want the default windowing scheme to use yellow on black text with an 18 point sans-serif font. An exception to this provision exempts applications that are designed to be isolated from their underlying platform software (such as Web applications) from this requirement. We received several comments (from individuals, a disability advocacy organization, and an accessibility ICT services provider) concerning the scope of the exception. These commenters acknowledged that certain technologies (such as Adobe® Flash®) were properly exempted, but thought that the exception was otherwise overbroad by sweeping in other types of Web applications (which were unspecified). More generally, some of these commenters also suggested that the Board broaden 503.2 so that the requirement for pass-through of user preferences apply to Web content, as well as applications.

With respect to commenters’ suggestion of overbreadth, the Board declines to revise the exception to apply only to certain types of Web applications. We are aware of no discernible basis for differentiating between Web applications that do and do not warrant the exception, nor did commenters offer any such criteria. It is not technically feasible to require Web applications to use platform preferences because generally the developer of a Web application has no way of knowing what font characteristics a reader will be using for text in windows of their operating system. Applications, including Web applications, which qualify for the exception to use platform settings are still subject to the other requirements of Chapter 5, including the requirements referenced by WCAG 2.0 Level AA.

Likewise, the Board finds commenters' suggestion that the scope of proposed 502.3 be broadened to include Web content to be misplaced. Section 502.3 in the final rule, as with all of Chapter 5, addresses technical requirements for accessibility of software, not Web content. In any event, requiring Web content to meet requirements for pass-through of user preferences would face the same technical challenges as Web applications.

504 Authoring Tools

This section contains additional requirements for software used to create and edit content and documents. The major substantive change from the proposed rule is the addition of a new requirement (final 504.2.2) that authoring tools capable of creating full-featured PDFs (that is, a PDF that conforms to PDF 1.7, also known as ISO 32000-1) must also support creating PDFs conforming to PDF/UA-1. PDF/UA-1 is an extension to PDF 1.7, meaning that PDF/UA-1 is only applicable to PDFs that already conform to PDF 1.7.

Based on comments from a standards developing organization, an ICT trade association, and an ICT company, we have made some editorial changes to proposed sections 504.2, 504.3, and 504.4 for the final rule. For example, "all features and formats" in the proposed rule have been changed to "all supported features and, as applicable, to file formats" in the final rule, to clarify that the limitations of the file formats be taken into consideration.

A disability advocacy organization commented that the accessibility features should be turned on by default, but the Board has decided that would be overly prescriptive. In addition, such a requirement could interfere with automated testing of content for accessibility features. For example, it is significantly easier to identify missing alternative text (as an error) than it is to test for overuse of placeholder or default alternative text. In response to requests from commenters, the Board also plans to incorporate examples from EN 301 549 into forthcoming technical assistance materials.

The NPRM proposed that authoring tools prompt authors to create content that conforms to WCAG 2.0 Level AA, and went on to specify that the tools should provide the option for prompts during initial content creation or when the content is saved (proposed 5.4.3). Based on a commenter observation that accessibility features might best be addressed in the middle of a document workflow process, the last sentence

from proposed 504.3 has been deleted in the final rule. The Board agrees that prompts and conformance checks can be performed at any point, not just upon content creation or when saving a file.

H. Chapter 6: Support Documentation and Services

601 General

Chapter 6 contains accessibility requirements for ICT support documentation and services. This section requires support services such as help desks, call centers, training services, and automated self-service technical support systems that provide documentation addressing accessibility and compatibility features available in accessible formats. We received multiple comments on the application of the PDF/UA-1 standard to electronic support documentation under proposed 602.3. Those comments are discussed in Section III.C. (Major Issues—Incorporation by Reference of PDF/UA-1). Additionally, we received a few comments on some of the other proposed provisions of Chapter 6, which are discussed below.

602 Support Documentation

The NPRM proposed a provision addressing alternate formats for non-electronic support documentation for people who are blind or have low vision (proposed 602.4). The Board received two comments on this provision, one from a state/local agency, and another from a disability advocacy organization. Both commenters asked that we broaden the application of proposed 602.4 to clarify that alternate formats must be provided to any requester with a disability, not just individuals who are blind or have low vision. The Board concurs with this and has amended 602.4 to require alternate formats usable by "individuals with disabilities." The intent of this provision is to address the needs of individuals whose disability makes it difficult to use hardcopy materials. Examples of such disabilities include blindness, low vision, fine motor impairments, and limited cognitive, language and learning abilities.

We received an additional comment from a disability advocacy organization requesting that a notification of the availability of alternate formats be prominently displayed, and that the alternate format provided be that of the requestor's choosing. The final rule requires that support documentation be provided on request in alternate formats usable by individuals with disabilities. We do not agree that mandating a particular placement for notification of

this is necessary. In addition, the Board does not find that it is reasonable to require manufacturers and government agencies to create alternate documentation in every format requested. We anticipate that most manufacturers and agencies will provide accessible softcopy to those that need it, but manufacturers are also permitted the flexibility to instead provide non-electronic support documentation in formats such as large print and braille if they choose to do so. We have concluded that the language of the final rule adequately ensures that alternate formats of electronic support documentation will be made available to individuals who need them, without overburdening manufacturers and government agencies.

603 Support Services

Three commenters discussed the proposed provision regarding support services to include information on accessibility and compatibility features of ICT (proposed 603.2). One commenter was a self-identified individual with a learning disability, one was an accessible ICT services provider, and one was a disability advocacy organization. All three commenters suggested that the Board add language to the provision mandating continuing education for personnel who staff help desks. The Board understands the concern, but declines to add the suggested language as it is overly prescriptive. We intend to provide technical assistance after the final rule has been promulgated that will address training programs as an example of a best practice in complying with this provision. Therefore, this provision is unchanged in the final rule.

I. Chapter 7: Referenced Standards

This new chapter, which provides a centralized IBR section for standards referenced in the Revised 508 Standards or Revised 255 Guidelines, was added to the final rule to comply with OFR regulations that govern incorporations by reference into the **Federal Register**. See 1 CFR part 51. This reorganization does not alter or change in any way the underlying application of the ten referenced standards in the revised standards and guidelines. Each of these standards is still referenced and apply to the prescribed extent specified in the respective IBR provisions. Chapter 7, in effect, simply streamlines the final rule by combining the respective IBR provisions of the Revised 508 Standards and 255 Guidelines into one consolidated IBR section.

With respect to the NPRM's proposed IBR under Section 508, a number of

commenters provided input on the proposed referenced standards. Several commenters raised concerns about the specific technical application of certain standards proposed for incorporation. These comments are addressed above in the applicable parts of Section III (Major Issues) and Section IV (Summary of Comments and Responses on Other Aspects of the Proposed Rule).

In addition, several commenters suggested that the Access Board reference other, additional standards in the updated 508 Standards. While several of the suggested standards serve as useful resources, the Board has determined that their incorporation into the standards is not necessary. With the exception of EN 301 549 (which is addressed below), the Board's bases for declining the suggested reference of additional standards are discussed above in Section IV.G (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 5: Software).

Of the 32 commenters mentioned above, 22 addressed the potential incorporation by reference of EN 301 549. Five commenters (three ICT companies and two ICT trade associations) suggested that the Access Board reference EN 301 549 as the sole technical standard for accessibility, or, at the very least, deem conformance with EN 301 549 as compliance with the Revised 508 Standards. These commenters made their recommendations in the interest of harmonization and, as one commenter put it, “promoting broader commercialization of accessible ICT systems.” In contrast, one commenter (an international disability advocacy organization) applauded the proposed rule as an improvement on several aspects of EN 301 549. This commenter also noted that, after publication of this final rule, EN 301 549 might well be revised to meet the higher (and, for some areas, more specific) accessibility requirements in the Revised 508 Standards.

For several important reasons, we decline to follow some commenters' suggestion that the Access Board incorporate by reference EN 301 549 into the final rule (or otherwise deem conformance with this European specification to be compliance with Section 508). In sum, EN 301 549 was not developed using a voluntary consensus process, which makes this specification unripe for incorporation by reference into Federal regulations. Moreover, even assuming that EN 301 549 was an appropriate standard for incorporation by reference, reference in the Revised 508 Standards would be

both unnecessary (*e.g.*, due to the high degree of harmonization between the Standards and the European specification) and contrary to law (*e.g.*, certain EN 301 549 provisions failing to provide sufficient accessibility under Section 508). Each of these considerations are discussed below.

First, EN 301 549 cannot be incorporated by referenced in the final rule because this European specification was not adopted through the requisite voluntary consensus standard development process. Under section 12(d) of the National Technology Transfer and Advancement Act of 1995 (codified at 15 U.S.C. 272 note) (NTTAA), Federal agencies are directed to use technical standards developed by voluntary consensus standards bodies (as opposed to government-unique standards) when carrying out their regulatory functions unless doing so would be inconsistent with applicable law or otherwise impractical. OMB Circular A-119, which provides Federal agencies with interpretive guidance on the NTTAA, specifies that standards must be developed under processes that feature five enumerated characteristics to be deemed “voluntary consensus standards” (*i.e.*, openness, balance, due process, appeals process, and consensus). *See* OMB, Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities §§ 2(d)–(e) (revised Jan. 27, 2016).

EN 301 549, however, was not developed under such a process. Mandate 376, which was issued by the European Commission and tasked the European standardization bodies (*i.e.*, CEN, CENELEC, and ETSI) with development of a harmonized set of functional accessibility requirements for publicly-procured ICT, did not require use of a voluntary consensus process; instead, this mandate merely provided that CEN/CENELEC/ETSI “shall work in close cooperation with relevant stakeholders” when developing the European procurement specification that became EN 301 549. *See* European Commission, Mandate 376 § 4 (Dec. 7, 2005), available at http://www.etsi.org/WebSite/document/aboutETSI/EC_Mandates/m376en.pdf. Additionally, while there was public input during the development of EN 301 549 by various stakeholders (including ICT industry representatives and some consumer groups), it does not appear that the process was sufficiently open or balanced to satisfy the requirements of Circular A-119. *See, e.g.*, ACT NOW! EDF Position on the European Standard on Accessibility Requirements for

Public Procurement of ICT, EASPD, <http://www.easpd.eu/en/content/act-now-edf-position-european-standard-accessibility-requirements-suitable-public> (last accessed Aug. 23, 2016) (noting concern that interests of persons with disabilities were not sufficiently represented during the development of EN 301 549 due to non-voting status of disability rights organizations); VVA Europe Ltd., European Association for the Coordination of Consumers Representation in Standardisation (ANEC), *Preliminary Study on Benefits of Consumer Participation in Standardisation to All Stakeholders* 45–52 (Nov. 13, 2014), available at <http://www.anec.eu/attachments/ANEC-R&T-2014-SC-006.pdf> (noting similar concerns with respect to consumer groups). Thus, while EN 301 549 represents an important step towards a more accessible ICT environment and serves as a meaningful set of technical specifications for public procurements of ICT in the European Union, it is not a voluntary consensus standard within the meaning of Circular A-119.

Moreover, even assuming that EN 301 549 was appropriate for incorporation by reference into the Revised 508 Standards, there is already broad harmonization between EN 301 549 and the final rule. As noted in prior preamble sections summarizing key aspects of the final rule and describing its rulemaking history, the timelines for development of the Revised 508 Standards and EN 301 549 largely overlapped; consequently, there was considerable coordination amongst the Federal entities (Section 508) and private organizations (CEN/CENELEC/ETSI) working on their respective technical accessibility standards for public ICT procurements. *See* Sections I.B.3 (Executive Summary—Summary of Key Provisions—Harmonization with International Standards) & II.F (Rulemaking History—Harmonization with European Activities).

Harmonization with international standards has been a guiding principle for this rulemaking from its earliest stages. For example, TEITAC Advisory Committee included several international representatives (including, notably, the European Commission), recognized the importance of standardization across markets worldwide, and coordinated its work with standard-setting bodies in the U.S. and abroad. *See* II.B (Rulemaking History—TEITAC Advisory Committee 2006–2008) (summarizing TEITAC Advisory Committee deliberations and report). Moreover, in the 2011 ANPRM, the Access Board expressly noted the standardization work going on in

Europe at the time. *See* 76 FR at 76642, 76644–45. Indeed, one of the Access Board's primary reasons for issuing a second ANPRM in 2011 was to afford the Joint Working Group on eAccessibility³ and the European Commission an opportunity to see the Board's progress and to promote harmonization. *Id.* at 76642. Consequently, EN 301 549—which was initially finalized in 2014—was largely harmonized with the Board's 2011 ANPRM. *Compare, e.g.,* ETSI, EN 301 549 V1.1.1 (2014–02) with U.S. Access Board, 2011 ANPRM, Draft Updated ICT Standards and Guidelines, *available at* <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/draft-rule-2011>; *see also* ETSI, EN 301 549 V1.1.2 (2015–04).

Harmonization, however, does not necessarily mean that the technical requirements for accessibility are exactly the same as between the final rule and EN 301 549. Rather, harmonization exists when the two sets of technical specifications are complimentary, in the sense that compliance with each can be achieved simultaneously without conflict. The Access Board evaluated EN 301 549 on a provision-by-provision and has determined that there are no conflicts between the technical requirements in the final rule and those specified in EN 301 549. However, we also concluded that, in some situations, EN 301 549 does not provide sufficient accessibility.⁴ This conclusion was also shared by several NPRM comments, principally European disability rights organizations. These commenters urged the Board to “stick to its proposal,” especially in relation to requirements for functional performance criteria, real-time text interoperability, and wideband audio. These commenters not only

applauded the proposed rule's high level of harmonization achieved with EN 301 549, but also expressed hope that the European specification would be revised at a future date to conform to the clearer requirements in, and higher levels of accessibility achieved by, the proposed rule.

Lastly, in any event, reference to EN 301 549 would be premature at this time because the specification is still likely to undergo revision after publication of the final rule. In December 2015, the CEN/CENELEC/ETSI Joint Working Group on eAccessibility met and concluded that “[a]t this moment there is consensus within [the Joint Working Group] on the need to revise EN 301 549 as soon as possible, with the aim to improve the document and to harmonize it with the next version of Section 508 as soon as [it] is public.” European Joint Working Group on eAccessibility, Draft Minutes 9th eAcc Meeting 7 (Dec. 10, 2015), <http://www.itu.int/en/ITU-T/jca/ahf/Documents/Doc%20219.pdf>.

For the foregoing reasons, the Access Board declines to reference EN 301 549 in the Revised 508 Standards or otherwise state that conformance with EN 301 549 equates to compliance with the final rule. The Revised 508 Standards' requirements closely track the EN 301 549 phrasing where appropriate. In places where the Revised 508 Standards diverge from EN 301 549, the Board has done so deliberately because it finds that other technical requirements provide better accessibility. The Board anticipates providing technical assistance materials on its Web site to assist product manufacturers with mapping EN 301 549 requirements to the Revised 508 Standards and vice versa.

Additionally, several NPRM commenters pointed out to the Access Board that some of the specific editions of the standards proposed for IBR in the NPRM had been supplanted by newer editions or versions. For example, commenters noted that there were newer versions of ITU–T Recommendation G.722 and TIA 1083, which were respectively referenced in proposed E102.7.1 and E102.8.2. One commenter also recommended the Opus Codec (IETF RFC 6716) as a modern industry consensus standard for digital audio compression that has merits similar to ITU–T Recommendation G.722.2. We concur with commenters and, in the final rule, the Board has updated the references in 702.7.2 to ITU–T Recommendation G.722.2, as well as the reference in 702.9.1 to TIA–1083–B. We also have added the Opus Codec as one of the referenced standards for digitally encoding speech

in 412.4 of the final rule. (Incorporation of this standard appears at 702.8.1.)

We also made several other “housekeeping”-type changes to the standards referenced in the final rule. For example, because the Access Board is not addressing Real-Time Text at this time, *see* discussion above Section III.D (Major Issues—Real-Time Text), we have deleted the RTT-related references to TIA 825–A and IETF RFC 4103. In addition, because the final rule specifies requirements for characters on variable message signs (402.5) *see* Section IV.G (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 4: Hardware), we have added a reference to ICC A117.1–2009 (Accessible and Usable Buildings and Facilities) in Chapter 7. Finally, we rearranged the list of referenced standards in Chapter 7 by alphabetical order of publisher name (rather than publisher acronym), which resulted in the reordering of some standards.

Finally, two commenters (an open government non-profit organization and an accessible ICT services provider) objected to the Access Board's incorporation by reference of any voluntary consensus standard that are was not available to the public free of charge on the ground that such standards were not “reasonably available.” While the Access Board agrees that making referenced standards reasonably available to interested parties is required under both Federal administrative law and regulation, *see* 5 U.S.C 552(a); 1 CFR part 51, we strongly disagree with their contention that the standards referenced in the final rule do not collectively meet this standard. Prior to publication of the final rule, Access Board staff worked with the standards developing organizations (SDOs) to ensure that versions of the referenced standards were, to the greatest extent possible, available to the general public either without charge or at a reduced rate. *See* discussion *infra* Section V.G (Regulatory Process Matters—Availability of Materials Incorporated by Reference). As a result, nine of the ten standards incorporated by reference into the final rule will be available online free of charge, either because the standards developing organization makes the standard freely available on its Web site or a read-only copy of the standard will be made available on one or more SDO's online standards portal. *Id.* The only exception is TIA–1083–B, which is referenced in 412.3.2 and 702.9.1. In discussions with Access Board staff, the SDO (Telecommunications Industry Association) declined to make a read-only version of this standard available

³ The Joint Working Group on eAccessibility consists of the three European Standardization Organizations, CEN, CENELEC and ETSI.

⁴ For example, the final rule and EN 301 549 vary significantly in their respective levels of specificity of technical requirements for ICT with closed functionality. In EN 301 549, the requirements for software with closed functionality are a subset of the requirements for software that does not have closed functionality (*compare, e.g.,* EN 301 549 Clause 11.2.2 with EN 301 549 11.2.1) and, as such, they fail to offer technical criteria that adequately and unambiguously address closed functionality. The only affirmative requirement for such ICT in EN 301 549 is that it be operable without the use of assistive technology (Clause 5.1.2.2), which is essentially the definition of closed functionality. EN 301 549 does not require ICT with closed functionality to be speech output enabled (*cf.* Clause 5.1.3.1), which is critical for persons with limited vision. The final rule, on the other hand, affirmatively requires ICT with closed to have this critical functionality. *See* 402.2 (Speech-Output Enabled).

online. Nonetheless, TIA-1083-B is still reasonably available by purchase (*i.e.*, publisher or online standards store) or personal inspection without charge at the offices of either the Access Board or the National Archives and Records Administration. *See id.*; *see also* 702.9 (providing information on obtaining standard from publisher).

J. Revised 508 Standards: Compliance and Effective Dates

In the NPRM, the Board noted that it was considering making the Revised 508 Standards effective six months after publication in the **Federal Register**. The Board also noted it was considering deferring to the Federal Acquisition Regulatory Council (FAR Council) to establish the effective date for application of the Revised 508 Standards to new ICT contracts awarded after publication of the FAR Council's final rule, as well as existing ICT contracts with award dates that precede that final rule.

The Board received 11 comments regarding the compliance date (seven from ICT companies and trade associations, two from state/local governments, one from a Federal agency, and one from an individual). Most of the commenters supported the Board's proposal to defer to the FAR Council for establishing the compliance date for new and existing ICT contracts. However, a few of the commenters also requested more than the six-month delay suggested in the NPRM for application of the Revised 508 Standards to ICT other than procurements. These commenters asserted that a six-month delay was too short given the amount of potential remediation required for legacy technology and content, and the limited availability of resources to effect the changes.

As noted in Section IV.A (Summary of Comments and Responses on Other Aspects of the Proposed Rule—508 Chapter 2: Scoping Requirements), the Board has incorporated a safe harbor into the Revised 508 Standards (E202.2) that, generally speaking, exempts unaltered, existing (legacy) ICT from having to upgrade or modify to conform to the Revised 508 standards. The Access Board expects that the addition of this safe harbor provision in the final rule substantially addresses some agencies' concerns about the potentially high cost of remediating currently-compliant legacy Web sites and other public-facing electronic content. In addition, to allow agencies to maximize planning and resources for timely compliance with the Revised 508 Standards, the Board has extended the

compliance date for the Revised 508 Standards from six months (as proposed in the ICT NPRM) to twelve months from the date of publication of the final rule. Prior to this date, agencies must continue to comply with the existing 508 Standards. For ease of reference, the existing 508 Standards have been republished as Appendix D to 36 CFR part 1194. (Note that, while the text of each provision provided in Appendix D remains identical to the existing 508 Standards, the numbering for each has been revised to conform to CFR publication requirements.)

This one-year compliance for the Revised 508 Standards is applicable to all ICT except that which is covered by the Federal Acquisition Regulations. The Board continues to defer to the FAR Council to establish the compliance date for new and existing ICT procurements subject to the Revised 508 Standards.

While the compliance date for the Revised 508 Standards is one year from the date of publication in the **Federal Register**, the overall effective date of the rule remains 60 days from publication. On the effective date of the rule, the existing 255 Guidelines will be replaced by the Revised 255 Guidelines, which may then be considered or adopted by the FCC pursuant to Section 255. Once the final rule is effective, the FAR Council within six months will incorporate the Revised 508 Standards into the FAR and establish an effective date for application of these revised regulations to new and existing procurements.

V. Regulatory Process Matters

A. Final Regulatory Impact Analysis

Executive Orders 13563 and 12866 direct agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Important goals of regulatory analyses are to (1) establish whether Federal regulation is necessary and justified to achieve a market failure or other social goal and (2) demonstrate that a range of reasonably feasible regulatory alternatives have been considered and that the most efficient and effective alternative has been selected. Executive Order 13563 also recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively those values that are difficult or impossible to

quantify, including equity, human dignity, fairness, and distributive impacts.

The Access Board contracted with an economic consulting firm, Econometrica, Inc. (Econometrica), to prepare a final regulatory impact analysis (FRIA) that assesses the likely benefits and costs of the Revised 508 Standards and 255 Guidelines. Expected benefits are evaluated and discussed and likely incremental costs for new or revised requirements are monetized for the projected 10-year regulatory timeframe. A complete copy of the final regulatory assessment is available on the Access Board's Web site (<https://www.access-board.gov/>), as well the Federal Government's online rulemaking portal (<https://www.regulations.gov/>).

1. Summary of Methodology, Revisions, and Overall Results

The Final RIA embodies a comprehensive benefit-cost analysis that assesses the incremental costs and benefits of the Revised 508 Standards and 255 Guidelines relative to a primary baseline. While the methodological framework and assumptions underlying the Final RIA largely mirror those used in the Preliminary RIA, the final regulatory assessment nonetheless does reflect some revisions that were aimed at incorporating more recent data, responding to public comments, or accounting for changes in scoping or technical requirements in the final rule. The Access Board believes that the resulting benefit and cost estimates in the Final RIA represent a reasonable measure of the likely effects of the final rule that can be quantified and monetized. However, some potentially significant benefits (and costs) from the Revised 508 Standards and 255 Guidelines could not be evaluated in the Final RIA due to lack of data or other methodological constraints. These unquantified benefits and costs are described qualitatively in the final regulatory assessment.

On the benefits side, the Final RIA monetizes benefits under the Revised 508 Standards attributable to, among other things, increased productivity of Federal employees who are expected to benefit from improved ICT accessibility, time savings to members of the public from more accessible Federal Web sites, and reduced call volumes to Federal agencies as individuals with disabilities shift their inquiries and transactions online due to improved online accessibility. In terms of benefit-side revisions reflected in the Final RIA, the beneficiary population has been modestly expanded. In order to evaluate

the impact of the new functional performance criteria addressed to limited cognitive abilities (section 302.9) and address public comments, the Final RIA adds individuals with learning and intellectual disabilities to the group of persons expected to experience monetizable benefits under the final rule (collectively referred to in the Final RIA as “addressable disabilities”). Additionally, in the Final RIA, estimates concerning time loss due to inaccessible Web sites—which factor into the benefits equation—were adjusted slightly downward for persons with vision-related disabilities and slightly upward for persons with other types of addressable disabilities. Assumptions relating to productivity benefits to Federal employees with vision disabilities from the Revised 508 Standards were also modestly increased. These adjustments to benefits assumptions were spurred by public comments and are supported by additional empirical research. *See* Final RIA, Section 6.

From the cost perspective, the Final RIA separately monetizes likely incremental compliance costs attributable to the Revised 508 Standards and 255 Guidelines. For Federal agencies, contractors, and vendors, estimated costs under the Revised 508 Standards include both in-house ICT (e.g., policy development, employee training, development of Web sites and electronic documents to ensure accessibility under revised standards), and procured ICT (e.g., procurement of Section 508-compliant hardware, software, services from Federal contractors and vendors). To address concerns expressed by commenters that the Preliminary RIA did not sufficiently account for the fact that, at many agencies, an ever-widening range of workers are becoming actively involved in ensuring the accessibility of electronic content, the Final RIA assumes that a larger number of Federal employees (across a wide range of job categories) will need to

receive training on the Revised 508 Standards. In addition, to address some commenters’ concerns regarding evaluation and remediation of covered ICT (particularly certain types of so-called “legacy” content), the final rule includes a “safe-harbor” provision that exempts existing ICT from modification to conform to the Revised 508 Standards so long as such ICT complies with the existing 508 Standards and is not altered after the date upon which agencies must comply with the Revised 508 Standards (one year from the date of publication of the final rule). As a result, no remediation costs are taken into account.

For manufacturers of telecommunications and customer premises equipment, projected costs under the Revised 255 Guidelines relate to ensuring that their respective support documentation and services (e.g., product support Web sites and electronic support documentation) comply with applicable accessibility requirements in WCAG 2.0. There were no material changes in the Final RIA relating to cost estimates for Section 255-covered equipment manufacturers under the revised guidelines.

The Final RIA (as with the Preliminary RIA) evaluates incremental benefits and costs of the final rule relative to separate baselines applicable to Sections 508 and 255. Baseline compliance costs to covered entities under the existing 508 Standards are derived from current spending levels for relevant ICT-related products, services, and personnel. Current spending by Federal agencies, vendors, and contractors on compliance with the existing 508 Standards is estimated to be \$1.3 billion annually. This amount represents less than 2 percent of annual ICT spending, which is estimated at \$88 billion to \$120 billion, depending on which products and services are included in the total. Baseline compliance costs for telecommunications equipment manufacturers under the existing 255

Guidelines for accessible product documentation and user support is estimated at \$106 million annually. Taken together, overall baseline compliance costs under the existing 508 Standards and 255 Guidelines are therefore assumed to be \$1.4 billion annually.

Finally, it bears noting that, in recognition of budget constraints that may initially limit any needed increases in resources for Section 508 compliance, Federal agencies are required to comply with the Revised 508 Standards one year after publication of the final rule; thus, Federal agencies are expected to incur incremental costs starting in 2018. The Final RIA also assumes that both initial costs and benefits under the Revised 508 Standards will be spread over three years, rather than the 2-year period used in the Preliminary RIA. (A similar 3-year implementation period is assumed for Section 255-related costs and benefits in recognition that software development and similar technology tasks typically take place over an extended period of time.)

Table 3 below summarizes the results from the Final RIA in terms of likely monetized benefits and costs, on an annualized basis, from the Revised 508 Standards and 255 Guidelines. All benefit and cost values are incremental to the applicable baseline, and were estimated for a 10-year time horizon starting in 2018 (since the final rule requires Federal agencies to comply one year after its publication) and converted to annualized values using discount rates of 7 and 3 percent. Three scenarios of incremental benefits and costs are presented, using alternative parameters that are assumptions made (not based on published estimates). These three scenarios include: a low net benefit scenario using parameters that result in lower benefits and higher costs; an expected scenario consisting of expected values for assumed parameters; and a high net benefit scenario using parameters that result in higher benefits and lower costs.

TABLE 3—ANNUALIZED VALUE OF MONETIZED BENEFITS AND COSTS UNDER THE REVISED 508 STANDARDS AND 255 GUIDELINES, 2018–2027
[In millions of 2017 dollars]

	Low net benefit scenario		Expected scenario		High net benefit scenario	
	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate
Monetized Incremental Benefits						
Benefits to Federal agencies from increased productivity by Federal employees with addressable disabilities ...	\$18.2	\$19.3	\$47.7	\$50.6	\$151.8	\$160.9

TABLE 3—ANNUALIZED VALUE OF MONETIZED BENEFITS AND COSTS UNDER THE REVISED 508 STANDARDS AND 255 GUIDELINES, 2018–2027—Continued

[In millions of 2017 dollars]

	Low net benefit scenario		Expected scenario		High net benefit scenario	
	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate
Benefits to individuals with addressable disabilities from improved Federal Web site accessibility	2.8	3.0	2.8	3.0	2.8	3.0
Benefits to Federal agencies from reduced call volumes	10.9	11.7	21.9	23.4	32.8	35.1
Total Annualized Value of Monetized Incremental Benefits	32.0	34.0	72.4	77.0	187.4	199.0
Monetized Incremental Costs						
Costs to Federal agencies, contractors, and vendors	276.2	287.4	122.8	181.1	111.5	117.2
(a) In-house	150.1	156.2	93.8	98.3	60.4	63.5
(b) Procured ICT	126.1	131.2	79.0	82.8	51.1	53.7
Costs to telecommunications equipment and CPE manufacturers for accessible Web sites and support documentation	9.5	9.6	9.5	9.6	9.5	9.6
Total Annualized Value of Monetized Incremental Costs	285.7	296.9	182.4	190.7	121.0	126.8

It is important to note that some potentially material benefits and costs from the Revised 508 Standards and 255 Guidelines are neither reflected in the table above nor monetized in the Final RIA due to lack of data or for other methodological constraints. These unquantified benefits and costs are described qualitatively below.

2. Benefits of the Final Rule

Overall, results from the Final RIA demonstrate that the Revised 508 Standards will likely have substantial monetizable benefits to Federal agencies and persons with disabilities. As shown in Table 3 above, the annualized value of monetized benefits from these revised standards is estimated to be \$72.4 million at a 7 percent discount rate over

the 10-year analysis period (sensitivity estimates of \$32 million and \$187.4 million). In calculating these monetized benefits, the Final RIA makes the following assumptions: (a) One-third of the recurring annual benefits derived from accessible ICT would be realized in the first year of implementation, two-thirds of the recurring annual benefits in the second year of implementation, and full annual benefits would start in the third year of implementation; and (b) the number of individuals with vision impairments and other addressable disabilities who visit Federal agency Web sites will increase every year, but a constant proportion of those individuals will visit such Web sites every year.

It is also important to note that the final rule is expected to generate significant benefits that could not be evaluated in the Final RIA, either because they were not quantified or monetized (due to lack of data or for other methodological reasons) or are inherently qualitative. Estimating the economic impact of a civil rights-based regulatory initiative in an area—and marketplace—as dynamic as ICT is a complex and difficult task. Some of these unquantified (or inherently unquantifiable) benefits of the Revised 508 Standards are listed in Table 4 below. The fact that these benefits were not be formally assessed in this Final RIA should not diminish their importance or value.

TABLE 4—UNQUANTIFIED BENEFITS OF THE FINAL RULE

Increased employment of individuals with disabilities.
Increased ability of individuals with disabilities to obtain information on Federal agency Web sites and conduct transactions electronically.
Greater independence for individuals with disabilities to access information and services on Federal agency Web sites without assistance.
More civic engagement by individuals with disabilities due to improved access to information and services on Federal agency Web sites.
Increased ability of individuals with disabilities to evaluate, purchase, and make full use of telecommunications products due to increased accessibility of support documentation and services.
Increased ability of individuals without disabilities to access information and conduct their business electronically when they face situational limitations (in a noisy place, in a low-bandwidth environment, or in bright sunlight).
Potential cost savings to Federal agencies due to reduced levels of in-person visits and mail correspondence.
Larger pool of ICT developers and content creators with accessibility knowledge and skills, providing more choice to Federal agencies due to use of internationally recognized, industry-driven standards).
Potential cost savings to manufacturers of telecommunications and CPE, state and local governments, and non-profit entities, as internationally harmonized standards reduce costs for ICT manufacturers and allow them to sell a single line of accessible products and services across all types of markets.

TABLE 4—UNQUANTIFIED BENEFITS OF THE FINAL RULE—Continued

Intrinsic existence value that individuals both with and without disabilities derive from the non-discrimination and equity values served by Sections 508 and 255.
 Cost savings to agencies already complying with equivalent WCAG 2.0 standards because of the availability of WCAG 2.0 support materials.

3. Costs of the Final Rule

The Final RIA shows that the Revised 508 Standards and 255 Guidelines will likely increase compliance costs substantially when first implemented, but will thereafter result in only a small percentage increase in recurring annual costs in later years. Overall, the Final RIA estimates that the total incremental cost of the Revised 508 Standards and 255 Guidelines is expected to be \$182.4 million on an annualized basis over the 10-year analysis period, based on a 7

percent discount rate with sensitivity estimates of \$285.7 million and \$121 million (*see* Table 3 above). It is assumed that, given a variety of budget constraints Federal agencies have faced in recent years, the one-time incremental costs would be incurred across the first three years of implementation.

The Final RIA does not, however, quantify and monetize all potential compliance costs arising from the final rule—due primarily to insufficient data

or for other methodological limitations. The impact of the Revised 255 Guidelines on telecommunications equipment manufacturers is, as the Final RIA notes, particularly difficult to quantify. (Information on the impact of the proposed guidelines was solicited unsuccessfully in both the 2010 and 2011 ANPRMs, as well as the 2015 NPRM.)

Some of these unquantified costs of the Revised 508 Standards and 255 Guidelines are listed in Table 5 below.

TABLE 5—UNQUANTIFIED COSTS OF THE FINAL RULE

Possible increase in Federal Government expenditures to provide accommodations if the government hires more people with addressable disabilities.
 Possible decrease in the amount or variety of electronic content produced, as government seeks to reduce Section 508 compliance costs.
 Potential costs to state and local governments and non-profit organizations that may be required to make electronic content accessible in order to do businesses with Federal agencies.
 Potential costs to ICT manufacturers of developing and producing hardware and telecommunications products that comply with the revised accessibility requirements.
 Possible increase in social costs to people with certain vision disabilities because they would have to use commercial screen magnification tools rather than turning off the style sheets (free of charge) in order to read Web pages.
 Costs of increased compliance by foreign telecommunications manufacturers shifted to U.S. end users (consumers).

In addition, incremental cost estimates in the Final RIA do not reflect other potentially influential factors that may occur over time—such as future changes in the fiscal environment and its effect on ICT budgets, the impact of recent government-wide initiatives to manage ICT more strategically, efforts to harmonize standards for a global ICT market, and trends in technological innovation.

4. Conclusion

While the Final RIA estimates that incremental costs, as assessed and monetized in the assessment, exceed the monetized benefits of the final rule, this finding represents only a piece of the regulatory story. Today, though ICT is now woven into the very fabric of everyday life, millions of Americans with disabilities often find themselves unable to use—or use effectively—computers, mobile devices, Federal agency Web sites, or electronic content. The Board expects this final rule to be a major step toward ensuring that current and future ICT is more accessible to and usable by individuals with disabilities—both in the Federal workplace and society generally. Indeed, much—if not most—of the benefits expected to accrue from the

final rule are difficult if not impossible to quantify or monetize, including: greater social equality, human dignity, and fairness. These are all values that, under Executive Order 13563,⁵ may properly be considered in the benefit-cost calculus.

Moreover, American companies that manufacture telecommunications equipment and ICT-related products would likely derive significant benefits from the harmonized accessibility standards. Given the relative lack of existing national and globally-recognized standards for accessibility of mobile technologies, telecommunications equipment manufacturers would greatly benefit from harmonization of the 255 guidelines with consensus standards. Similar benefits would likely accrue more generally to all ICT-related products as a result of harmonization. These manufacturers would earn return on investments in accessibility technology, remain competitive in the global marketplace, and achieve

economies of scale created by wider use of nationally and internationally recognized technical standards.

Accordingly, when considering all unquantified benefits and costs, the Access Board, along with its consulting economic firm (Econometrica), jointly conclude that the benefits of the Revised 508 Standards and 255 Guidelines justify its costs.

5. Potential Regulatory Alternatives

We considered two alternative approaches to updating the existing 508 Standards and 255 Guidelines:

- In the 2010 ANPRM, the Board proposed a set of requirements that were based on, but not identical to, the WCAG 2.0 standards and other voluntary consensus standards. Comments received from stakeholders and the public indicated that this approach was potentially confusing, as Federal agencies, contractors, and vendors would have to make specific compliance determinations in cases where the language used in updated 508 Standards differed from that in the referenced standard.

- The Board also considered requiring ICT to comply with the full set of functional performance criteria, which state in general terms the features

⁵ See also Office of Management and Budget, Circular A–4 (2003); Office of Management and Budget, Regulatory Impact Analysis: A Primer 3 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

of ICT that ensure its accessibility to people with one or more of different types of disabilities. Comments from stakeholders indicated that this approach would make it difficult for ICT producers to be able to determine whether or not their products and services conformed to the updated 508 Standards.

Based on the public feedback on the two policy alternatives, we determined that the clearest and most cost-effective way to set out revised accessibility requirements was to identify and directly reference existing, voluntary consensus standards, wherever possible.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to analyze the impact of regulatory actions on small entities, unless an agency certifies that the rule will not have a significant impact on a substantial number of small entities. 5 U.S.C. 604, 605(b). Section 604 of the RFA requires agencies to prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the final rule on small entities. Because the Revised 255 Guidelines regulate non-Federal entities (*e.g.*, telecommunications equipment manufacturers), these guidelines fall within the purview of the RFA. The Revised 508 Standards, on the other hand, directly regulate only Federal entities, which are not covered by the RFA. Accordingly, the Access Board evaluates here only the impact of the Revised 255 Guidelines on small entities. The Board provides below a final regulatory flexibility analysis (Final RFA) for these final guidelines.

Objectives of, and need for, the final rule. Section 255 of the Communications Act of 1934 (47 U.S.C. 255), as amended, requires telecommunication equipment to be accessible to and usable by individuals with disabilities, where readily achievable. The Access Board is statutorily responsible for developing accessibility guidelines for telecommunications equipment and customer premises equipment (CPE). The Access Board is also required to review and update the guidelines periodically. The Federal Communications Commission (FCC), however, is solely responsible for issuing implementing regulations and enforcing Section 255. The FCC is not

bound to adopt the Access Board's guidelines as its own or to use them as minimum standards.

In 1998, the Board issued the existing 255 Guidelines (36 CFR part 1193). Since then, telecommunications technology and commercial markets have changed dramatically, along with the usage of telecommunications equipment. The Access Board is thus updating the existing 255 Guidelines to keep pace with the revolution in ICT that has occurred since the promulgation of the initial guidelines nearly twenty years ago.

The Board's Revised 255 Guidelines will provide a much-needed "refresh" of the existing 255 Guidelines, and, thereby, better support the access needs of individuals with disabilities, while also taking into account incremental compliance costs to covered manufacturers of CPE and telecommunications equipment. The revised guidelines, if adopted by the FCC, will only be applicable to new products to the extent that compliance is readily achievable; they do not require retrofitting of existing equipment or retooling. Manufacturers may consider costs and available resources when determining whether, and the extent to which, compliance is required.

Significant issues raised by public comments in response to the initial regulatory flexibility analysis. The Access Board received no public comment in response to the initial regulatory flexibility analysis provided in the NPRM.

Agency response to comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule. The Access Board received no comments filed by the Chief Counsel in response to the proposed rule.

Description and estimate of the number of small entities to which the final rule will apply. The Revised 255 Guidelines cover manufacturers of telecommunications equipment and CPE, as well as the manufacturers of equipment that functions as telecommunications and CPE.⁶ The

⁶ Examples of CPE include wireline and wireless telephones or computers when employed on the premises of a person to originate, route, or terminate telecommunications (*e.g.*, Internet telephony, interconnected VoIP). Only a computer with a modem or internet telephony software can function as telecommunications equipment and

Board used publicly available data from the United States Census Bureau (Census Bureau) and Small Business Administration (SBA) to estimate the number of small businesses that potentially would be affected by the revised guidelines, as well as the likely economic impact of these guidelines.

To determine the number of small businesses potentially subject to the Revised 255 Guidelines, the Board reviewed SBA's small business size standards for ICT-related industry classifications, based on the North American Industry Classification System (NAICS).⁷ The Board determined that three NAICS-based industry classifications may be subject to the Revised 255 Guidelines. These industry categories and their accompanying six-digit NAICS codes are: (a) NAICS Code 334111—Electronic and Computer Manufacturing; (b) NAICS Code 334210—Telephone Apparatus Manufacturing; and (c) NAICS Code 334220—Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Board then matched these three NAICS classifications with SBA size standards (based on number of employees) to determine the number of small businesses within each respective classification.

Table 6 below provides the potential number of small businesses, based on SBA size standards, for each of the three categories of telecommunications and customer premises equipment manufacturers (by NAICS code) that may be affected by the Revised 255 Guidelines.

only the modem functions are associated with telecommunications. Therefore, the requirements of the final rule apply only to the modem or internet telephony software functions and incidental functions required for turning the computer on and launching the telecommunications programs. All other functions of the computer not related to telecommunications would not be covered, such as word processing or file searching or video conferencing.

⁷ The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies to classify business establishments. The Census Bureau provides detailed NAICS information on the agency's Web site. See U.S. Census Bureau, Introduction to NAICS, <http://www.census.gov/eos/www/naics/>. SBA provides, on its Web site, small business size standards for each NAICS code. See U.S. Small Business Administration, Table of Small Business Size Standards, <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/table-small-business-size-standards> (updated Feb. 26, 2016).

TABLE 6—SMALL BUSINESSES POTENTIALLY AFFECTED BY THE REVISED 255 GUIDELINES

NAICS code	Industry title	SBA small business size standard	Number of firms	Number of small firms *
334111	Electronic Computer Manufacturing	1,250 or fewer employees	382	365
334210	Telephone Apparatus Manufacturing	1,250 or fewer employees	249	231
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.	1,250 or fewer employees	748	702
Total .....	.....	.....	1,379	1,298

A few notes are in order about the foregoing estimates of the number of small firms potentially affected by the Revised 255 Guidelines. First, because all telephone equipment is covered by Section 255, all entities included in the telephone apparatus manufacturing category (334210) are necessarily subject to the guidelines. However, not all entities in the remaining two industry categories (334220 and 334111) are covered by the revised guidelines because many of these entities may manufacture only equipment that falls outside the scope of Section 255. For example, only radio and broadcasting equipment that meets the statutory definition of telecommunications (that is, “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”), is covered by the revised guidelines. Also, computers lacking modems or Internet telephony software are not covered by the revised guidelines. However, the Board lacks quantitative information to differentiate regulated from non-regulated manufacturing firms within these two NAICS categories, as well as to determine how many of the “small businesses” in each NAICS category are subject to the final guidelines. The number of small entities listed in Table 6 that may be affected by the Revised 255 Guidelines should, therefore, be considered an upper-bound estimate.

Second, the number of small firms listed under each NAICS code may include an unknown (though likely small) number of firms that modestly exceed the applicable SBA size standard. This potential over count results from a disconnect between the particular SBA size standard for these three NAICS classifications (1,250 or fewer employees) and the manner in which annual economic statistics for U.S. businesses are compiled by the Census Bureau and SBA. Specifically, the Census Bureau’s annual “Statistics of United States Businesses” (which is also used by SBA) presents firm size-

based data by various predetermined size “bands” only, the closest of which is the size band for businesses with 1,000 to 1,499 employees. Because there is no principled way to segment firms employing 1,250 or fewer persons from other firms falling within the 1,000-to-1,499 employee size band, all firms in this size band are deemed “small businesses” for purposes of this Final RFA.

Third, given that manufacturers of telecommunications equipment and CPE must comply with Section 255 only to the extent such compliance is “readily achievable” (*i.e.*, easily accomplishable and able to be carried out without much difficulty or expense), there will likely be some small firms for which compliance with the final guidelines will prove too difficult or expensive. This is not a new proposition. Under both the existing guidelines and current FCC regulations, compliance for manufacturing firms of all sizes is limited by the readily achievable limitation, though it necessarily applies with greater frequency to smaller entities. (*See* 36 CFR 1193.21; 47 CFR 6.3(g)). The Access Board also understands that many small firms in the three NAICS categories relevant to this analysis serve as partners or suppliers to larger firms that provide a full range of products and services. For these reasons, the Board assumes that many small firms identified in Table 6—particularly those with fewer than 20 employees—likely would not incur new costs under the Revised 255 Guidelines. Accordingly, the mid-point estimate for the number of small businesses that may be affected by the Revised 255 Guidelines is assumed to be small firms that meet the applicable SBA size standard and employ twenty or more workers.

Description of the projected reporting, record keeping, and other compliance requirements for small entities. As discussed above, the Revised 255 Guidelines contain many requirements that are similar to the existing guidelines. There is, however, one new accessibility requirement (final 602.3) in

the revised guidelines. Section 602.3 requires manufacturers of telecommunications equipment and CPE to make their electronic support documentation (such as Web-based self-service support and electronic manuals) accessible for users with disabilities by ensuring that such documentation conforms to all applicable Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0. This new requirement for accessible electronic documentation would potentially impose new costs on small manufacturing firms. The Final RIA develops estimated incremental costs, heavily relying on the cost methodology used by the Department of Transportation (DOT) in the regulatory assessment of its recent final rule requiring, among other things, airlines to make their Web sites accessible to persons with disabilities.⁸ (*See* Section V.A—Regulatory Process Matters—Final Regulatory Impact Analysis).

Based on the methodology and estimates used in the Final RIA, the Board’s Final RFA assesses potential compliance costs under the Revised 255 Guidelines for small manufacturers of telecommunications equipment and CPE based on estimated (a) one-time costs to create accessible electronic support documentation and Web sites, and (b) recurring, annual maintenance costs. One-time costs are assumed to be spread equally over the first three years (*i.e.*, one-third of covered firms realizing costs in the first year, and the other two-thirds equally in years two and three), with annual maintenance costs incurred thereafter for the remainder of the 10-year regulatory horizon. Estimated compliance costs are based on firm size. For small businesses with 100 or more employees, average one-time costs are

⁸Dept. of Transportation, Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 78 FR 67882 (Nov. 12, 2013); Econometrica, Inc., Final Regulatory Analysis on the Final Rule on Accessible Kiosks and Web Sites (Oct. 23, 2013), available at <https://www.regulations.gov/document?D=DOT-OST-2011-0177-0108>; see also Preliminary RIA, Sections 6.3, 8.11

assumed to be \$125,000 for bringing their respective support documentation and Web sites into compliance with the revised guidelines. For firms with fewer than 100 employees, average per-firm one-time costs under the revised guidelines are assumed to be \$25,000. Annual recurring maintenance costs are

estimated as twenty percent of one-time costs regardless of firm size.

Using these cost assumptions, the Final RFA evaluates the monetary impact of the Revised 255 Guidelines from three perspectives. The first scenario uses the upper-bound estimate for small businesses that may be

affected by the final guidelines (*i.e.*, all small firms meeting SBA size standards) to assess total one-time and annual maintenance costs across all affected industry categories. These costs, which should be considered an upper-bound estimate, are reflected below:

TABLE 7—ESTIMATED INCREMENTAL COSTS FOR SMALL FIRMS SUBJECT TO THE REVISED 255 GUIDELINES
[Scenario 1—all small firms]

Firm size	Firms meeting SBA small business size standards	Average one-time cost per firm	Total one-time costs	Average annual maintenance cost per firm	Total annual maintenance costs
100 or more employees	136	\$125,000	\$17,000,000	\$25,000	\$3,400,000
99 or fewer employees	1,162	25,000	29,050,000	5,000	5,810,000
Total	1,298	.....	46,050,000	.....	9,210,000

Second, to reflect the reality that compliance may not be readily achievable for the smallest firms (and, as well, the fact that such firms often serve as suppliers to larger firms and thus may not be covered by Section

255), the second scenario uses the mid-point estimate for small businesses that may be affected by the revised guidelines (*i.e.*, small firms that meet the SBA size standard and have twenty or more employees) to assess total one-

time and annual maintenance costs across all industry categories. These costs, which should be considered a mid-point estimate, are reflected below:

TABLE 8—ESTIMATED INCREMENTAL COSTS FOR SMALL FIRMS SUBJECT TO THE REVISED 255 GUIDELINES
[Scenario 2—small firms with 20 or more employees]

Firm size	Firms meeting SBA small business size standards	Average one-time cost per firm	Total one-time costs	Average annual maintenance cost per firm	Total annual maintenance costs
100 or more employees	136	\$125,000	\$17,000,000	\$25,000	\$3,400,000
20–99 employees	284	25,000	7,100,000	5,000	1,420,000
Total	420	.....	24,100,000	.....	4,820,000

Third, to assess the magnitude of potential compliance costs for small businesses under the Revised 255 Guidelines relative to annual receipts, the third scenario evaluates the ratio of average annualized costs per-firm to average receipts per firm for each of the three NAICS codes. Average annualized costs represent the per-firm stream of estimated one-time and recurring annual costs over the 10-year regulatory horizon at a 7 percent discount rate. Annualized costs are assumed to be

consistent across the three NAICS codes for each of the two studied small firm sizes (*i.e.*, more or less than 100 employees) because the Board does not have NAICS code-based data differentiating receipts by firm size. Annual estimated average per-firm receipts for each NAICS code, in turn, are derived from the 2012 annual dataset of the Statistics of United States Businesses (SUSB) compiled by the Census Bureau. The ratio of average per-firm annualized costs and annual per-

firm receipts is then calculated for each NAICS code and firm size, with the resulting percentage serving as a metric to evaluate the relative economic significance of compliance costs to small businesses under the Revised 255 Guidelines.

The results are presented below in two separate tables by the size (in terms of number of employees) of small firms covered by Section 255.

TABLE 9—ANNUALIZED PER-FIRM COSTS AS A PERCENTAGE OF PER-FIRM RECEIPTS FOR SMALL FIRMS WITH 100 OR MORE EMPLOYEES
[By NAICS Code]

NAICS code	Industry title	Annualized per-firm costs (7% discount rate)	Average per-firm annual receipts *	Annualized per-firm costs as percent of per-firm annual receipts
334111	Electronic Computer Manufacturing	\$34,883	\$129,699,213	0.03

TABLE 9—ANNUALIZED PER-FIRM COSTS AS A PERCENTAGE OF PER-FIRM RECEIPTS FOR SMALL FIRMS WITH 100 OR MORE EMPLOYEES—Continued
[By NAICS Code]

NAICS code	Industry title	Annualized per-firm costs (7% discount rate)	Average per-firm annual receipts *	Annualized per-firm costs as percent of per-firm annual receipts
334210	Telephone Apparatus Manufacturing	34,883	67,998,062	0.05
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.	34,883	63,164,314	0.06

* **Note:** Average per-firm annual receipts based on data from the Census Bureau's 2012 annual SUSB dataset. See U.S. Census Bureau, 2012 SUSB Annual Datasets by Establishment Industry, U.S. 6-digit NAICS, detailed employment sizes (release date June 22, 2015).⁹

TABLE 10—ANNUALIZED PER-FIRM COSTS AS A PERCENTAGE OF PER-FIRM RECEIPTS FOR SMALL FIRMS WITH 20 AND 99 EMPLOYEES
[By NAICS Code]

NAICS code	Industry title	Annualized per-firm costs (7% discount rate)	Average per-firm annual receipts *	Annualized per-firm costs as percent of per-firm annual receipts
334111	Electronic Computer Manufacturing	\$7,305	\$11,654,754	0.06
334210	Telephone Apparatus Manufacturing	7,305	10,602,855	0.07
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.	7,305	12,352,012	0.06

* **Note:** Average per-firm annual receipts based on data from the Census Bureau's 2012 annual SUSB dataset. See U.S. Census Bureau, 2012 SUSB Annual Datasets by Establishment Industry, U.S. 6-digit NAICS, detailed employment sizes (release date June 22, 2015).

The results of these annualized cost/receipt analyses demonstrate that incremental costs of the Revised 255 Guidelines for small businesses—whether larger or smaller than 100 employees—are expected to be minimal relative to firm receipts. In no case would this ratio exceed one-tenth of one percent, with values ranging from a low of 0.03% to a high of 0.07%. Accordingly, based on the foregoing analysis, the Board does not believe that the Revised 255 Guidelines are likely to have a significant economic impact on a substantial number of small entities.

Description of significant alternatives to the Revised 255 Guidelines. In the Board's view, there are no alternatives to the final guidelines that would accomplish the goal of meeting the access needs of individuals with disabilities, while taking into account compliance costs of manufacturers of

telecommunications equipment and CPE.

C. Executive Order 13132: Federalism

The final rule adheres to the fundamental Federalism principles and policy making criteria in Executive Order 13132. The Revised 508 Standards apply to the development, procurement, maintenance, or use of ICT by Federal agencies. The Revised 255 Guidelines apply to manufacturers of telecommunications equipment and customer premises equipment and require that equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if it is readily achievable to do so. As such, the Board has determined that the final rule does not have Federalism implications within the meaning of Executive Order 13132.

D. Executive Order 13609: Promoting International Regulatory Cooperation

Executive Order 13609 serves to promote international regulatory cooperation and harmonization. The Board has promoted the principles of the executive order by making concerted efforts with a number of foreign governments throughout the development of the Revised 508 Standards and 255 Guidelines. For example, the Board and the European Commission have made significant efforts to coordinate development of their respective ICT standards. This cooperation began with the 2005 EU-US Economic Initiative (http://trade.ec.europa.eu/doclib/docs/2006/june/tradoc_127643.pdf) and our participation in regular meetings with the U.S. Trade Representative's office and the European Commission in discussions on e-accessibility around

⁹ SUSB employer data is collected and produced by the U.S. Census and contains, for each NAICS code, such information as: Number of firms, employment figures, estimated annual receipts, and annual payroll. In accordance with Federal law, certain SUSB data elements are "masked" (e.g., receipts for a particular establishment size range)

when publication would disclose the identity of individual business establishments. See U.S. Census Bureau, Statistics of U.S. Businesses (SUSB)—Methodology, <http://www.census.gov/programs-surveys/susb/technical-documentation/methodology.html> (last revised June 8, 2016); see also 13 U.S.C. 9. As a result, when calculating

average per-firm annual receipts presented for each NAICS codes in Table 9 and Table 10, it was occasionally necessary to estimate missing data elements using other available, pertinent data for that NAICS code.

the Transatlantic Trade and Investment Partnership (TTIP). These cooperative efforts continued through the joint work of the Access Board and representatives from the European Commission, Canada, Australia, and Japan on the TEITAC Advisory Committee, which helped inform the requirements in the proposed 508 Standards and 255 Guidelines. In our view, the Revised 508 Standards and 255 Guidelines are the product of the Board's coordination with international regulatory partners, which will ultimately help American companies better compete globally.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act does not apply to regulations that enforce constitutional rights of individuals or enforce statutory rights that prohibit discrimination on the basis of race, color, sex, national origin, age, handicap, or disability. The Revised 508 Standards are issued pursuant to the Rehabilitation Act. When Federal agencies develop, procure, maintain, or use electronic and information technology, they are required to ensure that the electronic and information technology allows Federal employees with disabilities to have access to and use of information and data that is comparable to the access enjoyed by Federal employees without disabilities, unless doing so would impose an undue burden on the agency. The statute also requires that members of the public with disabilities seeking information or services from a Federal agency have access to and use of information and data that is comparable to that provided to other members of the public unless doing so would impose an undue burden on the agency. The Revised 255 Guidelines, in turn, are issued pursuant to Section 255 of the Communications Act, which requires manufacturers of telecommunications equipment and customer premises equipment to ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals

with disabilities, if it is readily achievable to do so. Accordingly, an assessment of the effect of the Revised 508 Standards and 255 Guidelines on state, local, and tribal governments is not required by the Unfunded Mandates Reform Act.

F. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) requires Federal agencies to obtain approval from the Office of Management and Budget (OMB) before requesting or requiring a “collection of information” from the public. As part of the PRA process, agencies are generally required to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information to solicit, among other things, comment on the necessity of the information collection and its estimated burden. 44 U.S.C. 3506(c)(2)(A). The 255 Guidelines, in both their existing and revised form, impose PRA-covered “information collection” obligations on manufacturers of telecommunications equipment and customer premises equipment by requiring such manufacturers to ensure that their support documentation and services meet specified accessibility requirements. Accordingly, in the NPRM, the Board published a notice of proposed collection of information to accompany the proposed revisions to the existing 255 Guidelines. The Board received one responsive comment, which addressed our estimated PRA-related time burdens under the proposed guidelines. We discuss below our estimates under the Revised 255 Guidelines of the projected annual time burden (in hours) on 255-covered manufacturers to make their support documentation and services accessible.

Section C206, in conjunction with the technical provisions in Chapter 6 (Support Documentation and Services), obligates manufacturers of telecommunications equipment and customer premises equipment to

provide accessible support documentation and services, which constitute “collections of information” under the PRA. More specifically, the revised guidelines require covered manufacturers, when providing support documentation and services, to ensure accessibility for individuals with disabilities in four respects: (1) Support documentation must list, and explain how to use, accessibility and compatibility features of telecommunications products (602.2); (2) electronic support documentation must conform to WCAG 2.0 (602.3); (3) non-electronic support documentation must be provided upon request in alternate formats (e.g., braille, large print) usable by individuals with disabilities (602.4); and (4) support services (e.g., help desks, call centers) must offer information on accessibility and compatibility features, as well as ensure a contact method that accommodates the communication needs of individuals with disabilities (603.2 and 603.3).

Taken together, these four accessibility requirements in the final rule impose PRA-covered information collection obligations on Section 255-covered manufacturers that are generally similar to those under the existing 255 Guidelines (which previously received PRA approval from OMB) (OMB Control Number 3014–0010), though compliance with WCAG 2.0 is new. The Revised 255 Guidelines do establish a new information collection by requiring that covered manufacturers ensure their electronic support documentation (such as Web-based self-service support or PDF user guides) complies with specified accessibility standards (602.3).

The Board estimates the annual burden on manufacturers of telecommunications equipment and customer premises equipment for the four categories of information collections under the final rule as follows:

TABLE 11—ESTIMATED ANNUAL RECORDKEEPING AND DOCUMENTATION BURDEN

Provision in final rule	Number of respondents	Annual number of responses per respondent	Average response time (hours)	Estimated annual burden (hours)
Section 602.2	1,379	6	1.5	12,411
Section 602.3	1,379	95% of 6	300	2,358,090
Section 602.4	1,379	5% of 6	25	10,343
Section 603	1,379	6 .....	.5	4,137
Total .....	.....	.....	.....	2,384,981

These estimates are based on the Access Board's experience with the current information collection requirements under the existing 255 Guidelines, as well as public comment received in response to the 2010 and 2011 ANPRMs. (While the Board received one comment to the 2015 NPRM suggesting that our assumptions about average response times were too high, for the reasons discussed below, we believe these time estimates are sound and have carried them forward to this PRA analysis.)

Highlighted below are the key assumptions used in the burden estimation calculus reflected above in Table 11:

Number of respondents. The estimated number of manufacturers of telecommunications equipment and customer premises equipment (1,384) is based on Census Bureau/NAICS data for the three ICT-related industry classifications potentially subject to the Revised 255 Guidelines. (See Section V.B (Regulatory Process Matters—Regulatory Flexibility Act)).

Number of responses annually per manufacturer. The number of annual responses for each manufacturer (6) is based on the estimated number of new products released in 2013 according to the Consumer Electronic Association.

Average response time. The Access Board estimates the average response time to comply with the accessibility requirements in Chapter 6 of the Revised 255 Guidelines as follows:

- *Section 602.2*—The estimated response time assumes that documenting the accessibility and compatibility features will take 1.5 hours for each new product.

- *Section 602.3*—The estimated response time assumes that development of accessible electronic support documentation will take 300 hours for each new product. This estimate, in turn, is based on the assumption that each product will have, on average, 200 pages of electronic documentation, and that each page will require 1.5 hours of formatting and editing to comply with WCAG 2.0. With respect to the annual number of responses for each manufacturer, it is assumed that support documentation for nearly all new products will be provided in an electronic format given current trends in the telecommunications industry. Specifically, it is estimated that 95 percent of the six new products introduced annually by each manufacturer (7,889 products) will have electronic support documentation that must conform to the accessibility

requirements for electronic support documentation in 602.3.

An NPRM commenter expressed concern that our time estimate of 1.5 hours per page to make electronic support documentation compliant with WCAG 2.0 was overly generous, stating that 10 to 20 minutes per page would be more likely. In our experience, while text-only or other less complex documents may well take, on average, only 10 to 20 minutes per page to ensure accessibility, the electronic documents at issue here—user manuals and Web-based self-service support—are typically more complex and often feature pictures, graphics, or tables interspersed with textual material. This complexity would likely make the process of ensuring compliance with applicable accessibility requirements more time intensive as compared to text-only documents. Consequently, to be conservative, we have retained the 1.5 hours per page assumption used in both the NPRM and Preliminary RIA.

- *Section 602.4*—The estimated response time assumes that development of accessible non-electronic support documentation in alternate formats (e.g., braille, large print) will take 25 hours for each new product. With respect to the annual number of responses for each manufacturer, it is assumed that support documentation for only a few new products will have support documentation in a non-electronic format in recognition of the fact that most support documentation is now posted online or otherwise provided in electronic formats. Thus, it is assumed that only 5 percent of the six new products introduced annually by each manufacturer (415 products) will have non-electronic support documentation that must conform to 602.4.

- *Section 603.1*—The estimated response time assumes that, for each new product in a given year, manufacturers will receive three 10-minute telephone calls to support centers (or emails or chat-based interactions) from individuals with disabilities seeking information on the accessibility and compatibility features of these products.

G. Availability of Materials Incorporated by Reference

Regulations issued by the Office of the Federal Register (OFR) require Federal agencies to describe in their regulatory preambles the steps taken to ensure that incorporated materials are reasonably available to interested parties, as well as summarize the contents of referenced standards. See 1 CFR part 51.

In keeping with these obligations for materials that are incorporated by reference in the Revised 508 Standards and 255 Guidelines, the Access Board provides below: (a) Information on the public availability of these ten standards (or, alternatively, how Access Board staff attempted to secure the availability of these materials to the public at no cost or reduced cost, if not already publicly available free of charge by the standards development organization); and (b) summaries of the materials to be incorporated by reference. In addition to the information provided below relating to public availability, a copy of each referenced standard is available for inspection at the Access Board's office, 1331 F Street NW., Suite 1000, Washington, DC 20004.

ATSC A/53 Part 5: 2014, Digital

Television Standard, Part 5—2014 AC-3 Audio System Characteristics (2014) (see 414.1.1, 702.2.1). The standard for digital television provides the system characteristics for advanced television systems. The document and its normative parts provide detailed specification of system parameters. Part 5 provides the audio system characteristics and normative specifications. It includes the Visually Impaired (VI) associated service, which is a complete program mix containing music, effects, dialogue and a narrative description of the picture content. Availability: Copies of this standard may be obtained from the Advanced Television Systems Committee (ATSC), 1776 K Street NW., Suite 200, Washington, DC 20006-2304. Free copies of ATSC A/53 Digital Television Standard are available online at the organization's Web site (<https://atsc.org/wp-content/uploads/2015/03/A53-Part-5-2014.pdf>).

ANSI/AIIM/ISO 14289-1-2016,

Document Management Applications—Electronic Document File Format Enhancement for Accessibility—Part 1: Use of ISO 32000-1 (2016) (PDF/UA-1) (see 504.2.2, 702.3.1). This standard (known as PDF/UA-1) defines how to represent electronic documents in the PDF format in a manner that allows the file to be accessible. This is accomplished by identifying the set of PDF components that may be used and restrictions on the form of their use. Availability: Copies of this standard may be obtained from Association for Information and Image Management (AIIM), 1100 Wayne Ave., Ste. 1100, Silver

Spring, Maryland 20910. This standard is available without cost to AIIM professional members and for a small fee (\$15.00) by other members of the public through the AIIM Web site (http://www.aiim.org/Resources/Standards/AIIM_ISO_14289-1). It is also the Board's understanding, based on discussions with the standards developer, that a free, read-only copy of the referenced portions of ANSI/HFES 200.2 would be made available on ANSI's IBR Standards Portal (<https://ibr.ansi.org/Standards/hfes.aspx>) following publication of the final rule.

ANSI/HFES 200.2, Human Factors Engineering of Software User Interfaces—Part 2: Accessibility (2008) (see 502.4, 702.4.1). This standard provides design specifications for human-system software interfaces to increase accessibility for persons with disabilities. It covers the design of accessible software for people with a wide range of physical, sensory and cognitive abilities, including those with temporary disabilities and older adults. Availability: Copies of this standard may be obtained from the Human Factors and Ergonomics Society (HFES), P.O. Box 1369, Santa Monica, CA 90406–1369. This standard is also available for purchase on the HFES Web site (<http://www.hfes.org>). In discussions with Access Board staff, an HFES senior representative noted that, consistent with the Society's standard practice of making read-only copies of standards available when incorporated by reference into Federal regulations, a free, read-only copy of the referenced portions of ANSI/HFES 200.2 would be made available on ANSI's IBR Standards Portal (<https://ibr.ansi.org/Standards/hfes.aspx>) following publication of the final rule.

ANSI/IEEE C63.19–2011 American National Standard for Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids (2011) (see 412.3.1, 702.5.1). This standard provides a uniform method of measurement for compatibility between hearing aids and wireless communications devices. Availability: Copies of this standard may be obtained from the Institute of Electrical and Electronics Engineers (IEEE), 10662 Los Vaqueros Circle, P.O. Box 3014, Los

Alamitos, CA 90720–1264. This standard is also available for purchase on the IEEE Web site (<http://www.ieee.org>). Additionally, a free, read-only version of ANSI/IEEE C63.19–2011 is available on the ANSI IBR Standards Portal.

ICC A117.1–2009, Accessible and Usable Buildings and Facilities (2010) (see 402.5, 702.6.1). This standard provides technical criteria for making sites, facilities, buildings, and elements accessible to and usable by people with disabilities. Availability: Copies of this standard may be obtained from ICC Publications, 4051 W. Flossmoor Road, Country Club Hills, IL 60478–5795 (<http://www.iccsafe.org>). A free, read-only version of ICC A117.1 is available online at the ICC's public access standards portal (<http://codes.iccsafe.org/app/book/toc/ICC%20Standards/ICC%20A117.1-2009/index.html>).

ITU-T Recommendation E.161, Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors—International operation—Numbering plan of the international telephone service, Arrangement of digits, letters and symbols on telephones and other devices that can be used for gaining access to a telephone network (2001) (see 407.3.3, 702.7.1). This standard defines the assignment of the basic 26 Latin letters (A to Z) to the 12-key telephone keypad. Availability: This standard may be obtained from ITU-T, Place des Nations CH–1211, Geneva 20, Switzerland. Free copies of ITU-T Recommendation E.161 are available online at the organization's Web site (<http://www.itu.int/rec/T-REC-E.161-200102-I/en>).

ITU-T Recommendation G.722.2: Series G: Transmission Systems and Media, Digital Systems and Networks, Digital terminal equipments—Coding of analogue signals by methods other than PCM, Wideband coding of speech at around 16 kbit/s using Adaptive Multi-Rate Wideband (AMR-WB) (2003) (see 412.4, 702.7.2). This standard describes the high quality Adaptive Multi-Rate Wideband (AMR-WB) encoder and decoder that is primarily intended for 7 kHz bandwidth speech signals. AMR-WB operates at a multitude of bit rates ranging from 6.6 kbit/s to 23.85 kbit/s. Availability: This standard may be obtained from the International Telecommunication

Union, Telecommunications Standardization Sector (ITU-T), Place des Nations CH–1211, Geneva 20, Switzerland. Free copies of ITU-T Recommendation G.722.2 are available online at the organization's Web site (<http://www.itu.int/rec/T-REC-G.722.2-200307-I/en>).

IETF RFC 6716, Definition of the Opus Audio Codec (2012) (see 412.4, 702.8.1). This standard establishes specifications that define the Opus interactive speech and audio codec. The Opus codec is designed to handle a wide range of interactive audio applications, including Voice over IP, videoconferencing, in-game chat, and even live, distributed music performances. This codec scales from low bitrate narrowband speech at 6 kbit/s to very high quality stereo music at 510 kbit/s. Availability: Free copies of this standard are available online at the Internet Engineering Task Force's Web site (<http://www.rfc-base.org/txt/rfc-6716.txt>).

TIA–1083–B: Telecommunications—Communications Products—Handset Magnetic Measurement Procedures and Performance Requirements (2015) (TIA–1083–B) (see 412.3.2, 702.9.1). This standard defines measurement procedures and performance requirements for the handset generated audio band magnetic noise of wireline telephones. This standard also addresses magnetic interference issues not covered by 47 CFR part 68. This standard can be used to evaluate devices with analog interfaces and digital interfaces that provide narrowband and wideband transmission. Availability: Copies of this standard, which is published by the Telecommunications Industry Association (TIA), may be obtained from the IHS Standard Store (IHS), 15 Inverness Way East, Englewood, CO 80112. This standard is also available for purchase on the IHS Markit Standards Store (<http://www.global.ihs.com>). In March 2016, Access Board staff spoke with TIA representatives to explore potential options for making TIA–1083–B readily available to the public. TIA took the position that this standard is available for sale and is, therefore, reasonably available.

WCAG 2.0, Web Content Accessibility Guidelines, W3C Recommendation (2008) (see E205.4, E205.4 Exception, E205.4.1, E207.2, E207.2 Exception 2, E207.2 Exception 3,

E207.2.1, E207.3, C203.1, C203.1 Exception, C203.1.1, C205.2, C205.2 Exception 2, C205.2 Exception 3, C205.2.1, C205.3, 408.3 Exception, 501.1 Exception, 504.2, 504.3, 504.4, 602.3, and 702.10.1). WCAG 2.0, published by the W3C Web Accessibility Initiative (W3C), specifies success criteria and requirements to make Web content more accessible to all users, including persons with disabilities. The W3C Web site also provides online technical assistance materials linked to each success criteria and technical requirement. Availability: Copies of this standard may be obtained from the W3C Web Accessibility Initiative, Massachusetts Institute of Technology, 32 Vassar Street, Room 32-G515, Cambridge, MA 02139. Free copies of WCAG 2.0, and its related technical assistance materials, are available online at W3C's Web site (<http://www.w3.org/TR/WCAG20>).

List of Subjects

36 CFR Part 1193

Civil rights, Communications, Communications equipment, Incorporation by reference, Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

36 CFR Part 1194

Civil rights, Communications, Communications equipment, Computer technology, Electronic products, Government employees, Government procurement, Incorporation by reference, Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

Approved by vote of the Access Board on September 14, 2016.

David M. Capozzi,
Executive Director.

For the reasons stated in the preamble, and under the authority of 47 U.S.C. 255(e), the Board amends 36 CFR chapter XI as follows:

PART 1193—[REMOVED]

- 1. Remove part 1193.

PART 1194—INFORMATION AND COMMUNICATION TECHNOLOGY STANDARDS AND GUIDELINES

- 2. The authority citation for part 1194 is revised to read as follows:

Authority: 29 U.S.C. 794d, 47 U.S.C. 255.

- 3. The heading for part 1194 is revised to read as set forth above.

- 4. Remove the designations of subparts A through D.

- 5. Add appendix D to part 1194 to read as follows:

Appendix D to Part 1194—Electronic and Information Technology Accessibility Standards as Originally Published on December 21, 2000

Sections D1194.6 through D1194.20

[Reserved]

Sections D1194.27 through D1194.30

[Reserved]

Sections D1194.32 through D1194.40

[Reserved]

Sections D1194.42 through D1194.50

[Reserved]

§§ 1194.1 through 1194.5 [Transferred to Appendix D to Part 1194 as Sections D1194.1 through D1194.5]

- 6. Redesignate §§ 1194.1 through 1194.5 as sections D1194.1 through D1194.5, respectively, and transfer to appendix D to part 1194.

§§ 1194.21 through 1194.26 [Transferred to Appendix D to Part 1194 as Sections D1194.21 through D1194.26]

- 7. Redesignate §§ 1194.21 through 1194.26 as sections D1194.21 through D1194.26, respectively, and transfer to appendix D to part 1194.

§ 1194.31 [Transferred to Appendix D to Part 1194 as Section D1194.31]

- 8. Redesignate § 1194.31 as section D1194.31 and transfer to appendix D to part 1194.

§ 1194.41 [Transferred to Appendix D to Part 1194 as Section D1194.41]

- 9. Redesignate § 1194.41 as section D1194.41 and transfer to appendix D to part 1194.

Appendix—Figures to Part 1194 [Transferred to Appendix D to Part 1194 as Section D1194.51]

- 10. Redesignate Appendix—Figures to Part 1194 as section D1194.51 and transfer to appendix D to part 1194, and revise its heading to read “Figures”.

- 11. Add §§ 1194.1 and 1194.2 to read as follows:

§ 1194.1 Standards for Section 508 of the Rehabilitation Act.

The standards for information and communication technology developed, procured, maintained, or used by Federal agencies covered by Section 508 of the Rehabilitation Act are set forth in Appendices A, C and D to this part.

§ 1194.2 Guidelines for Section 255 of the Communications Act.

The guidelines for telecommunications equipment and customer premises equipment covered

by Section 255 of the Communications Act are set forth in Appendices B and C to this part.

- 12. Add appendices A through C to part 1194 to read as follows:

Appendix A to Part 1194—Section 508 of the Rehabilitation Act: Application and Scoping Requirements

Table of Contents

508 Chapter 1: Application and Administration

E101 General
E102 Referenced Standards
E103 Definitions

508 Chapter 2: Scoping Requirements

E201 Application
E202 General Exceptions
E203 Access to Functionality
E204 Functional Performance Criteria
E205 Content
E206 Hardware
E207 Software
E208 Support Documentation and Services

508 Chapter 1: Application and Administration

E101 General

E101.1 *Purpose.* These Revised 508 Standards, which consist of 508 Chapters 1 and 2 (Appendix A), along with Chapters 3 through 7 (Appendix C), contain scoping and technical requirements for information and communication technology (ICT) to ensure accessibility and usability by individuals with disabilities. Compliance with these standards is mandatory for Federal agencies subject to Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d).

E101.2 *Equivalent Facilitation.* The use of an alternative design or technology that results in substantially equivalent or greater accessibility and usability by individuals with disabilities than would be provided by conformance to one or more of the requirements in Chapters 4 and 5 of the Revised 508 Standards is permitted. The functional performance criteria in Chapter 3 shall be used to determine whether substantially equivalent or greater accessibility and usability is provided to individuals with disabilities.

E101.3 *Conventional Industry Tolerances.* Dimensions are subject to conventional industry tolerances except where dimensions are stated as a range with specific minimum or maximum end points.

E101.4 *Units of Measurement.* Measurements are stated in metric and U.S. customary units. The values stated in each system (metric and U.S. customary units) may not be exact equivalents, and each system shall be used independently of the other.

E102 Referenced Standards

E102.1 *Application.* The specific editions of the standards listed in Chapter 7 are incorporated by reference into 508 Chapter 2 (Scoping Requirements) and Chapters 3 through 6 to the prescribed extent of each such reference. Where conflicts occur between the Revised 508 Standards and the

referenced standards, these Revised 508 Standards apply.

E103 Definitions

E103.1 Terms Defined in Referenced Standards. Terms defined in referenced standards and not defined in E103.4 shall have the meaning as defined in the referenced standards.

E103.2 Undefined Terms. Any term not defined in E103.4 or in referenced standards shall be given its ordinarily accepted meaning in the sense that the context implies.

E103.3 Interchangeability. Words, terms, and phrases used in the singular include the plural and those used in the plural include the singular.

E103.4 Defined Terms. For the purpose of the Revised 508 Standards, the terms defined in E103.4 have the indicated meaning.

Agency. Any agency or department of the United States as defined in 44 U.S.C. 3502, and the United States Postal Service.

Alteration. A change to *existing ICT* that affects interoperability, the user interface, or access to information or data.

Application. Software designed to perform, or to help the user to perform, a specific task or tasks.

Assistive Technology (AT). Any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

Audio Description. Narration added to the soundtrack to describe important visual details that cannot be understood from the main soundtrack alone. Audio description is a means to inform individuals who are blind or who have low vision about visual content essential for comprehension. Audio description of video provides information about actions, characters, scene changes, on-screen text, and other visual content. Audio description supplements the regular audio track of a program. Audio description is usually added during existing pauses in dialogue. Audio description is also called "video description" and "descriptive narration".

Authoring Tool. Any software, or collection of software components, that can be used by authors, alone or collaboratively, to create or modify content for use by others, including other authors.

Closed Functionality. Characteristics that limit functionality or prevent a user from attaching or installing assistive technology. Examples of ICT with closed functionality are self-service machines, information kiosks, set-top boxes, fax machines, calculators, and computers that are locked down so that users may not adjust settings due to a policy such as Desktop Core Configuration.

Content. Electronic information and data, as well as the encoding that defines its structure, presentation, and interactions.

Document. Logically distinct assembly of content (such as a file, set of files, or streamed media) that: Functions as a single entity rather than a collection; is not part of software; and does not include its own software to retrieve and present content for users. Examples of documents include, but

are not limited to, letters, email messages, spreadsheets, presentations, podcasts, images, and movies.

Existing ICT. ICT that has been procured, maintained or used on or before January 18, 2018.

Hardware. A tangible device, equipment, or physical component of ICT, such as telephones, computers, multifunction copy machines, and keyboards.

Information Technology. Shall have the same meaning as the term "information technology" set forth in 40 U.S.C. 11101(6).

Information and Communication Technology (ICT). Information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include, but are not limited to: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; Web sites; videos; and, electronic documents.

Keyboard. A set of systematically arranged alphanumeric keys or a control that generates alphanumeric input by which a machine or device is operated. A keyboard includes tactilely discernible keys used in conjunction with the alphanumeric keys if their function maps to keys on the keyboard interfaces.

Label. Text, or a component with a text alternative, that is presented to a user to identify content. A label is presented to all users, whereas a name may be hidden and only exposed by assistive technology. In many cases, the name and the label are the same.

Menu. A set of selectable options.

Name. Text by which software can identify a component to the user. A name may be hidden and only exposed by assistive technology, whereas a label is presented to all users. In many cases, the label and the name are the same. Name is unrelated to the name attribute in HTML.

Non-Web Document. A document that is not: A Web page, embedded in a Web page, or used in the rendering or functioning of Web pages.

Non-Web Software. Software that is not: A Web page, not embedded in a Web page, and not used in the rendering or functioning of Web pages.

Operable Part. Hardware-based user controls for activating, deactivating, or adjusting ICT.

Platform Accessibility Services. Services provided by a platform enabling interoperability with assistive technology. Examples are Application Programming Interfaces (API) and the Document Object Model (DOM).

Platform Software. Software that interacts with hardware or provides services for other software. Platform software may run or host other software, and may isolate them from underlying software or hardware layers. A single software component may have both platform and non-platform aspects. Examples of platforms are: Desktop operating systems; embedded operating systems, including

mobile systems; Web browsers; plug-ins to Web browsers that render a particular media or format; and sets of components that allow other applications to execute, such as applications which support macros or scripting.

Programmatically Determinable. Ability to be determined by software from author-supplied data that is provided in a way that different user agents, including assistive technologies, can extract and present the information to users in different modalities.

Public Facing. Content made available by an agency to members of the general public. Examples include, but are not limited to, an agency Web site, blog post, or social media pages.

Real-Time Text (RTT). Communications using the transmission of text by which characters are transmitted by a terminal as they are typed. Real-time text is used for conversational purposes. Real-time text also may be used in voicemail, interactive voice response systems, and other similar application.

Revised 508 Standards. The standards for ICT developed, procured, maintained, or used by agencies subject to Section 508 of the Rehabilitation Act as set forth in 508 Chapters 1 and 2 (36 CFR part 1194, Appendix A), and Chapters 3 through 7 (36 CFR part 1194, Appendix C).

Software. Programs, procedures, rules, and related data and documentation that direct the use and operation of ICT and instruct it to perform a given task or function. Software includes, but is not limited to, applications, non-Web software, and platform software.

Software Tools. Software for which the primary function is the development of other software. Software tools usually come in the form of an Integrated Development Environment (IDE) and are a suite of related products and utilities. Examples of IDEs include Microsoft® Visual Studio®, Apple® Xcode®, and Eclipse Foundation Eclipse®.

Telecommunications. The signal transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Terminal. Device or software with which the end user directly interacts and that provides the user interface. For some systems, the software that provides the user interface may reside on more than one device such as a telephone and a server.

Text. A sequence of characters that can be programmatically determined and that expresses something in human language.

TTY. Equipment that enables interactive text based communications through the transmission of frequency-shift-keying audio tones across the public switched telephone network. TTYs include devices for real-time text communications and voice and text intermixed communications. Examples of intermixed communications are voice carry over and hearing carry over. One example of a TTY is a computer with TTY emulating software and modem.

Variable Message Signs (VMS). Non-interactive electronic signs with scrolling, streaming, or paging-down capability. An example of a VMS is an electronic message

board at a transit station that displays the gate and time information associated with the next train arrival.

Voice over Internet Protocol (VoIP). A technology that provides real-time voice communications. VoIP requires a broadband connection from the user's location and customer premises equipment compatible with Internet protocol.

Web page. A non-embedded resource obtained from a single Universal Resource Identifier (URI) using HyperText Transfer Protocol (HTTP) plus any other resources that are provided for the rendering, retrieval, and presentation of content.

508 Chapter 2: Scoping Requirements

E201 Application

E201.1 *Scope.* ICT that is procured, developed, maintained, or used by agencies shall conform to the Revised 508 Standards.

E202 General Exceptions

E202.1 *General.* ICT shall be exempt from compliance with the Revised 508 Standards to the extent specified by E202.

E202.2 *Legacy ICT.* Any component or portion of existing ICT that complies with an earlier standard issued pursuant to Section 508 of the Rehabilitation Act of 1973, as amended (as republished in Appendix D), and that has not been altered on or after January 18, 2018, shall not be required to be modified to conform to the Revised 508 Standards.

E202.3 *National Security Systems.* The Revised 508 Standards do not apply to ICT operated by agencies as part of a national security system, as defined by 40 U.S.C. 11103(a).

E202.4 *Federal Contracts.* ICT acquired by a contractor incidental to a contract shall not be required to conform to the Revised 508 Standards.

E202.5 *ICT Functions Located in Maintenance or Monitoring Spaces.* Where status indicators and operable parts for ICT functions are located in spaces that are frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment, such status indicators and operable parts shall not be required to conform to the Revised 508 Standards.

E202.6 *Undue Burden or Fundamental Alteration.* Where an agency determines in accordance with E202.5 that conformance to requirements in the Revised 508 Standards would impose an undue burden or would result in a fundamental alteration in the nature of the ICT, conformance shall be required only to the extent that it does not impose an undue burden, or result in a fundamental alteration in the nature of the ICT.

E202.6.1 *Basis for a Determination of Undue Burden.* In determining whether conformance to requirements in the Revised 508 Standards would impose an undue burden on the agency, the agency shall consider the extent to which conformance would impose significant difficulty or expense considering the agency resources available to the program or component for which the ICT is to be procured, developed, maintained, or used.

E202.6.2 *Required Documentation.* The responsible agency official shall document in writing the basis for determining that conformance to requirements in the Revised 508 Standards constitute an undue burden on the agency, or would result in a fundamental alteration in the nature of the ICT. The documentation shall include an explanation of why and to what extent compliance with applicable requirements would create an undue burden or result in a fundamental alteration in the nature of the ICT.

E202.6.3 *Alternative Means.* Where conformance to one or more requirements in the Revised 508 Standards imposes an undue burden or a fundamental alteration in the nature of the ICT, the agency shall provide individuals with disabilities access to and use of information and data by an alternative means that meets identified needs.

E202.7 *Best Meets.* Where ICT conforming to one or more requirements in the Revised 508 Standards is not commercially available, the agency shall procure the ICT that best meets the Revised 508 Standards consistent with the agency's business needs.

E202.7.1 *Required Documentation.* The responsible agency official shall document in writing: (a) The non-availability of conforming ICT, including a description of market research performed and which provisions cannot be met, and (b) the basis for determining that the ICT to be procured best meets the requirements in the Revised 508 Standards consistent with the agency's business needs.

E202.7.2 *Alternative Means.* Where ICT that fully conforms to the Revised 508 Standards is not commercially available, the agency shall provide individuals with disabilities access to and use of information and data by an alternative means that meets identified needs.

E203 Access to Functionality

E203.1 *General.* Agencies shall ensure that all functionality of ICT is accessible to and usable by individuals with disabilities, either directly or by supporting the use of assistive technology, and shall comply with E203. In providing access to all functionality of ICT, agencies shall ensure the following:

A. That Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and

B. That members of the public with disabilities who are seeking information or data from a Federal agency have access to and use of information and data that is comparable to that provided to members of the public who are not individuals with disabilities.

E203.2 *User Needs.* When agencies procure, develop, maintain or use ICT they shall identify the needs of users with disabilities to determine:

A. How users with disabilities will perform the functions supported by the ICT; and

B. How the ICT will be developed, installed, configured, and maintained to support users with disabilities.

E204 Functional Performance Criteria

E204.1 *General.* Where the requirements in Chapters 4 and 5 do not address one or more functions of ICT, the functions not addressed shall conform to the Functional Performance Criteria specified in Chapter 3.

E205 Electronic Content

E205.1 *General.* Electronic content shall comply with E205.

E205.2 *Public Facing.* Electronic content that is public facing shall conform to the accessibility requirements specified in E205.4.

E205.3 *Agency Official Communication.* Electronic content that is not public facing shall conform to the accessibility requirements specified in E205.4 when such content constitutes official business and is communicated by an agency through one or more of the following:

- A. An emergency notification;
- B. An initial or final decision adjudicating an administrative claim or proceeding;
- C. An internal or external program or policy announcement;
- D. A notice of benefits, program eligibility, employment opportunity, or personnel action;
- E. A formal acknowledgement of receipt;
- F. A survey questionnaire;
- G. A template or form;
- H. Educational or training materials; or
- I. Intranet content designed as a Web page.

EXCEPTION: Records maintained by the National Archives and Records Administration (NARA) pursuant to Federal recordkeeping statutes shall not be required to conform to the Revised 508 Standards unless public facing.

E205.4 *Accessibility Standard.* Electronic content shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1).

EXCEPTION: Non-Web documents shall not be required to conform to the following four WCAG 2.0 Success Criteria: 2.4.1 Bypass Blocks, 2.4.5 Multiple Ways, 3.2.3 Consistent Navigation, and 3.2.4 Consistent Identification.

E205.4.1 *Word Substitution when Applying WCAG to Non-Web Documents.* For non-Web documents, wherever the term "Web page" or "page" appears in WCAG 2.0 Level A and AA Success Criteria and Conformance Requirements, the term "document" shall be substituted for the terms "Web page" and "page". In addition, in Success Criterion in 1.4.2, the phrase "in a document" shall be substituted for the phrase "on a Web page".

E206 Hardware

E206.1 *General.* Where components of ICT are hardware and transmit information or have a user interface, such components shall conform to the requirements in Chapter 4.

E207 Software

E207.1 *General.* Where components of ICT are software and transmit information or have a user interface, such components shall conform to E207 and the requirements in Chapter 5.

EXCEPTION: Software that is assistive technology and that supports the

accessibility services of the platform shall not be required to conform to the requirements in Chapter 5.

E207.2 WCAG Conformance. User interface components, as well as the content of platforms and applications, shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1).

EXCEPTIONS: 1. Software that is assistive technology and that supports the accessibility services of the platform shall not be required to conform to E207.2.

2. Non-Web software shall not be required to conform to the following four Success Criteria in WCAG 2.0: 2.4.1 Bypass Blocks; 2.4.5 Multiple Ways; 3.2.3 Consistent Navigation; and 3.2.4 Consistent Identification.

3. Non-Web software shall not be required to conform to Conformance Requirement 3 Complete Processes in WCAG 2.0.

E207.2.1 Word Substitution when Applying WCAG to Non-Web Software. For non-Web software, wherever the term “Web page” or “page” appears in WCAG 2.0 Level A and AA Success Criteria and Conformance Requirements, the term “software” shall be substituted for the terms “Web page” and “page”. In addition, in Success Criterion in 1.4.2, the phrase “in software” shall be substituted for the phrase “on a Web page.”

E207.3 Complete Processes for Non-Web Software. Where non-Web software requires multiple steps to accomplish an activity, all software related to the activity to be accomplished shall conform to WCAG 2.0 as specified in E207.2.

E208 Support Documentation and Services

E208.1 General. Where an agency provides support documentation or services for ICT, such documentation and services shall conform to the requirements in Chapter 6.

Appendix B to Part 1194—Section 255 of the Communications Act: Application and Scoping Requirements

Table of Contents

255 Chapter 1: Application and Administration

- C101 General
- C102 Referenced Standards
- C103 Definitions

255 Chapter 2: Scoping Requirements

- C201 Application
- C202 Functional Performance Criteria
- C203 Electronic Content
- C204 Hardware
- C205 Software
- C206 Support Documentation and Services

255 Chapter 1: Application and Administration

C101 General

C101.1 Purpose. These Revised 255 Guidelines, which consist of 255 Chapters 1 and 2 (Appendix B), along with Chapters 3 through 7 (Appendix C), contain scoping and technical requirements for the design, development, and fabrication of telecommunications equipment and customer premises equipment, content, and

support documentation and services, to ensure accessibility and usability by individuals with disabilities. These Revised 255 Guidelines are to be applied to the extent required by regulations issued by the Federal Communications Commission under Section 255 of the Communications Act of 1934, as amended (47 U.S.C. 255).

C101.2 Equivalent Facilitation. The use of an alternative design or technology that results in substantially equivalent or greater accessibility and usability by individuals with disabilities than would be provided by conformance to one or more of the requirements in Chapters 4 and 5 of the Revised 255 Guidelines is permitted. The functional performance criteria in Chapter 3 shall be used to determine whether substantially equivalent or greater accessibility and usability is provided to individuals with disabilities.

C101.3 Conventional Industry Tolerances. Dimensions are subject to conventional industry tolerances except where dimensions are stated as a range with specific minimum or maximum end points.

C101.4 Units of Measurement. Measurements are stated in metric and U.S. customary units. The values stated in each system (metric and U.S. customary units) may not be exact equivalents, and each system shall be used independently of the other.

C102 Referenced Standards

C102.1 Application. The specific editions of the standards listed in Chapter 7 are incorporated by reference into 255 Chapter 2 (Scoping Requirements) and Chapters 3 through 6 to the prescribed extent of each such reference. Where conflicts occur between the Revised 255 Guidelines and the referenced standards, these Revised 255 Guidelines apply.

C103 Definitions

C103.1 Terms Defined in Referenced Standards. Terms defined in referenced standards and not defined in C103.4 shall have the meaning as defined in the referenced standards.

C103.2 Undefined Terms. Any term not defined in C103.4 or in referenced standards shall be given its ordinarily accepted meaning in the sense that the context implies.

C103.3 Interchangeability. Words, terms, and phrases used in the singular include the plural and those used in the plural include the singular.

C103.4 Defined Terms. For the purpose of the Revised 255 Guidelines, the terms defined in C103.4 have the indicated meaning.

Application. Software designed to perform, or to help the user perform, a specific task or tasks.

Assistive Technology (AT). Any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

Audio Description. Narration added to the soundtrack to describe important visual details that cannot be understood from the

main soundtrack alone. Audio description is a means to inform individuals who are blind or who have low vision about visual content essential for comprehension. Audio description of video provides information about actions, characters, scene changes, on-screen text, and other visual content. Audio description supplements the regular audio track of a program. Audio description is usually added during existing pauses in dialogue. Audio description is also called “video description” and “descriptive narration.”

Authoring Tool. Any software, or collection of software components, that can be used by authors, alone or collaboratively, to create or modify content for use by others, including other authors.

Closed Functionality. Characteristics that limit functionality or prevent a user from attaching or installing assistive technology.

Content. Electronic information and data, as well as the encoding that defines its structure, presentation, and interactions.

Customer Premises Equipment (CPE). Equipment used on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications service or interconnected VoIP service, including software integral to the operation of telecommunications function of such equipment. Examples of CPE are telephones, routers, switches, residential gateways, set-top boxes, fixed mobile convergence products, home networking adaptors and Internet access gateways which enable consumers to access communications service providers’ services and distribute them around their house via a Local Access Network (LAN).

Document. Logically distinct assembly of content (such as a file, set of files, or streamed media) that: Functions as a single entity rather than a collection; is not part of software; and does not include its own software to retrieve and present content for users. Examples of documents include, but are not limited to, letters, email messages, spreadsheets, presentations, podcasts, images, and movies.

Hardware. A tangible device, equipment, or physical component of ICT, such as telephones, computers, multifunction copy machines, and keyboards.

Information and Communication Technology (ICT). Information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content.

Keyboard. A set of systematically arranged alphanumeric keys or a control that generates alphanumeric input by which a machine or device is operated. A keyboard includes tactilely discernible keys used in conjunction with the alphanumeric keys if their function maps to keys on the keyboard interfaces.

Label. Text, or a component with a text alternative, that is presented to a user to identify content. A label is presented to all users, whereas a name may be hidden and only exposed by assistive technology. In many cases, the name and the label are the same.

Manufacturer. A final assembler of telecommunications equipment or customer premises equipment that sells such equipment to the public or to vendors that sell to the public.

Menu. A set of selectable options.

Name. Text by which software can identify a component to the user. A name may be hidden and only exposed by assistive technology, whereas a label is presented to all users. In many cases, the label and the name are the same. Name is unrelated to the name attribute in HTML.

Non-Web Document. A document that is not: A Web page, embedded in a Web page, or used in the rendering or functioning of Web pages.

Non-Web Software. Software that is not: A Web page, not embedded in a Web page, and not used in the rendering or functioning of Web pages.

Operable Part. Hardware-based user controls for activating, deactivating, or adjusting ICT.

Platform Accessibility Services. Services provided by a platform enabling interoperability with assistive technology. Examples are Application Programming Interfaces (API) and the Document Object Model (DOM).

Platform Software. Software that interacts with hardware or provides services for other software. Platform software may run or host other software, and may isolate them from underlying software or hardware layers. A single software component may have both platform and non-platform aspects. Examples of platforms are: Desktop operating systems; embedded operating systems, including mobile systems; Web browsers; plug-ins to Web browsers that render a particular media or format; and sets of components that allow other applications to execute, such as applications which support macros or scripting.

Programmatically Determinable. Ability to be determined by software from author-supplied data that is provided in a way that different user agents, including assistive technologies, can extract and present the information to users in different modalities.

Real-Time Text (RTT). Communications using the transmission of text by which characters are transmitted by a terminal as they are typed. Real-time text is used for conversational purposes. Real-time text also may be used in voicemail, interactive voice response systems, and other similar application.

Revised 255 Guidelines. The guidelines for telecommunications equipment and customer premises equipment covered by Section 255 of the Communications Act as set forth in 255 Chapters 1 and 2 (36 CFR part 1194, Appendix B), and Chapters 3 through 7 (36 CFR part 1193, Appendix C).

Software. Programs, procedures, rules, and related data and documentation that direct the use and operation of ICT and instruct it to perform a given task or function. Software includes, but is not limited to, applications, non-Web software, and platform software.

Software Tools. Software for which the primary function is the development of other software. Software tools usually come in the form of an Integrated Development

Environment (IDE) and are a suite of related products and utilities. Examples of IDEs include Microsoft® Visual Studio®, Apple® Xcode®, and Eclipse Foundation Eclipse®.

Specialized Customer Premises Equipment. Assistive technology used by individuals with disabilities to originate, route, or terminate telecommunications or interconnected VoIP service. Examples are TTYs and amplified telephones.

Telecommunications. The signal transmission between or among points specified by the user of information and of the user's choosing without change in the form or content of the information as sent and received.

Telecommunications Equipment. Equipment, other than customer premises equipment, used by a carrier to provide telecommunications service or interconnected VoIP service and includes software integral to the operation of telecommunications function of such equipment.

Terminal. Device or software with which the end user directly interacts and that provides the user interface. For some systems, the software that provides the user interface may reside on more than one device such as a telephone and a server.

Text. A sequence of characters that can be programmatically determined and that expresses something in human language.

TTY. Equipment that enables interactive text based communications through the transmission of frequency-shift-keying audio tones across the public switched telephone network. TTYs include devices for real-time text communications and voice and text intermixed communications. Examples of intermixed communications are voice carry over and hearing carry over. One example of a TTY is a computer with TTY emulating software and modem.

Variable Message Signs (VMS). Non-interactive electronic signs with scrolling, streaming, or paging-down capability. An example of a VMS is an electronic message board at a transit station that displays the gate and time information associated with the next train arrival.

Voice over Internet Protocol (VoIP). A technology that provides real-time voice communications. VoIP requires a broadband connection from the user's location and customer premises equipment compatible with Internet protocol.

Web page. A non-embedded resource obtained from a single Universal Resource Identifier (URI) using HyperText Transfer Protocol (HTTP) plus any other resources that are provided for the rendering, retrieval, and presentation of content.

Chapter 2: Scoping Requirements

C201 Application

C201.1 Scope. Manufacturers shall comply with the requirements in the Revised 255 Guidelines applicable to telecommunications equipment and customer premises equipment (and related software integral to the operation of telecommunications functions) when newly released, upgraded, or substantially changed from an earlier version or model. Manufacturers shall also conform to the

requirements in the Revised 255 Guidelines for support documentation and services, including electronic documents and Web-based product support.

C201.2. Readily Achievable. When a manufacturer determines that conformance to one or more requirements in Chapter 4 (Hardware) or Chapter 5 (Software) would not be readily achievable, it shall ensure that the equipment or software is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to the extent readily achievable.

C201.3 Access to Functionality. Manufacturers shall ensure that telecommunications equipment and customer premises equipment is accessible to and usable by individuals with disabilities by providing direct access to all telecommunications functionality. Where manufacturers can demonstrate that it is not readily achievable for such equipment to provide direct access to all functionality, the equipment shall support the use of assistive technology and specialized customer premises equipment where readily achievable.

C201.4 Prohibited Reduction of Accessibility, Usability, and Compatibility. No change shall be undertaken that decreases, or has the effect of decreasing, the net accessibility, usability, or compatibility of telecommunications equipment or customer premises equipment.

EXCEPTION: Discontinuation of a product shall not be prohibited.

C201.5 Design, Development, and Fabrication. Manufacturers shall evaluate the accessibility, usability, and interoperability of telecommunications equipment and customer premises equipment during its product design, development, and fabrication.

C202 Functional Performance Criteria

C202.1 General. Where the requirements in Chapters 4 and 5 do not address one or more functions of telecommunications or customer premises equipment, the functions not addressed shall conform to the Functional Performance Criteria specified in Chapter 3.

C203 Electronic Content

C203.1 General. Electronic content that is integral to the use of telecommunications or customer premises equipment shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1).

EXCEPTION: Non-Web documents shall not be required to conform to the following four WCAG 2.0 Success Criteria: 2.4.1 Bypass Blocks, 2.4.5 Multiple Ways, 3.2.3 Consistent Navigation, and 3.2.4 Consistent Identification.

C203.1.1 Word Substitution when Applying WCAG to Non-Web Documents. For non-Web documents, wherever the term "Web page" or "page" appears in WCAG 2.0 Level A and AA Success Criteria and Conformance Requirements, the term "document" shall be substituted for the terms "Web page" and "page." In addition, in Success Criterion in 1.4.2, the phrase "in a

document” shall be substituted for the phrase “on a Web page.”

C204 Hardware

C204.1 *General.* Where components of telecommunications equipment and customer premises equipment are hardware, and transmit information or have a user interface, those components shall conform to applicable requirements in Chapter 4.

EXCEPTION: Components of telecommunications equipment and customer premises equipment shall not be required to conform to 402, 407.7, 407.8, 408, and 415.

C205 Software

C205.1 *General.* Where software is integral to the use of telecommunications functions of telecommunications equipment or customer premises equipment and has a user interface, such software shall conform to C205 and applicable requirements in Chapter 5.

EXCEPTION: Software that is assistive technology and that supports the accessibility services of the platform shall not be required to conform to the requirements in Chapter 5.

C205.2 *WCAG Conformance.* User interface components, as well as the content of platforms and applications shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1).

EXCEPTIONS: 1. Software that is assistive technology and that supports the accessibility services of the platform shall not be required to conform to C205.2.

2. Non-Web software shall not be required to conform to the following four Success Criteria in WCAG 2.0: 2.4.1 Bypass Blocks; 2.4.5 Multiple Ways; 3.2.3 Consistent Navigation; and 3.2.4 Consistent Identification.

3. Non-Web software shall not be required to conform to Conformance Requirement 3 Complete Processes in WCAG 2.0.

C205.2.1 *Word Substitution when Applying WCAG to Non-Web Software.* For non-Web software, wherever the term “Web page” or “page” appears in WCAG 2.0 Level A and AA Success Criteria and Conformance Requirements, the term “software” shall be substituted for the terms “Web page” and “page.” In addition, in Success Criterion 1.4.2, the phrase “in software” shall be substituted for the phrase “on a Web page.”

C205.3 *Complete Processes for Non-Web Software.* Where non-Web software requires multiple steps to accomplish an activity, all software related to the activity to be accomplished shall conform to WCAG 2.0 as specified in C205.2.

C206 Support Documentation and Services

C206.1 *General.* Where support documentation and services are provided for telecommunications equipment and customer premises equipment, manufacturers shall ensure that such documentation and services conform to Chapter 6 and are made available upon request at no additional charge.

Appendix C to Part 1194—Functional Performance Criteria and Technical Requirements

Table of Contents

Chapter 3: Functional Performance Criteria

- 301 General
- 302 Functional Performance Criteria

Chapter 4: Hardware

- 401 General
- 402 Closed Functionality
- 403 Biometrics
- 404 Preservation of Information Provided for Accessibility
- 405 Privacy
- 406 Standard Connections
- 407 Operable Parts
- 408 Display Screens
- 409 Status Indicators
- 410 Color Coding
- 411 Audible Signals
- 412 ICT with Two-Way Communication
- 413 Closed Caption Processing Technologies
- 414 Audio Description Processing Technologies
- 415 User Controls for Captions and Audio Descriptions

Chapter 5: Software

- 501 General
- 502 Interoperability with Assistive Technology
- 503 Applications
- 504 Authoring Tools

Chapter 6: Support Documentation and Services

- 601 General
- 602 Support Documentation
- 603 Support Services

Chapter 7: Referenced Standards

- 701 General
- 702 Incorporation by Reference

Chapter 3: Functional Performance Criteria

- 301 General
 - 301.1 *Scope.* The requirements of Chapter 3 shall apply to ICT where required by 508 Chapter 2 (Scoping Requirements), 255 Chapter 2 (Scoping Requirements), and where otherwise referenced in any other chapter of the Revised 508 Standards or Revised 255 Guidelines.

302 Functional Performance Criteria

302.1 *Without Vision.* Where a visual mode of operation is provided, ICT shall provide at least one mode of operation that does not require user vision.

302.2 *With Limited Vision.* Where a visual mode of operation is provided, ICT shall provide at least one mode of operation that enables users to make use of limited vision.

302.3 *Without Perception of Color.* Where a visual mode of operation is provided, ICT shall provide at least one visual mode of operation that does not require user perception of color.

302.4 *Without Hearing.* Where an audible mode of operation is provided, ICT shall provide at least one mode of operation that does not require user hearing.

302.5 *With Limited Hearing.* Where an audible mode of operation is provided, ICT shall provide at least one mode of operation that enables users to make use of limited hearing.

302.6 *Without Speech.* Where speech is used for input, control, or operation, ICT shall provide at least one mode of operation that does not require user speech.

302.7 *With Limited Manipulation.* Where a manual mode of operation is provided, ICT shall provide at least one mode of operation that does not require fine motor control or simultaneous manual operations.

302.8 *With Limited Reach and Strength.* Where a manual mode of operation is provided, ICT shall provide at least one mode of operation that is operable with limited reach and limited strength.

302.9 *With Limited Language, Cognitive, and Learning Abilities.* ICT shall provide features making its use by individuals with limited cognitive, language, and learning abilities simpler and easier.

Chapter 4: Hardware

401 General

401.1 *Scope.* The requirements of Chapter 4 shall apply to ICT that is hardware where required by 508 Chapter 2 (Scoping Requirements), 255 Chapter 2 (Scoping Requirements), and where otherwise referenced in any other chapter of the Revised 508 Standards or Revised 255 Guidelines.

EXCEPTION: Hardware that is assistive technology shall not be required to conform to the requirements of this chapter.

402 Closed Functionality

402.1 *General.* ICT with closed functionality shall be operable without requiring the user to attach or install assistive technology other than personal headsets or other audio couplers, and shall conform to 402.

402.2 *Speech-Output Enabled.* ICT with a display screen shall be speech-output enabled for full and independent use by individuals with vision impairments.

EXCEPTIONS: 1. Variable message signs conforming to 402.5 shall not be required to be speech-output enabled.

2. Speech output shall not be required where ICT display screens only provide status indicators and those indicators conform to 409.

3. Where speech output cannot be supported due to constraints in available memory or processor capability, ICT shall be permitted to conform to 409 in lieu of 402.2.

4. Audible tones shall be permitted instead of speech output where the content of user input is not displayed as entered for security purposes, including, but not limited to, asterisks representing personal identification numbers.

5. Speech output shall not be required for: The machine location; date and time of transaction; customer account number; and the machine identifier or label.

6. Speech output shall not be required for advertisements and other similar information unless they convey information that can be used for the transaction being conducted.

402.2.1 *Information Displayed On-Screen.* Speech output shall be provided for all information displayed on-screen.

402.2.2 *Transactional Outputs.* Where transactional outputs are provided, the speech output shall audibly provide all information necessary to verify a transaction.

402.2.3 *Speech Delivery Type and Coordination.* Speech output shall be delivered through a mechanism that is readily available to all users, including, but not limited to, an industry standard connector or a telephone handset. Speech shall be recorded or digitized human, or synthesized. Speech output shall be coordinated with information displayed on the screen.

402.2.4 *User Control.* Speech output for any single function shall be automatically interrupted when a transaction is selected. Speech output shall be capable of being repeated and paused.

402.2.5 *Braille Instructions.* Where speech output is required by 402.2, braille instructions for initiating the speech mode of operation shall be provided. Braille shall be contracted and shall conform to 36 CFR part 1191, Appendix D, Section 703.3.1.

EXCEPTION: Devices for personal use shall not be required to conform to 402.2.5.

402.3 *Volume.* ICT that delivers sound, including speech output required by 402.2, shall provide volume control and output amplification conforming to 402.3.

EXCEPTION: ICT conforming to 412.2 shall not be required to conform to 402.3.

402.3.1 *Private Listening.* Where ICT provides private listening, it shall provide a mode of operation for controlling the volume. Where ICT delivers output by an audio transducer typically held up to the ear, a means for effective magnetic wireless coupling to hearing technologies shall be provided.

402.3.2 *Non-private Listening.* Where ICT provides non-private listening, incremental volume control shall be provided with output amplification up to a level of at least 65 dB. A function shall be provided to automatically reset the volume to the default level after every use.

402.4 *Characters on Display Screens.* At least one mode of characters displayed on the screen shall be in a sans serif font. Where ICT does not provide a screen enlargement feature, characters shall be 3/16 inch (4.8 mm) high minimum based on the uppercase letter "I". Characters shall contrast with their background with either light characters on a dark background or dark characters on a light background.

402.5 *Characters on Variable Message Signs.* Characters on variable message signs shall conform to section 703.7 Variable Message Signs of ICC A117.1–2009 (incorporated by reference, *see* 702.6.1).

403 Biometrics

403.1 *General.* Where provided, biometrics shall not be the only means for user identification or control.

EXCEPTION: Where at least two biometric options that use different biological characteristics are provided, ICT shall be permitted to use biometrics as the only means for user identification or control.

404 Preservation of Information Provided for Accessibility

404.1 *General.* ICT that transmits or converts information or communication shall not remove non-proprietary information provided for accessibility or shall restore it upon delivery.

405 Privacy

405.1 *General.* The same degree of privacy of input and output shall be provided to all individuals. When speech output required by 402.2 is enabled, the screen shall not blank automatically.

406 Standard Connections

406.1 *General.* Where data connections used for input and output are provided, at least one of each type of connection shall conform to industry standard non-proprietary formats.

407 Operable Parts

407.1 *General.* Where provided, operable parts used in the normal operation of ICT shall conform to 407.

407.2 *Contrast.* Where provided, keys and controls shall contrast visually from background surfaces. Characters and symbols shall contrast visually from background surfaces with either light characters or symbols on a dark background or dark characters or symbols on a light background.

407.3 *Input Controls.* At least one input control conforming to 407.3 shall be provided for each function.

EXCEPTION: Devices for personal use with input controls that are audibly discernable without activation and operable by touch shall not be required to conform to 407.3.

407.3.1 *Tactilely Discernible.* Input controls shall be operable by touch and tactilely discernible without activation.

407.3.2 *Alphabetic Keys.* Where provided, individual alphabetic keys shall be arranged in a QWERTY-based keyboard layout and the "F" and "J" keys shall be tactilely distinct from the other keys.

407.3.3 *Numeric Keys.* Where provided, numeric keys shall be arranged in a 12-key ascending or descending keypad layout. The number five key shall be tactilely distinct from the other keys. Where the ICT provides an alphabetic overlay on numeric keys, the relationships between letters and digits shall conform to ITU-T Recommendation E.161 (incorporated by reference, *see* 702.7.1).

407.4 *Key Repeat.* Where a keyboard with key repeat is provided, the delay before the key repeat feature is activated shall be fixed at, or adjustable to, 2 seconds minimum.

407.5 *Timed Response.* Where a timed response is required, the user shall be alerted visually, as well as by touch or sound, and shall be given the opportunity to indicate that more time is needed.

407.6 *Operation.* At least one mode of operation shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate operable parts shall be 5 pounds (22.2 N) maximum.

407.7 *Tickets, Fare Cards, and Keycards.* Where tickets, fare cards, or keycards are provided, they shall have an orientation that is tactilely discernible if orientation is

important to further use of the ticket, fare card, or keycard.

407.8 *Reach Height and Depth.* At least one of each type of operable part of stationary ICT shall be at a height conforming to 407.8.2 or 407.8.3 according to its position established by the vertical reference plane specified in 407.8.1 for a side reach or a forward reach. Operable parts used with speech output required by 402.2 shall not be the only type of operable part complying with 407.8 unless that part is the only operable part of its type.

407.8.1 Vertical Reference Plane.

Operable parts shall be positioned for a side reach or a forward reach determined with respect to a vertical reference plane. The vertical reference plane shall be located in conformance to 407.8.2 or 407.8.3.

407.8.1.1 *Vertical Plane for Side Reach.* Where a side reach is provided, the vertical reference plane shall be 48 inches (1220 mm) long minimum.

407.8.1.2 *Vertical Plane for Forward Reach.* Where a forward reach is provided, the vertical reference plane shall be 30 inches (760 mm) long minimum.

407.8.2 *Side Reach.* Operable parts of ICT providing a side reach shall conform to 407.8.2.1 or 407.8.2.2. The vertical reference plane shall be centered on the operable part and placed at the leading edge of the maximum protrusion of the ICT within the length of the vertical reference plane. Where a side reach requires a reach over a portion of the ICT, the height of that portion of the ICT shall be 34 inches (865 mm) maximum.

407.8.2.1 *Unobstructed Side Reach.* Where the operable part is located 10 inches (255 mm) or less beyond the vertical reference plane, the operable part shall be 48 inches (1220 mm) high maximum and 15 inches (380 mm) high minimum above the floor.

407.8.2.2 *Obstructed Side Reach.* Where the operable part is located more than 10 inches (255 mm), but not more than 24 inches (610 mm), beyond the vertical reference plane, the height of the operable part shall be 46 inches (1170 mm) high maximum and 15 inches (380 mm) high minimum above the floor. The operable part shall not be located more than 24 inches (610 mm) beyond the vertical reference plane.

407.8.3 *Forward Reach.* Operable parts of ICT providing a forward reach shall conform to 407.8.3.1 or 407.8.3.2. The vertical reference plane shall be centered, and intersect with, the operable part. Where a forward reach allows a reach over a portion of the ICT, the height of that portion of the ICT shall be 34 inches (865 mm) maximum.

407.8.3.1 *Unobstructed Forward Reach.* Where the operable part is located at the leading edge of the maximum protrusion within the length of the vertical reference plane of the ICT, the operable part shall be 48 inches (1220 mm) high maximum and 15 inches (380 mm) high minimum above the floor.

407.8.3.2 *Obstructed Forward Reach.* Where the operable part is located beyond the leading edge of the maximum protrusion within the length of the vertical reference plane, the operable part shall conform to 407.8.3.2. The maximum allowable forward

reach to an operable part shall be 25 inches (635 mm).

407.8.3.2.1 *Operable Part Height for ICT with Obstructed Forward Reach.* The height

of the operable part shall conform to Table 407.8.3.2.1.

TABLE 407.8.3.2.1—OPERABLE PART HEIGHT FOR ICT WITH OBSTRUCTED FORWARD REACH

Reach depth	Operable part height
Less than 20 inches (510 mm)	48 inches (1220 mm) maximum.
20 inches (510 mm) to 25 inches (635 mm)	44 inches (1120 mm) maximum.

407.8.3.2.2 *Knee and Toe Space under ICT with Obstructed Forward Reach.* Knee and toe space under ICT shall be 27 inches (685 mm) high minimum, 25 inches (635 mm) deep maximum, and 30 inches (760 mm) wide minimum and shall be clear of obstructions.

EXCEPTIONS: 1. Toe space shall be permitted to provide a clear height of 9 inches (230 mm) minimum above the floor and a clear depth of 6 inches (150 mm) maximum from the vertical reference plane toward the leading edge of the ICT.

2. At a depth of 6 inches (150 mm) maximum from the vertical reference plane toward the leading edge of the ICT, space between 9 inches (230 mm) and 27 inches (685 mm) minimum above the floor shall be permitted to reduce at a rate of 1 inch (25 mm) in depth for every 6 inches (150 mm) in height.

408 Display Screens

408.1 *General.* Where provided, display screens shall conform to 408.

408.2 *Visibility.* Where stationary ICT provides one or more display screens, at least one of each type of display screen shall be visible from a point located 40 inches (1015 mm) above the floor space where the display screen is viewed.

408.3 *Flashing.* Where ICT emits lights in flashes, there shall be no more than three flashes in any one-second period.

EXCEPTION: Flashes that do not exceed the general flash and red flash thresholds defined in WCAG 2.0 (incorporated by reference, *see* 702.10.1) are not required to conform to 408.3.

409 Status Indicators

409.1 *General.* Where provided, status indicators shall be discernible visually and by touch or sound.

410 Color Coding

410.1 *General.* Where provided, color coding shall not be used as the only means of conveying information, indicating an action, prompting a response, or distinguishing a visual element.

411 Audible Signals

411.1 *General.* Where provided, audible signals or cues shall not be used as the only means of conveying information, indicating an action, or prompting a response.

412 ICT With Two-Way Voice Communication

412.1 *General.* ICT that provides two-way voice communication shall conform to 412.

412.2 *Volume Gain.* ICT that provides two-way voice communication shall conform to 412.2.1 or 412.2.2.

412.2.1 *Volume Gain for Wireline Telephones.* Volume gain conforming to 47 CFR 68.317 shall be provided on analog and digital wireline telephones.

412.2.2 *Volume Gain for Non-Wireline ICT.* A method for increasing volume shall be provided for non-wireline ICT.

412.3 *Interference Reduction and Magnetic Coupling.* Where ICT delivers output by a handset or other type of audio transducer that is typically held up to the ear, ICT shall reduce interference with hearing technologies and provide a means for effective magnetic wireless coupling in conformance with 412.3.1 or 412.3.2.

412.3.1 *Wireless Handsets.* ICT in the form of wireless handsets shall conform to ANSI/IEEE C63.19–2011 (incorporated by reference, *see* 702.5.1).

412.3.2 *Wireline Handsets.* ICT in the form of wireline handsets, including cordless handsets, shall conform to TIA–1083–B (incorporated by reference, *see* 702.9.1).

412.4 *Digital Encoding of Speech.* ICT in IP-based networks shall transmit and receive speech that is digitally encoded in the manner specified by ITU–T Recommendation G.722.2 (incorporated by reference, *see* 702.7.2) or IETF RFC 6716 (incorporated by reference, *see* 702.8.1).

412.5 *Real-Time Text Functionality.* [Reserved].

412.6 *Caller ID.* Where provided, caller identification and similar telecommunications functions shall be visible and audible.

412.7 *Video Communication.* Where ICT provides real-time video functionality, the quality of the video shall be sufficient to support communication using sign language.

413 Closed Caption Processing Technologies

413.1 *General.* Where ICT displays or processes video with synchronized audio, ICT shall provide closed caption processing technology that conforms to 413.1.1 or 413.1.2.

413.1.1 *Decoding and Display of Closed Captions.* Players and displays shall decode closed caption data and support display of captions.

413.1.2 *Pass-Through of Closed Caption Data.* Cabling and ancillary equipment shall pass through caption data.

414 Audio Description Processing Technologies

414.1 *General.* Where ICT displays or processes video with synchronized audio, ICT shall provide audio description processing technology conforming to 414.1.1 or 414.1.2.

414.1.1 *Digital Television Tuners.* Digital television tuners shall provide audio

description processing that conforms to ATSC A/53 Digital Television Standard, Part 5 (2014) (incorporated by reference, *see* 702.2.1). Digital television tuners shall provide processing of audio description when encoded as a Visually Impaired (VI) associated audio service that is provided as a complete program mix containing audio description according to the ATSC A/53 standard.

414.1.2 *Other ICT.* ICT other than digital television tuners shall provide audio description processing.

415 User Controls for Captions and Audio Descriptions

415.1 *General.* Where ICT displays video with synchronized audio, ICT shall provide user controls for closed captions and audio descriptions conforming to 415.1.

EXCEPTION: Devices for personal use shall not be required to conform to 415.1 provided that captions and audio descriptions can be enabled through system-wide platform settings.

415.1.1 *Caption Controls.* Where ICT provides operable parts for volume control, ICT shall also provide operable parts for caption selection.

415.1.2 *Audio Description Controls.* Where ICT provides operable parts for program selection, ICT shall also provide operable parts for the selection of audio description.

Chapter 5: Software

501 General

501.1 *Scope.* The requirements of Chapter 5 shall apply to software where required by 508 Chapter 2 (Scoping Requirements), 255 Chapter 2 (Scoping Requirements), and where otherwise referenced in any other chapter of the Revised 508 Standards or Revised 255 Guidelines.

EXCEPTION: Where Web applications do not have access to platform accessibility services and do not include components that have access to platform accessibility services, they shall not be required to conform to 502 or 503 provided that they conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1).

502 Interoperability With Assistive Technology

502.1 *General.* Software shall interoperate with assistive technology and shall conform to 502.

EXCEPTION: ICT conforming to 402 shall not be required to conform to 502.

502.2 *Documented Accessibility Features.* Software with platform features defined in platform documentation as accessibility features shall conform to 502.2.

502.2.1 User Control of Accessibility Features. Platform software shall provide user control over platform features that are defined in the platform documentation as accessibility features.

502.2.2 No Disruption of Accessibility Features. Software shall not disrupt platform features that are defined in the platform documentation as accessibility features.

502.3 Accessibility Services. Platform software and software tools that are provided by the platform developer shall provide a documented set of accessibility services that support applications running on the platform to interoperate with assistive technology and shall conform to 502.3. Applications that are also platforms shall expose the underlying platform accessibility services or implement other documented accessibility services.

502.3.1 Object Information. The object role, state(s), properties, boundary, name, and description shall be programmatically determinable.

502.3.2 Modification of Object Information. States and properties that can be set by the user shall be capable of being set programmatically, including through assistive technology.

502.3.3 Row, Column, and Headers. If an object is in a data table, the occupied rows and columns, and any headers associated with those rows or columns, shall be programmatically determinable.

502.3.4 Values. Any current value(s), and any set or range of allowable values associated with an object, shall be programmatically determinable.

502.3.5 Modification of Values. Values that can be set by the user shall be capable of being set programmatically, including through assistive technology.

502.3.6 Label Relationships. Any relationship that a component has as a label for another component, or of being labeled by another component, shall be programmatically determinable.

502.3.7 Hierarchical Relationships. Any hierarchical (parent-child) relationship that a component has as a container for, or being contained by, another component shall be programmatically determinable.

502.3.8 Text. The content of text objects, text attributes, and the boundary of text rendered to the screen, shall be programmatically determinable.

502.3.9 Modification of Text. Text that can be set by the user shall be capable of being set programmatically, including through assistive technology.

502.3.10 List of Actions. A list of all actions that can be executed on an object shall be programmatically determinable.

502.3.11 Actions on Objects. Applications shall allow assistive technology to programmatically execute available actions on objects.

502.3.12 Focus Cursor. Applications shall expose information and mechanisms necessary to track focus, text insertion point, and selection attributes of user interface components.

502.3.13 Modification of Focus Cursor. Focus, text insertion point, and selection attributes that can be set by the user shall be capable of being set programmatically, including through the use of assistive technology.

502.3.14 Event Notification. Notification of events relevant to user interactions, including but not limited to, changes in the component's state(s), value, name, description, or boundary, shall be available to assistive technology.

502.4 Platform Accessibility Features. Platforms and platform software shall conform to the requirements in ANSI/HFES 200.2, Human Factors Engineering of Software User Interfaces—Part 2: Accessibility (2008) (incorporated by reference, *see* 702.4.1) listed below:

A. Section 9.3.3 Enable sequential entry of multiple (chorded) keystrokes;

B. Section 9.3.4 Provide adjustment of delay before key acceptance;

C. Section 9.3.5 Provide adjustment of same-key double-strike acceptance;

D. Section 10.6.7 Allow users to choose visual alternative for audio output;

E. Section 10.6.8 Synchronize audio equivalents for visual events;

F. Section 10.6.9 Provide speech output services; and

G. Section 10.7.1 Display any captions provided.

503 Applications

503.1 General. Applications shall conform to 503.

503.2 User Preferences. Applications shall permit user preferences from platform settings for color, contrast, font type, font size, and focus cursor.

EXCEPTION: Applications that are designed to be isolated from their underlying platform software, including Web applications, shall not be required to conform to 503.2.

503.3 Alternative User Interfaces. Where an application provides an alternative user interface that functions as assistive technology, the application shall use platform and other industry standard accessibility services.

503.4 User Controls for Captions and Audio Description. Where ICT displays video with synchronized audio, ICT shall provide user controls for closed captions and audio descriptions conforming to 503.4.

503.4.1 Caption Controls. Where user controls are provided for volume adjustment, ICT shall provide user controls for the selection of captions at the same menu level as the user controls for volume or program selection.

503.4.2 Audio Description Controls. Where user controls are provided for program selection, ICT shall provide user controls for the selection of audio descriptions at the same menu level as the user controls for volume or program selection.

504 Authoring Tools

504.1 General. Where an application is an authoring tool, the application shall conform to 504 to the extent that information required for accessibility is supported by the destination format.

504.2 Content Creation or Editing. Authoring tools shall provide a mode of operation to create or edit content that conforms to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see*

702.10.1) for all supported features and, as applicable, to file formats supported by the authoring tool. Authoring tools shall permit authors the option of overriding information required for accessibility.

EXCEPTION: Authoring tools shall not be required to conform to 504.2 when used to directly edit plain text source code.

504.2.1 Preservation of Information Provided for Accessibility in Format Conversion. Authoring tools shall, when converting content from one format to another or saving content in multiple formats, preserve the information required for accessibility to the extent that the information is supported by the destination format.

504.2.2 PDF Export. Authoring tools capable of exporting PDF files that conform to ISO 32000-1:2008 (PDF 1.7) shall also be capable of exporting PDF files that conform to ANSI/AIIM/ISO 14289-1:2016 (PDF/UA-1) (incorporated by reference, *see* 702.3.1).

504.3 Prompts. Authoring tools shall provide a mode of operation that prompts authors to create content that conforms to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1) for supported features and, as applicable, to file formats supported by the authoring tool.

504.4 Templates. Where templates are provided, templates allowing content creation that conforms to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1) shall be provided for a range of template uses for supported features and, as applicable, to file formats supported by the authoring tool.

Chapter 6: Support Documentation and Services

601 General

601.1 Scope. The technical requirements in Chapter 6 shall apply to ICT support documentation and services where required by 508 Chapter 2 (Scoping Requirements), 255 Chapter 2 (Scoping Requirements), and where otherwise referenced in any other chapter of the Revised 508 Standards or Revised 255 Guidelines.

602 Support Documentation

602.1 General. Documentation that supports the use of ICT shall conform to 602.

602.2 Accessibility and Compatibility Features. Documentation shall list and explain how to use the accessibility and compatibility features required by Chapters 4 and 5. Documentation shall include accessibility features that are built-in and accessibility features that provide compatibility with assistive technology.

602.3 Electronic Support Documentation. Documentation in electronic format, including Web-based self-service support, shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 (incorporated by reference, *see* 702.10.1).

602.4 Alternate Formats for Non-Electronic Support Documentation. Where support documentation is only provided in non-electronic formats, alternate formats usable by individuals with disabilities shall be provided upon request.

603 Support Services

603.1 *General.* ICT support services including, but not limited to, help desks, call centers, training services, and automated self-service technical support, shall conform to 603.

603.2 *Information on Accessibility and Compatibility Features.* ICT support services shall include information on the accessibility and compatibility features required by 602.2.

603.3 *Accommodation of Communication Needs.* Support services shall be provided directly to the user or through a referral to a point of contact. Such ICT support services shall accommodate the communication needs of individuals with disabilities.

Chapter 7: Referenced Standards

701 General

701.1 *Scope.* The standards referenced in Chapter 7 shall apply to ICT where required by 508 Chapter 2 (Scoping Requirements), 255 Chapter 2 (Scoping Requirements), and where referenced in any other chapter of the Revised 508 Standards or Revised 255 Guidelines.

702 Incorporation by Reference

702.1 *Approved IBR Standards.* The Director of the Office of the Federal Register has approved these standards for incorporation by reference into this part in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the referenced standards may be inspected at the U.S. Access Board, 1331 F Street, NW., Suite 1000, Washington, DC 20004, (202) 272-0080, and may also be obtained from the sources listed below. They are also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

702.2 *Advanced Television Systems Committee (ATSC).* Copies of the referenced standard may be obtained from the Advanced Television Systems Committee, 1776 K Street NW., Suite 200, Washington, DC 20006-2304 (<http://www.atsc.org>).

702.2.1 *ATSC A/53 Part 5:2014, Digital Television Standard, Part 5—AC-3 Audio System Characteristics*, August 28, 2014, IBR approved for Appendix C, Section 414.1.1.

702.3 *Association for Information and Image Management (AIIM).* Copies of the referenced standard may be obtained from AIIM, 1100 Wayne Ave., Ste. 1100, Silver Spring, Maryland 20910 (http://www.aiim.org/Resources/Standards/AIIM_ISO_14289-1).

702.3.1 *ANSI/AIIM/ISO 14289-1-2016, Document Management Applications—Electronic Document File Format Enhancement for Accessibility—Part 1: Use of ISO 32000-1 (PDF/UA-1)*, ANSI-approved February 8, 2016, IBR approved for Appendix C, Section 504.2.2.

702.4 *Human Factors and Ergonomics Society (HFES).* Copies of the referenced standard may be obtained from the Human Factors and Ergonomics Society, P.O. Box 1369, Santa Monica, CA 90406-1369 (<http://www.hfes.org/Publications/ProductDetail.aspx?Id=76>).

702.4.1 *ANSI/HFES 200.2, Human Factors Engineering of Software User Interfaces—Part 2: Accessibility*, copyright 2008, IBR approved for Appendix C, Section 502.4.

702.5 *Institute of Electrical and Electronics Engineers (IEEE).* Copies of the referenced standard may be obtained from the Institute of Electrical and Electronics Engineers, 10662 Los Vaqueros Circle, P.O. Box 3014, Los Alamitos, CA 90720-1264 (<http://www.ieee.org>).

702.5.1 *ANSI/IEEE C63.19-2011, American National Standard for Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids*, May 27, 2011, IBR approved for Appendix C, Section 412.3.1.

702.6 *International Code Council (ICC).* Copies of the referenced standard may be obtained from ICC Publications, 4051 W. Flossmoor Road, Country Club Hills, IL 60478-5795 (<http://www.iccsafe.org>).

702.6.1 *ICC A117.1-2009, Accessible and Usable Buildings and Facilities*, approved October 20, 2010, IBR approved for Appendix C, Section 402.5.

702.7 *International Telecommunications Union Telecommunications Standardization Sector (ITU-T).* Copies of the referenced standards may be obtained from the International Telecommunication Union, Telecommunications Standardization Sector, Place des Nations CH-1211, Geneva 20, Switzerland (<http://www.itu.int/en/ITU-T>).

702.7.1 *ITU-T Recommendation E.161, Series E. Overall Network Operation, Telephone Service, Service Operation and Human Factors—International operation—Numbering plan of the international telephone service, Arrangement of digits, letters and symbols on telephones and other devices that can be used for gaining access to a telephone network*, February 2001, IBR approved for Appendix C, Section 407.3.3.

702.7.2 *ITU-T Recommendation G.722.2, Series G. Transmission Systems and Media, Digital Systems and Networks—Digital terminal equipment—Coding of analogue signals by methods other than PCM, Wideband coding of speech at around 16 kbit/s using Adaptive Multi-Rate Wideband (AMR-WB)*, July 2003, IBR approved for Appendix C, Section 412.4.

702.8 *Internet Engineering Task Force (IETF).* Copies of the referenced standard may be obtained from the Internet Engineering Task Force (<http://www.ietf.org>).

702.8.1 *IETF RFC 6716, Definition of the Opus Codec*, September 2012, J.M. Valin, Mozilla Corporation, K. Vos, Skype Technologies S.A., T. Terriberry, Mozilla Corporation, IBR approved for Appendix C, Section 412.4.

702.9 *Telecommunications Industry Association (TIA).* Copies of the referenced standard, published by the Telecommunications Industry Association, may be obtained from IHS Markit, 15 Inverness Way East, Englewood, CO 80112 (<http://global.ihs.com>).

702.9.1 *TIA-1083-B, Telecommunications—Communications Products—Handset Magnetic Measurement Procedures and Performance Requirements*, October 2015, IBR approved for Appendix C, Section 412.3.2.

702.10 *Worldwide Web Consortium (W3C).* Copies of the referenced standard may be obtained from the W3C Web Accessibility Initiative, Massachusetts Institute of Technology, 32 Vassar Street, Room 32-G515, Cambridge, MA 02139 (<http://www.w3.org/TR/WCAG20>).

702.10.1 *WCAG 2.0, Web Content Accessibility Guidelines, W3C Recommendation*, December 11, 2008, IBR approved for: Appendix A (Section 508 of the Rehabilitation Act: Application and Scoping Requirements), Sections E205.4, E205.4 Exception, E205.4.1, E207.2, E207.2 Exception 2, E207.2 Exception 3, E207.2.1, E207.3; Appendix B (Section 255 of the Communications Act: Application and Scoping Requirements), C203.1, C203.1 Exception, C203.1.1, C205.2, C205.2 Exception 2, C205.2 Exception 3, C205.2.1, C205.3; and Appendix C (Functional Performance Criteria and Technical Requirements), 408.3 Exception, 501.1 Exception, 504.2, 504.3, 504.4, and 602.3.

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Part V

Social Security Administration

20 CFR Parts 404 and 416

Revisions to Rules Regarding the Evaluation of Medical Evidence; Final Rule

SOCIAL SECURITY ADMINISTRATION**20 CFR Parts 404 and 416****[Docket No. SSA–2012–0035]****RIN 0960–AH51****Revisions to Rules Regarding the Evaluation of Medical Evidence****AGENCY:** Social Security Administration.
ACTION: Final rules.

SUMMARY: We are revising our medical evidence rules. The revisions include redefining several key terms related to evidence, revising our rules about acceptable medical sources (AMS), revising how we consider and articulate our consideration of medical opinions and prior administrative medical findings, revising our rules about medical consultants (MC) and psychological consultants (PC), revising our rules about treating sources, and reorganizing our evidence regulations for ease of use. These revisions conform our rules to the requirements of the Bipartisan Budget Act of 2015 (BBA), reflect changes in the national healthcare workforce and in the manner that individuals receive medical care, and emphasize the need for objective medical evidence in disability and blindness claims. We expect that these changes will simplify our rules to make them easier to understand and apply, and allow us to continue to make accurate and consistent disability determinations and decisions.

DATES: These final rules are effective on March 27, 2017.

FOR FURTHER INFORMATION CONTACT: Dan O'Brien, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 597–1632. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at www.socialsecurity.gov.

SUPPLEMENTARY INFORMATION:**Background**

We are revising and making final the rules regarding the evaluation of medical evidence that we proposed in a notice of proposed rulemaking (NPRM) published in the **Federal Register** on September 9, 2016 (81 FR 62560). In the preamble to the NPRM, we discussed the revisions we proposed and the bases for the proposals. To the extent that we are adopting those revisions as we proposed them, we are not repeating that information here. Interested readers may refer to the preamble to the NPRM,

available at <http://www.regulations.gov> by searching for document number SSA–2012–0035–0001.

To help clarify which regulation sections we refer to in this preamble, we refer to the regulation sections in effect on the date of publication as the “current” regulation sections. We refer to the regulation sections that we proposed as the “proposed” regulation sections. We refer to the regulation sections that will be in effect as of the effective date of these final rules as the “final” regulation sections. The current, proposed, and final regulation sections refer to regulation sections in Title 20 of the Code of Federal Regulations.

Based on our adjudicative experience, legal precedents,¹ recommendations from the Administrative Conference of the United States (ACUS), and public comments we received on the NPRM, we are revising our rules to ensure that they reflect modern healthcare delivery and are easier to understand and use. We expect that these changes will help us continue to ensure a high level of accuracy in our determinations and decisions. We also are revising related rules about who can be an MC and a PC in conformity with requirements in the BBA.

The following list summarizes the differences in these final rules from what we proposed in the NPRM:

1. We revised the definitions of “signs” and “laboratory findings” to clarify that “one or more” signs, “one or more” laboratory findings, or both constitute objective medical evidence in final 404.1502 and 416.902.

2. We revised the proposed regulatory text for AMS optometrists in final 404.1502 and 416.902 to refer to the scope of practice in the State in which the optometrist practices.

3. We revised the proposed regulatory text for AMS audiologists in final 404.1502 and 416.902 to state that licensed audiologists are AMSs for impairments of hearing loss, auditory processing disorders, and balance disorders within the licensed scope of practice only.

4. We recognized physician assistants as AMSs for claims filed on or after March 27, 2017, in final 404.1502 and 416.902.

5. We revised the title and definition of the category of “evidence from nonmedical sources” in final 404.1513

and 416.913. We changed the title from “statements from nonmedical sources” as proposed to “evidence from nonmedical sources” for clarity. We revised the definition for brevity and to explain that we may receive evidence from nonmedical sources either directly from the nonmedical source or indirectly, such as from forms and our administrative records.

6. We clarified that a statement(s) about whether or not an individual has a severe impairment(s) is a statement on an issue reserved to the Commissioner in final 404.1520b(c)(3) and 416.920b(c)(3).

7. We revised final 404.1520c(a)–(b) and 416.920c(a)–(b) to clarify that, while we consider all evidence we receive, we have specific articulation requirements about how we consider medical opinions and prior administrative medical findings.

8. For claims filed on or after March 27, 2017, we are revising our rules to state that our adjudicators will articulate how they consider medical opinions from all medical sources, regardless of whether or not the medical source is an AMS, in final 404.1520c and 416.920c.

9. We revised the factors for considering medical opinions and prior administrative medical findings in final 404.1520c and 416.920c to both emphasize that there is not an inherent persuasiveness to evidence from MCs, PCs, or CE sources over an individual's own medical source(s), and vice versa, and to highlight that we continue to consider a medical source's longstanding treatment relationship with the individual.

10. We added regulatory text in final 404.1520c(d) and 416.920c(d) for claims filed on or after March 27, 2017, that there is no requirement to articulate how we considered evidence from nonmedical sources about an individual's functional abilities and limitations using the rules for considering and articulating our consideration of medical opinions found in final 404.1520c and 416.920c.

11. We clarified the section headings and introductory text in final 404.1520c, 404.1527, 416.920c, and 416.927 about the implementation process.

12. We added regulatory text in final 404.1527(f) and 416.927(f) for claims filed before March 27, 2017, about how we consider and articulate our consideration of opinions from medical sources who are not AMSs, and from nonmedical sources. We are adding our current policies found in SSR 06–03p, which explains how we consider and when we articulate our consideration of opinions from medical sources who are not AMSs and from nonmedical sources

¹ As we explained in the preamble to our NPRM, courts in most circuits typically remand claims to us for further adjudication when they find we erred by not giving controlling weight to treating source opinions; however, the Ninth Circuit uses a “credit-as-true” rule, which sometimes results in it ordering us to award benefits instead of remanding cases. 81 FR 62560, 62573.

under our current rules, into the final rules for these claims.

13. We revised the criteria for which audiologists may perform audiometric testing in sections 2.00B and 102.00B of the Listings² to be consistent with our revision to recognize licensed audiologists as AMSs. We now state that audiometric testing must be performed by, or under the direct supervision of, a licensed audiologist or otolaryngologist.

14. We did not adopt our proposal to recognize independently practicing psychologists with master's-level education as qualified to be PCs. Instead, we will continue to follow our current policies about who is qualified to be a PC, which generally require a doctorate-level education degree, in final 404.1616 and 416.1016.

15. We made a number of nonsubstantive revisions relating to the revisions listed above, as part of our effort to reorganize our regulations for ease of use, to use consistent terminology throughout our rules, to reflect revisions to regulatory text made by other rules since publication of the NPRM, and for clarity.

Because of these revisions, these final rules retain only two programmatic distinctions between AMSs and medical sources who are not AMSs in our regulations for claims filed on or after March 27, 2017. First, we need objective medical evidence from an AMS to establish the existence of a medically determinable impairment(s) at step 2 of the sequential evaluation process.³ Second, in a few instances, we need specific evidence from an AMS to establish that an individual's impairment meets a Listing.⁴

Effect on Certain Social Security Rulings (SSR)

We will also rescind the following SSRs that are otherwise inconsistent with or duplicative of these final rules:

- SSR 96–2p: Titles II and XVI: Giving Controlling Weight to Treating Source Medical Opinions.⁵
- SSR 96–5p: Titles II and XVI: Medical Source Opinions on Issues Reserved to the Commissioner.⁶
- SSR 96–6p: Titles II and XVI: Consideration of Administrative Findings of Fact by State Agency Medical and Psychological Consultants and Other Program Physicians and Psychologists at the Administrative Law

Judge and Appeals Council Levels of Administrative Review; Medical Equivalence.⁷

- SSR 06–03p: Titles II and XVI: Considering Opinions and Other Evidence from Sources Who Are Not “Acceptable Medical Sources” in Disability Claims; Considering Decisions on Disability by Other Governmental and Nongovernmental Agencies.⁸

In addition, because we will rescind SSR 96–6p, we will publish a new SSR that will discuss certain aspects of how administrative law judges (ALJ) and the Appeals Council (AC) must obtain evidence sufficient to make a finding of medical equivalence.

Public Comments

We received 383 comments on the NPRM, which are available for public viewing at <http://www.regulations.gov>. These comments were from:

- Individual citizens and claimant representatives;
 - Members of Congress;
 - Various professional organizations, such as the American Speech-Language Hearing Association (ASHA), American Psychological Association Practice Organization, American Academy of Family Physicians, American Academy of Pediatrics, American Optometric Association, and the American Association for Justice;
 - National groups representing claimant representatives, such as the National Organization of Social Security Claimants' Representatives, the National Coalition of Social Security and SSI Advocates, and the National Association of Disability Representatives;
 - Advocacy groups, such as the Consortium for Citizens with Disabilities, The Arc, the Community Legal Services of Philadelphia, and the North Carolina Coalition to End Homelessness; and
 - Organizations representing our employees and employees of State agencies, such as the National Council of Disability Determination Directors, National Association of Disability Examiners, and the Association of Administrative Law Judges.
- While we received several public comments in support of our proposed rules, we received many public comments that opposed our proposed revisions and that suggested alternative solutions to the policy changes we proposed. Among the most common concerns that the public comments raised were that:
- We should recognize additional medical sources as AMSs;

- The NPRM appeared to favor evidence from MCs, PCs, and consultative examination (CE) providers over evidence from an individual's own medical sources;

- We should continue to value or emphasize the individual's relationship with a treating source, including giving controlling weight to the medical source statements of treating sources in certain situations; and

- We should provide written analysis about medical opinions from all of an individual's own medical sources, regardless of whether the medical source is an AMS.

We carefully considered the comments. We strive to have clear and fair rules because our adjudicative process is non-adversarial.⁹ To help maintain the fairness of our rules and our administrative review process, we have made several revisions in these final rules.

We discuss below the significant comments we received. Because some of the comments were long, we have condensed, summarized, and paraphrased them. We have tried to summarize the commenters' views accurately, and to respond to the significant issues raised by the commenters that were within the scope of the NPRM.

Sections 404.1502 and 416.902—Definitions for This Subpart

Comment: We received several comments about our proposal to recognize Advanced Practice Registered Nurses (APRN) as acceptable medical sources (AMS). While most of these commenters supported our proposal, a few commenters said that APRN qualifications were not equivalent to those of physicians, who are AMSs. Another commenter asked us to specify in the regulatory text that APRNs include Nurse Practitioners (NP) to reduce confusion.

Response: We agree with the comments that supported our proposal to recognize APRNs as AMSs for purposes of our programs. Although APRNs are not physicians, including APRNs as AMSs reflects the modern primary healthcare delivery system, including how healthcare is delivered in many rural areas.¹⁰ In addition, the Institute of Medicine recommended Federal agencies recognize the advanced level of care provided by APRNs.¹¹

⁹ Current 404.900(b) and 416.1400(b).

¹⁰ Agency for Healthcare Research and Quality, available at <http://www.ahrq.gov/research/findings/factsheets/primary/pcwork3/index.html>.

¹¹ Committee on the Robert Wood Johnson Foundation Initiative on the Future of Nursing, at Continued

² Part 404 Subpart P Appendix 1.

³ See 42 U.S.C. 423(d)(3) and 1382c(a)(3)(D).

⁴ See, for example, our rules for xeroderma pigmentosum in Listings 8.07A and 108.07A.

⁵ 61 FR 34490 (July 2, 1996).

⁶ 61 FR 34471 (July 2, 1996).

⁷ 61 FR 34466 (July 2, 1996).

Furthermore, State licensure requirements for APRNs are rigorous. To receive APRN licensure, all States require these medical sources to be registered nurses and to have earned advanced nursing educational degrees. In addition, nearly all States require APRNs to obtain and maintain national certification by a standard advanced nursing credentialing agency,¹² and this certification requires extensive education and training.¹³ Despite minor variability in names and licensure requirements, a growing number of States are adopting the Consensus Model for APRN Regulation from the American Association of Nurse Practitioners, which defines the standards for licensure, accreditation, certification, education, and practice.¹⁴

While we appreciate the suggestion to specify in our rules that APRNs include NPs, we did not adopt it. As we stated in the preamble to the NPRM,¹⁵ APRNs include four types of medical sources: Certified Nurse Midwife, NP, Certified Registered Nurse Anesthetist, and Clinical Nurse Specialist. Although the majority of States use the APRN title, a minority of States use other similar titles, such as Advanced Practice Nurse and Advanced Registered Nurse Practitioner. We will maintain a current list of State-specific AMS titles in our subregulatory instructions to help our adjudicators identify the appropriate titles for APRNs.

Comment: Several commenters supported our proposal to include

audiologists as AMSs. One commenter also supported the addition of audiologists as providers who could perform the otologic examination in order to establish the medically determinable impairment that causes hearing loss. Another commenter asked us to recognize that audiologists' scope of practice includes impairments of balance disturbance.

Response: We agree with these commenters. We included audiologists as AMSs and allow use of licensed audiologist-performed otologic examinations under Listings 2.00 and 102.00 in these final rules.

We also revised the final regulatory text to recognize that audiologists' scope of practice generally includes evaluation, examination, and treatment of certain balance impairments that result from the audio-vestibular system. However, some impairments involving balance involve several different body systems that are outside the scope of practice for audiologists, such as those involving muscles, bones, joints, vision, nerves, heart, and blood vessels. Therefore, we revised final 404.1502 and 416.902 to state that licensed audiologists are AMSs for impairments of hearing loss, auditory processing disorders, and balance disorders within the licensed scope of practice only.

Comment: Two commenters asked us to recognize audiologists as AMSs if they did not have State licensure but did have certification from the American Board of Audiology (ABA) or a Certificate of Clinical Competence in Audiology (CCC-A) from ASHA.

Response: We did not accept this comment because our existing practice has been to rely on State professional education and licensure requirements that are largely consistent with each other when we have expanded the AMS list.¹⁶ While we appreciate the background provided by the commenter, we do not find it contained persuasive rationale about why we should be able to use evidence from these unlicensed sources to help establish the existence of hearing loss, auditory processing disorders, or balance disorders. Moreover, an audiologist without a valid State license will not qualify as a medical source under final sections 404.1502(d) and 416.902(i).

Comment: The American Optometric Association suggested that we modify our AMS definition of optometrists to refer to the scope of practice as authorized by State licensure. By simply

stating that doctors of optometry can serve as an AMS according to their State's scope of practice laws, we would not need to go through the rulemaking process to change our regulations if a State chooses to change its scope of practice laws in the future.

Response: We agree with this comment, and we revised the final regulatory text about optometrists as AMSs. Specifically, we revised the proposed regulatory text for AMS optometrists in final 404.1502 and 416.902 to read, "Licensed optometrist for impairments of visual disorders, or measurement of visual acuity and visual fields only, depending on the scope of practice in the State in which the optometrist practices."

Comment: We received comments from several commenters, including the American Association of Physician Assistants, recommending that we add physician assistants (PA) to the AMS list. These commenters supported this recommendation by stating that PAs receive extensive medical education (approximately 27 months), have at least 2,000 hours of supervised clinical practice, are recognized as primary care providers, and must pass the Physician Assistant National Certifying Examination (PANCE).

Response: We are adopting this comment and recognizing PAs as AMSs. We agree that health care delivery continues to change and that PAs have an important and growing role as primary and specialty health care providers in many different health care settings. We agree that PAs receive extensive medical education, clinical experience, and pass the rigorous PANCE. Almost all States now require PAs to have at least a masters-level education, with the master's education level set to become the universal requirement in the near future.¹⁷

Consistent with our implementation process discussed more fully in the NPRM and below, we will recognize PAs as AMSs for claims filed on or after March 27, 2017, as we are doing for APRNs and audiologists.

Comment: We received many other public comments on the criteria we should use to add AMSs and whether we should add other medical sources, such as licensed clinical social workers (LCSW), to the AMS list. Most of these commenters supported recognizing LCSWs as AMSs, and they suggested we also add a wide variety of other medical sources and nonmedical sources,

the Institute of Medicine; Institute of Medicine: The Future of Nursing: Leading Change, Advancing Health (2011), available at <http://www.nationalacademies.org/hmd/Reports/2010/The-Future-of-Nursing-Leading-Change-Advancing-Health/Report-Brief-Scope-of-Practice.aspx>.

¹² In a very few States, the advanced nursing credentialing is optional. These are: (1) California for Nurse Practitioners, see Cal.C.Reg. 16.8.1482, available at <http://www.rm.ca.gov/pdfs/regulations/bp2834-r.pdf>; (2) Indiana for Nurse Practitioners and Clinical Nurse Specialists, see Indiana's Administrative Code 848 IAC 4-1-4 and -5, available at <http://www.in.gov/pla/files/ISBN.2011-EDITION.pdf>; (3) New York, see Education Law Article 139 § 6910 for Nurse Practitioners and Clinical Nurse Specialists, available at <http://www.op.nysed.gov/prof/nurse/article139.htm>, and Article 140 § 79-5.2 for Midwives, available at <http://www.op.nysed.gov/prof/midwife/part79-5.htm>; and (4) Oregon for Clinical Nurse Specialists, see Oregon Rules 851-054-0040, available at http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_851/851_054.html.

¹³ See, for example, the American Academy of Nurse Practitioners Certification Program, available at <http://www.aanpcert.org/ptistore/control/certs/qualifications>.

¹⁴ See National Council of State Boards of Nursing Campaign for Consensus, available at <https://www.ncsbn.org/738.htm>, and the Consensus Model for APRN Regulation: Licensure, Accreditation, Certification & Education, available at <http://www.aacn.nche.edu/education-resources/APRNReport.pdf>.

¹⁵ 81 FR at 62568.

¹⁶ The only exception has been for speech-language pathologists who meet certain certification requirements. See current 404.1513(a)(5) and 416.913(a)(5).

¹⁷ See the *Accreditation Standards for Physician Assistant Education, Fourth Edition*, available at: <http://www.arc-pa.org/wp-content/uploads/2016/10/Standards-4th-Ed-March-2016.pdf>.

including licensed marriage and family therapists (LMFT), registered nurses (RN), licensed professional counselors (LPC), physical therapists (PT), chiropractors, and even healthcare professionals without medical licensure.

Response: We value these comments, and we will continue to monitor licensure requirements for the medical sources the commenters suggested that we add. At this time, however, we have decided to add only APRNs, audiologists, and PAs as AMSs. Upon investigation of licensing requirements for other medical sources, we did not find a similar level of consistency or rigor in terms of education, training, certification, and scope of practice.

Many of the comments that asked us to expand the AMS list to these additional medical sources said we should recognize these medical sources as AMSs so we could begin to consider their evidence in our adjudicative process. However, as we stated in the NPRM, we currently receive from all medical sources regardless of AMS status. However, as we noted above, we need objective medical evidence from an AMS to establish that an individual has a medically determinable impairment, as required by the Social Security Act (Act).

Additionally, many comments focused upon the prevalence of these sources in the healthcare system, particularly for individuals who have mental impairments, are poor, or are experiencing homelessness. Comments that did address licensing requirements, training, and education for these medical sources did not demonstrate that they have sufficiently consistent and rigorous national licensing requirements for education, training, certification, and scope of practice that is equivalent to the current and final list of AMSs.

For RNs, licensure typically can be obtained with education at or below the bachelor's degree level.¹⁸ This is contrast to the current and new AMSs, for whom more rigorous education, training, and credentialing requirements are necessary.

For LCSWs, LPCs, LMFTs, PTs, and chiropractors, States significantly vary on titles, the required hours of experience for licensure, and the scope of practice, such as clinical and non-clinical practice. Our current and new

AMSs have licensure requirements that are more nationally consistent, which is essential for us to administer a national disability program.¹⁹

As to the comments that asked us to recognize nonmedical sources as AMSs, our rules require an AMS to be a "medical source" as defined in 404.1502 and 416.902. Therefore, we did not adopt those suggestions.

Although we will not recognize the additional suggested medical sources as AMSs at this time, we will continue to consider evidence from these medical sources under these final rules when we evaluate the severity of an individual's impairment(s) and its effect on the individual.

Comment: One commenter agreed with our proposed definition of "medical source" in proposed 404.1502 and 416.902. The commenter said including licensure and certification requirements as specified by State or Federal law would help to ensure that medical sources who provide evidence to us are qualified and practicing lawfully. Another commenter asked us to recognize an entire medical practice as a medical source instead of its individual providers because some individuals receive treatment from multiple medical sources employed by the same medical practice.

Response: We agree with the first comment, and we are adopting our proposed definition of "medical source" in these final rules. However, we did not adopt the second comment because a medical source is an individual, not an entity, under our current rules.²⁰ Although we request evidence from medical practices, an entire practice itself is not capable of evaluating, examining, or treating an individual's impairments. A medical practice would not be able to perform a consultative examination at our request, or provide a medical opinion about an individual's functional abilities or limitations. Ultimately, individual medical practitioners and not their employing entities perform these functions. For these reasons, we did not adopt the recommendation to recognize an entire medical practice as a medical source.

Comment: Several commenters opposed our proposal to remove the term "treating source" from our regulations. One commenter opposed our proposal to recognize all of the medical sources that an individual identifies as his or her medical source instead of using the term "treating

source" for AMSs as defined in our current rules.

Response: While we acknowledge the importance of the relationship between an individual and his or her own medical sources, we are adopting our proposed regulatory text in these final rules. As part of our revisions to align our rules with how individuals now receive healthcare, it is appropriate to remove the distinction between a "treating source"—who must be an AMS—and the other medical sources from whom an individual may choose to receive evaluation, examination, or treatment. This will allow us to select an individual's own medical source, regardless of AMS status, to be a preferred source to conduct a consultative examination (CE) if the medical source meets our other requirements for CE sources in final 404.1519h and 416.919h.

Comment: One commenter requested that we specify that licensed mental health care providers who are working within the scope of practice permitted by law are a type of healthcare worker, and therefore a medical source. Another commenter was concerned that the proposed regulatory definition of nonmedical source would cause confusion when a licensed mental healthcare provider works at a homeless shelter or social service agency instead of a medical practice.

Response: We agree that the definition of medical source includes licensed mental health care providers working within the scope of practice permitted by law. The definition of medical source in final 404.1502 and 416.902 is sufficiently broad to include licensed mental health care providers without the need to amend the regulatory definition. We do not consider the employer of a source to determine whether a source is a medical source. Instead, we look to whether the source meets the definition of a medical source. Part of our final definition of a "medical source" is that the source is working within the licensed scope of his or her practice. Therefore, when an individual is licensed as a healthcare worker by a State and is working within the scope of his or her practice under State or Federal law, we will consider the source to be a medical source.

Comment: Some commenters raised concern about the language in proposed sections 404.1502 and 416.902 that define "objective medical evidence" as "signs, laboratory findings, or both." The commenters indicated that the proposed language appeared to state a new requirement that would make it "extremely difficult" to establish the existence of mental impairments and

¹⁸ See Bureau of Labor Statistics Occupational Outlook Handbook: "Registered Nurses", available at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm>, and American Nurses Association, available at <http://www.nursingworld.org/EssentiallyForYou/What-is-Nursing/Tools-You-Need/RegisteredNurseLicensing.html>.

¹⁹ For example, all physicians, optometrists, and podiatrists have doctorate degrees.

²⁰ See, for example, current 404.1513(d) and 416.913(d).

impairments related to migraine headaches. The commenters suggested that we also consider a person's diagnosis, statement of symptoms, and medical source opinions to establish the existence of an impairment. One commenter thought the exclusion of symptoms from "objective medical evidence" conflicted with our recent final rules "Revised Medical Criteria for Evaluating Mental Disorders."²¹ Those final rules include references to symptoms of mental impairments in the introductory text and criteria of the mental disorders listings.

Response: We understand the commenter's concerns that we should not disadvantage individuals with mental and headache-related impairments, and these clarifications of our current policy will not change how we establish these medically determinable impairments.

The proposed definition of objective medical evidence in proposed 404.1502(f) and 416.902(k) is consistent with our current rules. We currently define objective medical evidence as signs *and* laboratory findings.²² To clarify our current policy, we redefine objective medical evidence as signs, laboratory findings, or both to make clear that signs alone *or* laboratory findings alone are objective medical evidence.

Our current rules require objective medical evidence consisting of signs or laboratory findings to establish impairments, including mental and headache-related impairments.²³ Current 404.1508 and 416.908 states that "[a] physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms." Thus, even under our current rules, mental and headache-related impairments must be established by objective medical evidence. These final rules merely clarify this current policy.

Another current policy that we are clarifying in the definition of "signs" in these final rules is that one or more medically demonstrable phenomena that indicate specific psychological abnormalities that can be observed, apart from your statements, such as abnormalities of behavior, mood, thought, memory, orientation, development, or perception, can be "signs" that establish a medically

determinable impairment. Additionally, psychological test results are laboratory findings that may establish medically determinable cognitive impairments.

Once we establish the existence of an impairment, we use evidence from all sources to determine the severity of the impairment and make the appropriate findings in the sequential evaluation process, such as whether an impairment meets the criteria of a Listing. This includes statements of symptoms, diagnoses, prognoses, and medical opinions.

Our recent final rules "Revised Medical Criteria for Evaluating Mental Disorders" discuss an individual's symptoms in the context of our assessments of the *severity* of a mental impairment and whether the mental impairment satisfies the listing criteria. However, we make these assessments *after* we determine that objective medical evidence establishes the existence of the mental impairment. Under our current rules, the proposed rules, and these final rules, an individual's statement of his or her symptoms cannot establish the existence of an impairment.

Sections 404.1504 and 416.904—Decisions by Other Governmental Agencies and Nongovernmental Entities

Comment: While a few commenters agreed with our proposal not to provide analysis about decisions by other governmental agencies and nongovernmental entities in our decisions and determinations, other commenters disagreed that those decisions are inherently neither valuable nor persuasive. Some commenters stated these decisions are important evidence that we should always discuss because the rules or purposes of other disability programs are similar to our programs, while other commenters said we should discuss the decisions because they may be more or less probative to our decisionmaking due to the different standards used. Some commenters suggested we provide additional training to our adjudicators about the standards used by other governmental agencies and nongovernmental entities. Other commenters asserted that the Department of Veterans Affairs (VA) 100% disability ratings and Individual Unemployability (IU) ratings are highly probative to our decisionmaking by pointing to our own research showing veterans are substantially more likely to be found disabled than the general population of applicants. A few commenters said we should adopt a VA 100% disability rating or have a rebuttable presumption that someone

with a VA disability rating is entitled to disability under the Act.

Response: While we acknowledge the commenters' concerns, we are adopting our proposal in these final rules.

As we stated in the notice of proposed rulemaking (NPRM), there are four reasons why we are not requiring our adjudicators to explain their consideration of these decisions—(1) the Act's purpose and specific eligibility requirements for disability and blindness differ significantly from the purpose and eligibility requirements of other programs; (2) the other agency or entity's decision may not be in the record or may not include any explanation of how the decision was made, or what standards applied in making the decision; (3) our adjudicators generally do not have a detailed understanding of the rules other agencies or entities apply to make their decisions; and (4) over time Federal courts have interpreted and applied our rules and Social Security Ruling (SSR) 06-03p differently in different jurisdictions.²⁴

Although we are not requiring adjudicators to provide written analysis about how they consider the decisions from other governmental agencies and nongovernmental entities, we do agree with the commenters that underlying evidence that other governmental agencies and nongovernmental entities use to support their decisions may be probative of whether an individual is disabled or blind under the Act. In sections 404.1504 and 416.904 of the proposed rules, we provided that we would consider in our determination or decision the relevant supporting evidence underlying the other governmental agency or nongovernmental entity's decision that we receive as evidence in a claim. We clarify in final 404.1504 and 416.904 that we will consider all of the supporting evidence underlying the decision from another government agency or nongovernmental entity decision that we receive as evidence in accordance with final 404.1513(a)(1)–(4) and 416.913(a)(1)–(4).

We are not adopting the suggestion that we should train our adjudicators on the various standards of other governmental agencies and nongovernmental entities that make disability or blindness decisions. Even with increased training, the actual decision reached under different standards is inherently neither valuable nor persuasive to determine whether an individual is disabled or blind under the requirements in the Act, for the

²¹ 81 FR 66137 (Sept. 26, 2016).

²² Current 404.1512(b)(1)(i) and 416.912(b)(1)(i), as defined in current 404.1528(b)–(c) and 416.928(b)–(c).

²³ See current 404.1508 and 416.908, as published on August 20, 1980 at 45 FR 55584, pp. 55586 and 55623.

²⁴ 81 FR at 62564–65.

reasons we discussed in the preamble to the NPRM.²⁵

Furthermore, while we did not rely on the research cited in a few comments to propose these rules, upon review of that research,²⁶ we disagree with the commenters' summary of it. Specifically, our researchers studied the interaction of our rules and the VA's disability standards, focusing upon VA 100% disability ratings and IU ratings. They concluded VA and SSA disability programs serve different purposes for populations that overlap. While individuals with a VA rating of 100% or IU have a slightly higher allowance rate under our programs than members of the general population, nearly one-third are denied benefits based on our rules for evaluating medical (or medical-vocational) considerations. This data also supports our conclusion that these ratings alone are neither inherently valuable nor persuasive in our disability evaluation because they give us little substantive information to consider. Fortunately, the VA and the Department of Defense (DoD) share medical records electronically with us, and our adjudicators obtain the medical evidence documenting DoD and VA treatment and evaluations to evaluate these claims.

Comment: Two commenters asked whether individuals and their representatives would need to submit evidence of a disability, blindness, or employability decision by another governmental agency or nongovernmental entity to us because our rules would state these decisions are inherently neither valuable nor persuasive to us.

Response: We appreciate the opportunity to clarify this matter. Under current and final 404.1512(a) and 416.912(a), an individual must inform us about or submit all evidence known to him or her that relates to whether or not he or she is blind or disabled. Similarly, under current 404.1740(b)(1) and 416.1540(b)(1), an appointed representative must act with reasonable promptness to help obtain the information or evidence that the individual must submit under our regulations, and forward the information or evidence to us for consideration as soon as practicable. A disability, blindness, or employability

decision by another government agency or nongovernmental entity may not relate to whether or not an individual is blind or disabled under our rules.

Nevertheless, as explained above, our adjudicators will consider the relevant supporting evidence underlying the other governmental agency or nongovernmental entity's decision. When an individual informs us about another government agency's or nongovernmental entity's decision, we will identify and consider, or will assist in developing, the supporting evidence that the other agency or entity used to make its decision. We may also use that evidence to expedite processing of claims for Wounded Warriors and for veterans with a 100% disability compensation rating, as we do under our current procedures.²⁷

Sections 404.1512 and 416.912—Responsibility for Evidence

Comment: We received one comment about the regulatory text in proposed 404.1512(a)(2) and 416.912(a)(2). The commenter asked us to revise this rule to require our adjudicators to develop evidence from the time before an individual's date last insured²⁸ through the date of our determination or decision, even when this date last insured occurs many years earlier. The commenter also suggested that proposed 404.1512(a)(2) and 416.912(a)(2) could be inconsistent with the Act's requirement in 42 U.S.C. 423(d)(5)(A) that an individual has the burden to provide us with evidence sufficient to determine that he or she is under a disability.

Response: We did not adopt this comment because the regulatory text in proposed 404.1512(a)(2) and 416.912(a)(2) is identical to the current text in 404.1513(e) and 416.913(e). We proposed this language verbatim for proposed 404.1512(a)(2) and 416.912(a)(2) as part of our effort to reorganize our rules. We did not propose any substantive revision. An individual does have the burden to prove he or she is disabled, and this regulatory text is consistent with that requirement of the Act. Our current

policies about how to develop a claim with a date last insured in the past are found in our subregulatory instructions.²⁹

Comment: A few commenters asked us increase the 10 to 20 calendar day timeframe for medical sources to respond to our initial request for evidence in proposed 404.1512(b)(1)(i) and 416.912(b)(1)(i). Some commenters suggested different periods between 20 to 30 calendar days as a more reasonable time for medical sources to respond, and they suggested that a longer timeframe would reduce our costs associated with for consultative examinations (CE). Another commenter suggested we include five additional days for mailing time.

Response: While we appreciate these comments, we did not adopt them. When we develop evidence in a claim, we make every reasonable effort to get evidence from an individual's own medical sources. Under our current rules in 404.1512(d)(1) and 416.912(d)(1), this requirement includes giving medical sources 10 to 20 calendar days to respond to our initial request for evidence before we make a follow-up attempt. After the follow-up attempt, our regulations provide for an additional 10 days, for a minimum of at least 20 to 30 days in total. In our experience, our current rules provide an adequate amount of time to submit records because most medical sources provide the requested evidence within this period. Our current rules in 404.1512(e) and 416.912(e) generally require us to wait until after this period to request a CE, and the final rules in 404.1512(b)(2) and 416.912(b)(2) retain this requirement.

With the increasing use of electronic health records and electronic records transfer, we receive an increasing amount of medical evidence the same day that we request it. We are committed to expanding our electronic transfer capacity for medical records through ongoing expansion of the use of Health Information Technology. The expanded use of Health Information Technology means that we do not have an administrative need to make the change to the rules that the commenters suggested.

Sections 404.1513 and 416.913—Categories of Evidence

Comment: One commenter disagreed with our proposal to exclude "symptoms, diagnosis, and prognosis"

²⁹ See POMS DI 25501.320 Date Last Insured (DLI) and the Established Onset Date (EOD), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425501320>.

²⁷ See Information for Wounded Warriors and Veterans Who Have a Compensation Rating of 100% Permanent & Total (P&T), available at <https://www.ssa.gov/people/veterans>.

²⁸ In order to be entitled to disability insurance benefits under title II of the Act, an individual must have, among other things, enough earnings in employment covered by Social Security to be insured for disability. See section 223(c)(1) of the Act, 42 U.S.C. 423(c)(1), and current 404.130 and 404.315(a). An individual's date last insured is the last date the individual is insured for purposes of establishing a period of disability or becoming entitled to disability insurance benefits, as determined under current 404.130.

²⁵ *Id.*

²⁶ Social Security Bulletin, Vol. 74, No. 3, 2014, p. 25. Veterans Who Apply for Social Security Disabled-Worker Benefits After Receiving a Department of Veterans Affairs Rating of "Total Disability" for Service-Connected Impairments: Characteristics and Outcomes. (by L. Scott Muller, Nancy Early, and Justin Ronca), available at <https://www.ssa.gov/policy/docs/ssb/v74n3/v74n3p1.pdf>.

from the definition of “medical opinion” and instead categorize these as “other medical evidence.” The commenter expressed concern that most medical sources, unless prompted to fill out a functional questionnaire, do not specifically address functional abilities and limitations in their notes; rather, medical sources normally include symptoms, diagnoses, and prognoses. This commenter indicated that as a result, unrepresented individuals would be disadvantaged because they may not know to ask medical sources to complete the functional questionnaires. The commenter also said some medical sources refuse to fill out such forms or perhaps charge extra for completing the forms, which is outside the individual’s control. This commenter asserted that without a form or letter from a medical source, we are more likely to schedule a consultative examination (CE) and to disregard the medical source’s evidence in the hearing decision.

Response: We understand the concerns expressed in these comments; however, we did not adopt the recommendation to retain “symptoms, diagnosis, and prognosis” in the definition of “medical opinions.” Diagnoses and prognoses do not describe how an individual functions. It is also not appropriate to categorize symptoms as medical opinions because they are subjective statements made by the individual, not by a medical source, about his or her condition.

As for the commenter’s concerns about the effect of these final rules on unrepresented individuals, our current practice is consistent with the Act’s requirements that we make every reasonable effort to obtain evidence from all of an individual’s medical sources.³⁰ We make every reasonable effort to develop evidence about an individual’s complete medical history from the individual’s own medical sources prior to evaluating medical evidence obtained from any other source on a consultative basis, regardless of whether the individual is represented or not.³¹ Regardless of an individual’s financial situation,

diagnoses and prognoses do not describe how an individual functions and symptoms are subjective statements made by the individual, not a medical source, about his or her impairments.

Comment: One commenter supported the clarification in the proposed rules that all medical sources, not just acceptable medical sources (AMS), can provide evidence that we will categorize as being evidence from medical sources.

Response: We appreciate this comment, and we are adopting the clarification in these final rules.

Comment: A few commenters opposed our proposed category of evidence that we called “statements from nonmedical sources” in proposed 404.1513(a)(4) and 416.913(a)(4) because they wanted us to consider evidence from unlicensed staff who are part of social service agencies and public mental health systems separately from evidence from individuals, family members, and neighbors. Another commenter stated the proposed rule would threaten the functional assessment by eliminating the need for the adjudicator to explain how he or she considers functional evidence, particularly offered by nonmedical sources. A few commenters asserted this revision would disadvantage child claimants who have functional evidence from nonmedical sources, such as educators.

Response: We want to reassure these commenters that this proposal to use one category of evidence for these nonmedical sources, which we are adopting in these final rules, will not disadvantage individuals in our programs. We proposed the single category of evidence, which we renamed in these final rules as “evidence from nonmedical sources,” to reflect that there are no policy differences in how we consider this type of evidence. We agree that evidence from nonmedical sources who are part of social service agencies and public mental health systems may be valuable, and we consider this evidence. However, this evidence is not inherently more or less valuable than evidence from any other kind of nonmedical source, such as individuals, family members, and neighbors.

Sometimes, the individual, family members, and other nonmedical sources

of evidence can provide helpful longitudinal evidence about how an impairment affects a person’s functional abilities and limitations on a daily basis. In claims for child disability, we often receive functional evidence from nonmedical sources, such as testimony, evaluations, and reports from parents, teachers, special education coordinators, counselors, early intervention team members, developmental center workers, day care center workers, social workers, and public and private social welfare agency personnel. Depending on the unique evidence in each claim, it may be appropriate for an adjudicator to provide written analysis about how he or she considered evidence from nonmedical sources, particularly in claims for child disability.

Because we consider all evidence we receive, we are not adopting the suggestion to use separate categories of evidence for different kinds of nonmedical sources or for rules about which nonmedical sources’ evidence is inherently more valuable than others’ evidence.

Our adjudicators will continue to assess an individual’s ability to function under these final rules using all evidence we receive from all sources, including nonmedical sources. Having one category of evidence instead of two for nonmedical sources will not affect our rules for assessing an individual’s functional abilities.

In response to these and other public comments, both the title and definition of this category of evidence is different from that which we proposed. We decided to simplify, shorten, and clarify that this category of evidence includes any evidence from any nonmedical source that we receive, and that we may receive it in any manner.

For example, this category of evidence includes data from our administrative records about an individual’s earnings history and information resulting from data matching with other government agencies that relates to any issue in a claim, such as birthdates and marriage history.

We list and define the categories of evidence in final 404.1513(a)(1)–(5) and 416.913(a)(1)–(5). The following chart displays the categories:

³⁰ 42 U.S.C. 423(d)(5)(B) and 1382c(a)(1)(H)(i).

³¹ See, for example, POMS DI 22505.006

Requesting Evidence—General, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0422505006>.

Category of evidence	Source	Summary of definition
Objective medical evidence	Medical sources	Signs, laboratory findings, or both.
Medical opinion	Medical sources	A statement about what an individual can still do despite his or her impairment(s) and whether the individual has one or more impairment-related limitations or restrictions in one or more specified abilities.
Other medical evidence	Medical sources	All other evidence from medical sources that is not objective medical evidence or a medical opinion.
Evidence from nonmedical sources	Nonmedical sources	All evidence from nonmedical sources.
Prior administrative medical finding	MCs and PCs	A finding, other than the ultimate determination about whether the individual is disabled, about a medical issue made by an MC or PC at a prior administrative level in the current claim.

Sections 404.1519h and 416.9191h— Your Medical Source

Comment: Many commenters supported our proposal to broaden the preference for consultative examination (CE) sources from “treating sources” to any of an individual’s own medical sources who are otherwise qualified to perform the CE.

Response: We agree with these comments. In order to perform a CE, an individual’s medical source must be qualified, equipped and willing to perform the examination or tests for the designated payment and send in timely, complete reports. This aligns with the current requirements for all CE providers and does not significantly change our current process. If these standards are met, it is our preference to use an individual’s own medical source to perform a CE.

Sections 404.1520b and 416.920b—How We Consider Evidence

Comment: One commenter opposed proposed 404.1520b(c)(2) and 416.920b(c)(2), under which we would not provide written analysis about disability examiner findings at subsequent adjudicative levels of appeal, as we do for prior administrative medical findings.

Response: Because this is our current policy, we did not adopt this comment. At each level of the administrative process, we conduct a new review of the evidence whenever we issue a new determination or decision. While some disability examiners now make some administrative medical findings at the initial and reconsideration levels under temporary legal authority, this authority is scheduled to end pursuant to the Bipartisan Budget Act of 2015 (BBA) section 832.³²

Comment: A few commenters suggested that we continue the current practice of not giving any special significance to opinions on issues

reserved to the Commissioner instead of adopting our proposal in 404.1520b(c)(3) and 416.920b(c)(3) that we not provide any analysis about how we consider statements on issues reserved to the Commissioner. These commenters also stated that the final rule should clarify that adjudicators will consider the context of a medical source’s use of terms in our laws and regulations, such as “moderate,” “marked,” and “sedentary.” One commenter noted that the diagnostic term “intellectual disability” uses the word “disability” but is not a statement on an issue reserved to the Commissioner. These commenters cautioned against adjudicators dismissing medical opinions as issues reserved for the Commissioner simply because they use the same terms in our laws and regulations. The commenters suggested we include an example in our rules. Another commenter said we should not include “statements that you are or are not . . . able to perform regular or continuing work” as an example of a statement on an issue reserved to the Commissioner in proposed 404.1520b(c)(3) and 416.920b(c)(3) because it is probative about an individual’s residual functional capacity (RFC).³³

Response: We agree that adjudicators should consider the context of a source’s use of a term in our laws and regulations to determine if it qualifies as a statement on an issue reserved to the Commissioner or another kind of evidence, such as a medical opinion. We frequently receive documents from medical sources that contain different categories of evidence, such as a treatment note that includes a laboratory finding, a medical opinion, and a statement on an issue reserved to the Commissioner. When we receive a document from a medical source that contains multiple categories of evidence, we will consider each kind of evidence according to its applicable rules. We will not consider an entire

document to be a statement on an issue to the Commissioner simply because the document contains a statement on an issue that is reserved to the Commissioner. However, we are not revising our rules to add text about considering context or to provide examples because we intend to further clarify and provide examples, as appropriate, in our subregulatory instructions.

We are not adopting the suggestion to require adjudicators to assign weight to a statement on an issue reserved to the Commissioner. Because we are responsible for making the determination or decision about whether an individual meets the statutory definition of disability, these statements are neither valuable nor persuasive for us. Therefore, our adjudicators will continue to review all evidence and consider the context of a source’s use of terms in our regulations, but they are not required to articulate how they considered statements on an issue reserved to the Commissioner.

We are also not revising our rules to omit the phrase “statements that you are or are not . . . able to perform regular or continuing work” from final 404.1520b(c)(3) and 416.920b(c)(3). We are responsible for assessing an individual’s RFC, including how our programmatic terms apply to evidence we receive.

Comment: One commenter asked us to state that when an administrative law judge (ALJ) asks a medical expert about whether an impairment(s) medically equals an impairment(s) in the Listings, that is a medical opinion and not a statement on an issue reserved to the Commissioner.

Response: Because we are not revising this current policy in these final rules, we are not adopting the comment. When a medical expert, or any other medical source, opines about whether an individual’s impairment(s) medically equals an impairment(s) in the Listings, we consider that statement to be a statement on an issue reserved to the Commissioner under our current policy.

³² See *Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features*, 81 FR 58544 (August 25, 2016).

³³ See current 404.1545 and 416.945.

For example, if we receive a medical report that contains a medical opinion and a statement on an issue reserved to the Commissioner, we will articulate how we considered the medical opinion according to its rules but not articulate how we considered the statement on an issue reserved to the Commissioner.

In addition, we will issue a new Social Security Ruling that will discuss certain aspects of how ALJs and the AC must obtain evidence sufficient to make a finding of medical equivalence.

Comment: One commenter opposed our terminology of a statement on an issue reserved to the Commissioner because it is “reserved for the ALJ, not the Commissioner.”

Response: We did not adopt this comment. Whenever an adjudicator at any level of our administrative process makes a disability or blindness determination or decision, he or she is acting pursuant to authority delegated by the Commissioner.³⁴ Our adjudicators do not have authority independent of the authority given to them pursuant to a lawful delegation of authority.

Sections 404.1520c and 416.920c—How We Consider and Articulate Medical Opinions and Prior Administrative Medical Findings for Claims Filed on or After March 27, 2017

Prior Administrative Medical Findings

Comment: Two commenters had concerns about our policies for considering prior administrative findings, such as the severity of an individual’s symptoms, failure to follow prescribed treatment, and drug addiction and alcoholism. The commenters stated that medical evidence should be provided solely by medical professionals and suggested that prior administrative medical findings are not made by medical sources.

Response: The three categories of evidence from medical sources and prior administrative medical findings must be made by medical sources. Prior administrative medical findings are made by medical sources who are State or Federal agency medical consultants or psychological consultants. This is our current policy in current 404.1527(e)(1) and 416.927(e)(1). Our rules in current 404.1527(e)(2) and 416.927(e)(2) require us to consider and articulate our consideration of prior administrative medical findings using the same factors we use to consider medical opinions.

Under section 221(h) of the Act, as amended by the Bipartisan Budget Act

of 2015 (BBA) section 832, we are now required to make “every reasonable effort” to ensure that a qualified physician (in cases involving a physical impairment) or a qualified psychiatrist or psychologist (in cases involving a mental impairment) has completed the medical review of the case and any applicable residual functional capacity (RFC) assessment. In final 404.1520c, 404.1527, 416.920c, and 416.927, we explain in detail how will we consider and articulate our consideration of prior administrative medical findings.

Comment: One commenter asked us to consider opinions from the Appeals Council’s (AC) Medical Support Staff (MSS) as prior administrative medical findings.

Response: Although our current policies allow adjudicators at the hearings and AC levels of review to obtain medical expert evidence, including MSS opinions at the AC, we did not adopt this comment for two reasons. First, expert medical opinions obtained at the same level of adjudication could not be a *prior* administrative medical finding. Second, medical expert evidence obtained at the hearings or AC levels does not amount to our own medical findings; instead, our adjudicators at these levels are responsible for determining whether an individual is disabled. They must consider expert medical opinions obtained at the same level under the standard for evaluating medical opinions.

Comment: A few commenters asked how our rules for considering prior administrative medical findings would apply to claims we decided previously, considering the legal principle of *res judicata*, which means an issue definitively settled by a prior determination or decision.

Response: We appreciate this comment, and we have revised the final rules to address this question. These final rules do not affect our current policies about *res judicata*. Prior administrative medical findings are evidence in the current claim. To help clarify this point, we have revised the prior administrative medical findings evidence category’s definition in final 404.1513(a)(5) and 416.913(a)(5) to specify that this is a category of evidence in the current claim.

Comment: One commenter asserted that allowing administrative law judges (ALJ) to consider prior administrative medical findings means that individuals at the hearings level do not get a new and independent review of their claims. Another commenter raised concern that requiring State agency adjudicators to provide written analysis about the

persuasiveness of the prior administrative medical findings from the initial level of review appeared to conflict with the principles of getting a new and independent review.

Response: We did not make any specific changes based on these comments. A *new* decision means that adjudicators at subsequent levels of the administrative review process (*i.e.*, reconsideration, hearing, and AC) do not need to defer to the findings or conclusions of prior adjudicators. Instead, they make new findings and conclusions. Currently, adjudicators at all levels of the administrative review process consider prior administrative medical findings as part of conducting a new and independent review when they issue a determination or decision.³⁵ Based on our experience administering our programs, we have found that our adjudicators reasonably consider prior administrative medical findings as part of the evidence in the claim and do not automatically favor or disfavor this evidence simply because the medical source is a medical consultant (MC) or a psychological consultant (PC).

Treating Source Rule

Comment: Multiple commenters asked us to retain the current treating source rule, while some commenters agreed with our proposal to eliminate it. Those who wanted us to retain the treating source rule said that evidence from a treating source has special intrinsic value due to the nature of the medical source’s relationship with the claimant. They also said that the current rules contain an appropriate inherent hierarchy to give the most weight to treating sources, then to examining sources like CE sources, and the least weight to nonexamining sources, such as MCs and PCs. One commenter said without this hierarchy, our adjudicators would have a more difficult time evaluating evidence.

One organization that represents claimant representatives noted that if we do not keep the treating source rule, the treatment relationship should be a more important factor for consideration of medical opinions and prior administrative medical findings than the factors of supportability and consistency. Another commenter disagreed with our reasons for revising the factors for considering medical opinions and prior administrative medical findings.

³⁴ See 42 U.S.C. 902(a)(7) and current 404.1503(c) and 416.903(c).

³⁵ See current 20 404.1512(b)(vii), 404.1527(e)(1)(i) and (iii), 416.912(b)(vii), and 416.927(e)(1)(i) and (iii).

The commenters who supported changing our rules agreed with our proposal to consider the supportability and consistency factors as the most important factors in assessing persuasiveness. These commenters said that this approach better reflects the actual state of health care today and allows adjudicators to focus more on the content of the evidence than on the source.

Response: While we understand the perspectives presented in these comments, we are not retaining the treating source rule in final 404.1520c and 416.920c for claims filed on or after March 27, 2017. Since we first adopted the current treating source rule in 1991, the healthcare delivery system has changed in significant ways that require us to revise our policies in order to reflect this reality. Many individuals receive health care from multiple medical sources, such as from coordinated and managed care organizations, instead of from one treating AMS.³⁶ These individuals less frequently develop a sustained relationship with one treating physician. Indeed, many of the medical sources from whom an individual may seek evaluation, examination, or treatment do not qualify to be “treating sources” as defined in current 404.1502 and 416.902 because they are not AMSs. These final rules recognize these fundamental changes in healthcare delivery and revise our rules accordingly.

Courts reviewing claims under our current rules have focused more on whether we sufficiently articulated the weight we gave treating source opinions, rather than on whether substantial evidence supports our final decision. As the Administrative Conference of the United States’ (ACUS) Final Report explains, these courts, in reviewing final agency decisions, are reweighing evidence instead of applying the substantial evidence standard of review, which is intended to be highly deferential standard to us.³⁷

In addition, our experience adjudicating claims using the treating source rule since 1991 has shown us

that the two most important factors for determining the persuasiveness of medical opinions are consistency and supportability. The extent to which a medical source’s opinion is supported by relevant objective medical evidence and the source’s supporting explanation—supportability—and the extent to which the opinion is consistent with the evidence from other medical sources and nonmedical sources in the claim—consistency—are also more objective measures that will foster the fairness and efficiency in our administrative process that these rules are designed to ensure. These same factors also form the foundation of the current treating source rule, and we believe that it is appropriate to continue to keep these factors as the most important ones we consider in our evaluation of medical opinions and prior administrative medical findings. Because we currently consider all medical opinions and opinions using these factors, we disagree that considering these factors as the most important factors will make evaluating evidence more difficult.

Furthermore, to reflect modern healthcare delivery, we will articulate in our determinations and decisions how we consider medical opinions from all of an individual’s medical sources, not just those who may qualify as “treating sources” as we do under current 404.1527(c)(2) and 416.927(c)(2).

Moreover, these final rules in 404.1520c(c)(3) and 416.920c(c)(3) retain the relationship between the medical source and the claimant as one of the factors we consider as we evaluate the persuasiveness of a medical opinion. These final rules also continue to allow an adjudicator to consider an individual’s own medical source’s medical opinion to be the most persuasive medical opinion if it is both supported by relevant objective medical evidence and the source’s explanation, and is consistent with other evidence, as described in final 404.1520c and 416.920c.

Finally, our current rules do not create an automatic hierarchy for treating sources, examining sources, then nonexamining sources to which we must mechanically adhere. For example, adjudicators can currently find a treating source’s medical opinion is not well-supported or is inconsistent with the other evidence and give it little weight, while also finding a medical opinion from an examining source, such as a consultative examiner, or nonexamining source, such a medical or psychological consultant, is supported and consistent and entitled to great weight. These final rules help eliminate

confusion about a hierarchy of medical sources and instead focus adjudication more on the persuasiveness of the content of the evidence.

Comment: Instead of ending the treating source rule, some commenters asked us to reflect modern healthcare delivery by requiring our adjudicators to provide written analysis about how they consider medical opinions from any medical source from whom an individual chooses to receive evaluation, examination, or treatment, regardless of whether the medical source is an AMS.

Response: We carefully considered these comments, and we are adopting them. We agree that our rules need to reflect modern healthcare delivery, and that is a main reason we are ending the treating source rule. We further agree that our rules should reflect that individuals’ own medical sources may not be AMSs. Therefore, these final rules state that we will consider and articulate our consideration of all medical opinions, regardless of AMS status, consistent with the standard we set forth for AMSs in proposed 404.1520c and 416.920c.

Under proposed sections 404.1520c(b)(4) and 416.920c(b)(4), we said that we would articulate how we consider the medical opinion(s) from a medical source who is not an AMS only if we found it to be well-supported and consistent with the record and more valuable and persuasive than the medical opinion(s) and prior administrative medical findings from all of the AMSs in the individual’s case record. We are not adopting proposed 404.1520c(b)(4) and 416.920c(b)(4) in these final rules in order to ensure that our rules on articulation reflect the realities of the current healthcare delivery system.

Comment: A few commenters opposed our proposal to end the treating source rule because they said the proposed rules would create arbitrary and inconsistent decisionmaking.

Response: We disagree with these comments because these final rules require our adjudicators to consider all of the factors in final 404.1520c and 416.920c for all medical opinions and, at a minimum, to articulate how they considered the supportability and consistency factors for all of a medical source’s medical opinions or prior administrative medical findings.

These final rules improve upon our current rules in several ways. For example, we will require our adjudicators to articulate how they consider medical opinions from all medical sources, regardless of AMS status, to reflect the changing nature of

³⁶ Kaiser Commission on Medicaid and the Uninsured, Improving Access to Adult Primary Care in Medicaid: Exploring the Potential Role of Nurse Practitioners and Physician Assistants, available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8167.pdf>; Administrative Conference of the United States, SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule, pp. 25–37 (April 3, 2013), available at http://www.acus.gov/sites/default/files/documents/Treating_Physician_Rule_Final_Report_4-3-2013_0.pdf.

³⁷ 81 FR at 62572.

healthcare delivery. Therefore, we expect these final rules will enhance the quality and consistency of our decisionmaking, and they will provide individuals with a better understanding of our determinations and decisions.

Comment: Some commenters suggested that instead of changing the treating source rule, we should provide our adjudicators with additional training about it, and increase our quality control measures, so that there are fewer appeals and remands about this issue.

Response: We agree with the comments to provide training and quality control measures to ensure policy compliance with our rules, but we are adopting our proposal to end the treating source rule for claims filed on or after March 27, 2017. The suggestion that we not end the treating source rule would neither align our policies with the current state of medical practice, nor would we expect it to result in substantially fewer appeals and remands about this issue.

To account for the changes in the way healthcare is currently delivered, we are adopting rules that focus more on the content of medical opinions and less on weighing treating relationships against each other. This approach is more consistent with current healthcare practice.

Additionally, we provide extensive training on our rules, and we will provide adjudicators with appropriate training on these final rules. In part because of our extensive training efforts, the work of our adjudicators is policy compliant and highly accurate. For example, in fiscal year 2015, the accuracy rate of our initial determinations was nearly 98 percent, and the overall rate at which the AC has agreed with hearing decisions has increased in recent years. We are committed to ensuring our disability adjudicators remain policy compliant; therefore, we will continue our existing ongoing efforts to train adjudicators on best practices for applying our policies, including the policies in these final rules.

Comment: A few commenters said that we should not adopt our proposed rules because the process of training our adjudicators and adapting our computer systems to comply with them will be difficult, time-consuming, and expensive.

Response: We are not adopting this comment. We believe that the changes we made to our rules will be beneficial to the administration of our programs because they will make our rules easier to understand and apply and will allow us to continue to make accurate and

consistent decisions, while acknowledging the changing healthcare landscape. We agree that providing comprehensive training and updating our software to reflect the revisions in these final rules are critical, and we are confident that we will be able to provide the necessary training and software changes in a timely manner. Among our existing employees are dedicated teams that provide in-house training and software enhancements for all of our regulatory revisions. We are currently training our employees and are updating our systems to be ready for when these final rules become effective. We will also undertake quality control monitoring to ensure the training and software updates are effective and working as we intend.

Comment: One commenter requested that we clarify what “consistency” means when considering medical opinions and prior administrative findings. The commenter also recommended that we consider the consistency and treatment relationship with the claimant factors equally. The commenter explained, “Given the brevity of some of these treatment relationships, medical sources may reasonably come to different conclusions about the claimant’s impairments and functioning.”

Response: While we acknowledge that determining the consistency of medical opinions may be challenging in certain claims, we did not adopt this suggestion. Our adjudicators now use the consistency factor when they consider medical opinions and medical findings from MCs and PCs. Consistent with that approach, proposed and final 404.1520c and 416.920c explain that the more consistent a medical opinion or prior administrative medical finding is with the evidence from other medical sources and nonmedical sources in the claim, the more persuasive the medical opinion or prior administrative medical finding is.

Moreover, our use of the word “consistent” in the regulations is the same as the plain language and common definition of “consistent.” This includes consideration of factors such as whether the evidence conflicts with other evidence from other medical sources and whether it contains an internal conflict with evidence from the same medical source. We acknowledge that the symptom severity of some impairments may fluctuate over time, and we will consider the evidence in the claim that may reflect on this as part of the consistency factor as well. Thus, the appropriate level of articulation will necessarily depend on the unique circumstances of each claim.

The supportability and consistency factors provide a more balanced and objective framework for considering medical opinions than focusing upon the factors of consistency and the medical source’s relationship with the individual. A medical opinion without supporting evidence, or one that is inconsistent with evidence from other sources, will not be persuasive regardless of who made the medical opinion.

Our final rules provide an appropriate framework to evaluate situations when multiple medical sources provide medical opinions that are not consistent. Our adjudicators will consider all of the factors when they determine how persuasive they find a medical opinion, and these factors are based on the current factors in our rules.

Comment: One commenter said the proposed rules did not contain sufficient guidance about when we would explain how we would consider opinions from sources who are not AMSs in claims with a filing date before the effective date of these final rules. The commenter expressed concern that more claims would be remanded if we did not include more policies from Social Security Ruling (SSR) 06–03p, which we are rescinding, into these final rules. A few other commenters asked us to retain the policies in SSR 06–03p about considering and providing written analysis about opinions from sources who are not AMSs for all claims.

Response: We agree with this comment, and we revised the final regulatory text about claims filed both before and after the effective date of these rules, March 27, 2017, to ensure we have provided clear and comprehensive guidance to our adjudicators and the public.

Under SSR 06–03p, we consider opinions from medical sources who are not AMSs and from nonmedical sources using the same factors we use to evaluate medical opinions from AMSs. We state that an adjudicator generally should explain the weight given to opinions from these sources, or otherwise ensure that the discussion of the evidence in the determination or decision allows an individual or subsequent reviewer to follow the adjudicator’s reasoning, when such opinions may have an effect on the outcome of the case. In addition, when an adjudicator determines that an opinion from one of these sources is entitled to greater weight than a medical opinion from a treating source, the adjudicator must explain the reasons in the determination or decision if the determination is less than fully

favorable under our current rules. In these final rules, we have included these policies from SSR 06–03p into final 404.1527 and 416.927 for claims filed before March 27, 2017.

In the NPRM,³⁸ we did not propose a rule that would have required our adjudicators to articulate how they considered evidence from nonmedical sources because these sections only discuss medical opinions, which come from medical sources. In response to the comment asking us to include guidance about how we will consider and provide articulation about how we considered evidence from nonmedical sources, we have made two changes. First, for claims filed before March 27, 2017, we have added a new paragraph, sections 404.1527(f) and 416.927(f), which explains how we will consider, and articulate our consideration of, opinions from medical sources who are not AMSs and from nonmedical sources. Second, we are also including regulatory text about evidence from nonmedical sources for claims filed on or after March 27, 2017. For these claims, new sections 404.1520c(d) and 416.920c(d) state that, “We are not required to articulate how we considered evidence from nonmedical sources using the requirements in” sections 404.1520c(a)–(c) and 416.920c(a)–(c) of the rules. This change clarifies our original intent.

Specifically, aside from where our regulations elsewhere may require an adjudicator to articulate how we consider evidence from nonmedical sources, such as when we evaluate symptoms,³⁹ there is no requirement for us to articulate how we considered evidence from nonmedical sources about an individual’s functional limitations and abilities using the rules in final 404.1520c and 416.920c.

Comment: We received a comment from ACUS asking us to revise the preamble and our rules to reflect that the ACUS Assembly voted to adopt two of its principal recommendations from the ACUS Final Report⁴⁰ in the ACUS Conference Recommendations.⁴¹ Another commenter asked us to disregard the ACUS Final Report and ACUS Conference Report because, he

asserted, ACUS is unfamiliar with the realities that individuals face in daily life.

Response: We value the expertise ACUS provides to help improve Federal agencies’ administrative processes, and specifically in this rulemaking process,⁴² and we appreciate ACUS’ continued interest in helping us improve the ways we administer our programs. At this time, we are adopting most of the ACUS Conference Recommendations that relate to the treating source rule in these final rules.

The first ACUS recommendation encourages us to use “notice-and-comment rulemaking to eliminate the controlling weight aspect of the treating source rule in favor of a more flexible approach based on specific regulatory factors” that are in our current rules. This recommendation also said that our adjudicators should articulate the bases for the weight given to medical opinions “in all cases.”

We base the factors we will use to evaluate medical opinions in these final rules, which are based on notice-and-comment rulemaking, on the factors in our current rules. In response to ACUS’ recommendation that our adjudicators should articulate the reasons for the weight given to medical opinions in all cases, we have revised final 404.1520c(b) and 416.920c(b) to state that we will articulate in our determination or decision how persuasive we find all of the medical opinions and all of the prior administrative medical findings in an individual’s case record. We also provide specific articulation requirements for medical opinions from all medical sources, regardless of whether the medical source is an AMS.

The second ACUS recommendation asked us to both: (1) Recognize nurse practitioners (NP), physician assistants (PA), and licensed clinical social workers (LCSW) as AMSs consistent with their respective State law-based licensure and scope of practice, and (2) issue a policy statement that clarifies the value and weight to be afforded to opinions from NPs, PAs, and LCSWs.

As stated above, we are recognizing PAs and ARNPs, which includes NPs, as AMSs in these final rules. At this time, we are not recognizing LCSWs as AMSs, for the reasons we discussed previously.

⁴² ACUS is “an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures.” About the Administrative Conference of the United States (ACUS), available at <http://www.acus.gov/about-administrative-conference-united-states-acus>.

With respect to ACUS’ recommendation that we assign an inherent value to medical opinions from these medical sources, we will explain how we considered the medical opinions from these medical sources because we are not adopting our proposal to base the articulation requirements on whether the medical source is an AMS.

Comment: One commenter asked us to retain the treating source rule for child claims because pediatricians still have important treating relationships with child claimants. Another commenter asked us to give controlling weight to teacher assessments in child claims.

Response: While we are not adopting these comments, we agree that pediatricians have a valuable role in many child claims. Final sections 404.1520c(c) and 416.920c(c) explain that we will continue to consider the medical source’s area of specialty and a medical source’s relationship with an individual, including a child, as part of our evaluation of medical opinions. However, a treating pediatrician’s relationship with a child patient is not sufficiently different from a treating doctor’s relationship with an adult patient to warrant having a separate rule for evaluating medical opinions from treating pediatricians. Because we are moving away from applying the treating source rule for all medical sources, we are not expanding the treating source rule to give controlling weight to nonmedical sources like teachers.

Comment: One commenter suggested that instead of revising our rules about treating sources, we make additional efforts to develop evidence from treating sources, such as sending them functional questionnaires and asking them for medical opinions.

Response: We did not adopt this comment because our current practice is consistent with the Act’s requirements that we make every reasonable effort to obtain evidence from all of an individual’s medical sources.⁴³

Comment: One commenter asked us to replace “consider” with “evaluate” and asserted that “consider” is a vague term.

Response: We did not adopt this comment because the use of the term “consider” is consistent with our current rules,⁴⁴ and it is easily distinguishable from the articulation requirements. Adoption of the term “evaluate” could imply a need to provide written analysis, which is not what we intend. Therefore, we have

⁴³ 42 U.S.C. 423(d)(5)(B) and 1382c(a)(1)(H)(i).

⁴⁴ See, for example, 404.1520b and 416.920b.

³⁸ 81 FR at 62583–84 and 62592–93.

³⁹ See current 404.1529 and 416.929.

⁴⁰ Administrative Conference of the United States, SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule (April 3, 2013), available at http://www.acus.gov/sites/default/files/documents/Treating_Physician_Rule_Final_Report_4-3-2013_0.pdf.

⁴¹ Conference Recommendation 2013–1, Improving Consistency in Social Security Disability Adjudications. 78 FR 41352 (July 10, 2013), also available at <https://acus.gov/recommendation/improving-consistency-social-security-disability-adjudications>.

continued to use the term “consider” in these final rules.

Comment: One commenter offered an alternative approach to ending the treating source rule. The alternative approach would continue to give controlling weight to treating physician opinions in most circumstances, significantly limit how persuasive we could find a CE source’s opinions, and limit the role of MCs and PCs to identifying when additional medical evidence is needed to adjudicate a claim.

Response: We are not adopting this suggestion because it is not consistent with section 221(h) of the Act, as amended by BBA section 832. As we noted earlier in the preamble, under section 221(h) of the Act, we are now required to make “every reasonable effort” to ensure that a qualified physician (in cases involving a physical impairment) or a qualified psychiatrist or psychologist (in cases involving a mental impairment) has completed the medical review of the case and any applicable residual functional capacity (RFC) assessment, not just identify when additional medical evidence is needed to adjudicate a claim.

Furthermore, the suggestion would not bring our rules into alignment with the modern healthcare delivery. Our rules focus on the content of the medical opinions in evidence, rather than on the source of the evidence. The commenter’s proposal would require us to adopt the opinions of either a treating physician or a consultative examiner to determine if the claimant meets our statutory definition of disability. This would confer upon these other sources the authority to make the determination or decision that we are required to make, and would be an abdication of our statutory responsibility to determine whether the person meets the statutory definition of disability.

Comment: A few commenters said we should never consider evidence from our MCs and PCs to be more persuasive than evidence from an individual’s own medical source because MCs and PCs are unqualified and misrepresent the evidence they review.

Response: We did not adopt this comment because we maintain strict requirements for who may serve as a qualified MC or PC.⁴⁵ MCs and PCs have valuable experience in our adjudicative processes, and their review of all of the evidence we receive provides them with a comprehensive perspective that other

medical sources, including an individual’s own medical sources, may not have.

Comment: One commenter said we provided no evidence to support the NPRM’s statement that individuals less frequently develop a sustained relationship with one treating physician now than when they did when we published the treating source rule in 1991.

Response: In the preamble to the NPRM, we provided a list of sources of evidence in footnote 119, which refers readers to the ACUS Final Report.⁴⁶ Examples of sources that ACUS cites in section III.A. of its Final Report include:

- Sharyn J. Potter & John B. McKinlay, *From a Relationship to Encounter: An Examination of Longitudinal and Lateral Dimensions in the Doctor-Patient Relationship*, 61 SOC. SCI. & MED. 465, 466–470 (2005). These authors described the “longitudinal changes to doctor-patient relationship in latter decades of 20th century as corporatist model of health care took hold, due largely to ‘exponential growth of managed health care in the 1980s and 1990s [that] drastically changed the roles of both physicians and patients.’ ”⁴⁷

- John W. Saultz & Waleed Albedaiwi, *Interpersonal Continuity of Care and Patient Satisfaction: A Critical Review*, 2 ANNALS OF FAM. MED. 445, 445 (Sept./Oct. 2004). This article reports that, “‘Changes in the American healthcare system during the past decade have made it increasingly difficult to establish such long-term trusting relationships between physicians and patients. Some authors have questioned whether a personal model of care is feasible, as health plans increasingly have required provider changes for economic reasons.’ ”⁴⁸

- Paul Nutting et al., *Continuity of Primary Care: To Whom Does it Matter and When?*, 1 ANNALS OF FAM. MED. 149, 154 (Nov. 2003) This article states, “‘The current organizational and financial restructuring of the health care system creates strong pressures against continuity with employers changing plans, and plans changing providers. Forced disruption in continuity of care is common, particularly for those with a managed care type of insurance.’ ”⁴⁹

⁴⁶ Administrative Conference of the United States, *SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule* (April 3, 2013), available at http://www.acus.gov/sites/default/files/documents/Treating_Physician_Rule_Final_Report_4-3-2013_0.pdf.

⁴⁷ *Id.* at 26, footnote 205.

⁴⁸ *Id.* at 26, footnote 206.

⁴⁹ *Id.* at 28, footnote 220.

There are other similar sources of evidence establishing that individuals less frequently develop a sustained relationship with one treating physician now on pages 25–28 of the ACUS Final Report, including in the footnotes.

Comment: Some commenters opined that increasing complexity in cases and voluminous files provide insufficient reasons for moving away from the treating source rule.

Response: The increasing complexity in cases and voluminous files were not reasons that we provided in support of moving away from the treating source rule. We are moving away from the treating source rule to align our policies more closely with the ways that people receive healthcare today.

Instead, the increasing complexity of cases and voluminous files were reasons we provided in support of our proposed rules about how we would articulate our consideration of medical opinions. As explained elsewhere in this preamble, we received comments raising concern with certain aspects of the proposed articulation requirements. As a result, we revised the final rules in several ways, such as to require adjudicators to articulate how they considered medical opinions from all medical sources, rather than only from AMSs, in final 404.1520c and 416.920c.

As we explained in the preamble to the NPRM,⁵⁰ it is not administratively feasible for us to articulate how we considered all of the factors for all of the medical opinions and prior administrative medical findings in all claims. As we noted earlier in the preamble, our goal in these final rules is to continue to ensure that our adjudicative process is both fair and efficient. We have an obligation to treat each claimant as an individual and to decide his or her claim fairly. We also have an obligation to all individuals to provide them with timely, accurate determinations and decisions.

Our experience since 1991 using the treating source rule shows that the articulation requirement in the current rule, which requires adjudicators to address each opinion, rather than addressing the opinions on a source-level, does not always foster those two goals. Accordingly, we believe it is appropriate to revise the articulation requirement in our current rules. We believe that the changes we have made from the NPRM address the concerns raised by the commenters, while still allowing us to ensure that our administrative process is both fair and efficient.

⁵⁰ 81 FR at 62574.

⁴⁵ See current 404.1616 and 416.1016, as revised by final 404.1616 and 416.1016 to accommodate section 221(h) of the Act, as amended by BBA section 832.

Comment: A few commenters disagreed with how we characterized some of the legal precedents we cited as in the preamble to the NPRM, such as *Black & Decker Disability Plan v. Nord*.⁵¹ These commenters asserted that *Black & Decker* reflected positively on the 1991 treating source rule regulations, and that many courts support the treating source rule's deferential standard.

Response: We included *Black & Decker* in the preamble to the NPRM⁵² because the opinion notes that, "the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. And if a consultant engaged by a plan may have an 'incentive' to make a finding of 'not disabled,' so a treating physician, in a close case, may favor a finding of 'disabled.'" ⁵³

Although the *Black & Decker* court was referring to medical consultants contracted under ERISA plans, the concerns about short treatment relationships and lack of specialization are equally applicable in the context of disability adjudication under our rules. Notably, ACUS agrees with our interpretation of the discussions in these opinions.⁵⁴ Additionally, setting aside the Court's decision in *Black & Decker*, the other rationale we provided in the NPRM for revising our policy on how we consider treating source and other medical source opinions remains compelling.

Comment: Some commenters, including the authors of a law review article mentioned in section VI.D.5. of the NPRM preamble,⁵⁵ submitted comments stating we had inaccurately presented parts of the content of that article and their position on the treating physician rule.

Response: We appreciate the commenters' concerns and their interest in our programs and this rulemaking proceeding. We regret the mischaracterization of the authors' position in their article. We note that the other rationale discussed in the NPRM and these final rules remains compelling.

Articulation Requirements

Comment: A few commenters expressed concern with the factors that we proposed to consider when evaluating medical opinions and prior administrative medical findings. One commenter indicated that we should not elevate consistency above the other factors. Another commenter thought that the consistency factor would automatically make a longitudinal record subject to being found inconsistent. Other commenters said we should continue to use our existing factors, or first consider the factor of a longstanding treatment relationship, to evaluate the persuasiveness of medical opinions and prior administrative medical findings. Some commenters were concerned with our proposal to add "understanding our policy" and "familiarity with the record" to our list of factors because they may appear to favor evidence from our MCs and PCs over an individual's own medical sources.

Response: We agree, in part, with these comments. We are adopting our proposal to consider supportability and consistency as the two most important factors when we evaluate the persuasiveness of medical opinions and prior administrative medical findings. Our experience adjudicating claims demonstrates that these factors are more objective measures than the relationship with the claimant factor and are the same factors we look to as part of the current treating source rule. While we agree that there is no hierarchy to the remaining factors, we did not revise our rules to include this language in the regulatory text. Instead, we agree with the comments that we should revise the regulatory text to eliminate any appearance that inherently we favor evidence from MCs or PCs over evidence from an individual's own medical sources, and vice versa. Therefore, we made several revisions to the regulatory text in final 404.1520c and 416.920c.

We revised the issues within the "relationship with the claimant" factor to read: length of the treatment relationship, examining relationship, frequency of examinations, purpose of the treatment relationship, and extent of the treatment relationship. This underscores our recognition that an individual's own medical source may have a unique perspective of an individual's impairments based on the issues listed, such as a long treatment relationship. We will consider the unique evidence in each claim that tend to support or weaken how persuasive we find these issues.

Similarly, under both our current rules and the proposed rules, we may consider a medical source's familiarity with the entire record and his or her understanding of our policy. In our proposed rules, we proposed to separately list "understanding our policy" and "familiarity with the record" as individual factors instead of examples of "other factors" as in the current rules. Some commenters were concerned that this change favored our MCs and PCs, who often review all evidence in a claim and are trained in our policies. This was not our intent, and we proposed to reorganize the factors to clarify, not change, our policy on this point. Therefore, we agree with the comments that it would be best to list these issues within "other factors."

We also recognize that new evidence submitted after an MC or PC provided a prior administrative medical finding may affect how persuasive that finding is at subsequent levels of adjudication. We are adding in final 404.1520c(c)(5) and 416.920c(c)(5) that when we consider a medical source's familiarity with the other evidence in a claim, we will also consider whether new evidence we receive after the medical source made his or her medical opinion or prior administrative medical finding makes the medical opinion or prior administrative medical finding more or less persuasive.

Additionally, we recognize that evidence from a medical source who has a longstanding treatment relationship with an individual may contain some inconsistencies over time due to fluctuations in the severity of an individual's impairments. Our adjudicators will consider this possibility as part of evaluation of the consistency factor, as they do so under our current rules. We will also include this issue within our training to our adjudicators.

Comment: Some commenters were concerned that, by moving away from assigning a specific weight to opinions and prior administrative medical findings, we would add subjectivity into the decisionmaking process and said we would only require our adjudicators to think about the evidence but not provide written analysis. Other commenters suggested that by requiring articulation on only two factors—supportability and consistency—our decisions would not sufficiently inform the individual or a reviewing Federal court of the decisionmaker's reasoning, which would lead to more appeals to and remands from the courts.

Response: While we understand the concerns in these comments, we are adopting our proposal to look to the

⁵¹ 538 U.S. 822 (2003).

⁵² 81 FR 62572.

⁵³ 538 U.S. at 832.

⁵⁴ See ACUS Final Report at 43.

⁵⁵ Richard E. Levy & Robert L. Glicksman, Agency-Specific Precedents, 89 TEX. L. REV. 499, 546 (2011).

persuasiveness of medical opinions and prior administrative medical findings for claims filed on or after March 27, 2017. Our current regulations do not specify which weight, other than controlling weight in a specific situation, we should assign to medical opinions. As a result, our adjudicators have used a wide variety of terms, such as significant, great, more, little, and less. The current rules have led to adjudicative challenges and varying court interpretations, including a doctrine by some courts that supplants the judgment of our decisionmakers and credits as true a medical opinion in some cases.

By moving away from assigning a specific weight to medical opinions, we are clarifying both how we use the terms “weigh” and “weight” in final 404.1520c(a), 404.1527, 416.920c(a), and 416.927 and also clarifying that adjudicators should focus on how persuasive they find medical opinions and prior administrative medical findings in final 404.1520c and 416.920c. Our intent in these rules is to make it clear that it is never appropriate under our rules to “credit-as-true” any medical opinion.

We are also stating in final 404.1520c(b) and 416.920c(b) what minimum level of articulation we will provide in our determinations and decisions to provide sufficient rationale for a reviewing adjudicator or court. In light of the level of articulation we expect from our adjudicators, we do not believe that these final rules will result in an increase in appeals or remands from the courts.

Comment: We received various comments regarding our proposal in sections 404.1520c(b) and 416.920c(b) about when we would articulate how we considered medical opinions from medical sources who are not AMSs. A few commenters supported our proposal. However, several other commenters, including Members of Congress, expressed concern with the proposed changes. Some commenters said the changes would result in less transparency because adjudicators would have “too much individual discretion to dismiss key evidence without providing a rationale.” Other commenters said that our proposed rules would not allow reviewing courts to determine whether substantial evidence supports our decisions.

Response: We partially adopted these comments, and we appreciate the perspective of the commenters who expressed concern with the proposed rules. We are committed to having a transparent, fair, and balanced adjudicative process that ensures that

every entitled individual receives the disability benefits or payments and that every individual understands why he or she is not entitled to benefits. We agree with the majority of commenters that we should articulate how we consider medical opinions from any of an individual’s own medical sources, regardless of whether that source is an AMS.

Therefore, we revised final 404.1520c(c) and 416.920c(c) to require our adjudicators to articulate how they consider medical opinions from all medical sources, regardless of AMS status. This revision helps align our rules with current medical practice and recognizes that individuals may obtain evaluation, examination, or treatment from medical sources who are not AMSs.

To account for this change, we are not adopting proposed 404.1520c(b)(4) and 416.920c(b)(4) in these final rules, which would have stated standards about when we would articulate how we considered medical opinions from medical sources who are not AMSs. We also revised final 404.1520c(a)–(b) and 416.920c(a)–(b) to clarify that there is a difference between considering evidence and articulating how we consider evidence. We consider all evidence we receive, but we have a reasonable articulation standard for determinations and decisions that does not require written analysis about how we considered each piece of evidence.

We expect that the articulation requirements in these final rules will allow a subsequent reviewer or a reviewing court to trace the path of an adjudicator’s reasoning, and will not impede a reviewer’s ability to review a determination or decision, or a court’s ability to review our final decision.

Comment: One commenter asked for clarification about what we meant by “medical source” in proposed 404.1520c(b)(1) and 416.920c(b)(1), particularly when an entity provides us with evidence. The commenter asked if we were referring to the same health care provider, the same clinic, the same medical group, or the same hospital.

Response: Under both our current and these final rules, only an individual, not an entity, can be a medical source.

When an entity provides us with evidence from multiple medical sources, we will evaluate each medical source’s evidence separately instead of considering the evidence as coming from one source.

Comment: One commenter agreed with our proposal to require an adjudicator to discuss other relevant factors when we find two medical sources’ medical opinion(s) or prior

administrative medical finding(s) equally persuasive. Another comment asserted that the NPRM did not provide much guidance as to when medical opinions are both equally well-supported and consistent with the record.

Response: We agree with the first commenter that this requirement provides an appropriate standard about when an adjudicator has discretion to discuss the other relevant factors. Because the content of evidence, including medical opinions and prior administrative medical findings, varies with each unique claim, it would not be appropriate to set out a detailed rule for when this situation may occur. We expect that each adjudicator will use his or her discretion to determine when this situation occurs.

The final rules include sufficient guidance to adjudicators in determining when this situation exists. Under final sections 404.1520c(b)(3) and 416.920c(b)(3), the medical opinions or prior administrative medical findings must be “both equally well-supported” under sections 404.1520c(c)(1) or 416.920c(c)(1) “and consistent with the record” under sections 404.1520c(c)(2) or 416.920c(c)(2). In addition, the opinions or prior administrative medical findings must not be “exactly the same.” Under these circumstances, we will articulate how we considered the other most persuasive factors in sections 404.1520c(c)(3)–(c)(5) or 416.920c(c)(3)–(c)(5) for those medical opinions or prior administrative medical findings in the determination or decision.

Comment: One commenter thought we would no longer provide rationale about why we did not adopt a medical opinion from an individual’s doctor. A few commenters believed that the proposed rule would reduce our articulation burden and would increase inconsistency in how we evaluate individuals.

Response: While we understand some commenters were concerned about these issues, these final rules continue the requirement in current 404.1527 and 416.927 to articulate how we consider medical opinions from an individual’s own doctor. In fact, these final rules enhance the current requirements in several ways, such as requiring articulation about medical opinions from all of an individual’s medical sources, making consistency and supportability the most important factors, and clarification of the factors themselves. These improvements will increase the consistency in how we evaluate claims, and we also expect them to reduce remands.

Comment: One commenter asked us to adopt the medical opinions of highly-specialized doctors without considering the other factors.

Response: After careful consideration, we are not adopting this comment. The specialization of the medical source who provides a medical opinion or prior administrative medical finding is one of the factors we consider when we evaluate how persuasive a medical opinion or prior administrative medical finding is. Under our current rules in 404.1527(c) and 416.927(c), we consider several factors when we decide what “weight” to give to a medical opinion, and we do not consider the specialization of the medical source in isolation. Evaluating the persuasiveness of a medical opinion requires consideration of several factors and in context of all of the evidence in the claim.

Comment: One commenter asked us to add a factor for considering medical opinions that would inquire about whether the individual is indigent, because such individuals cannot afford psychotherapy.

Response: We are not adopting this comment because the factors for considering medical opinions and prior administrative medical findings relate to the persuasiveness of the evidence presented, not to the financial status of the individual. We will consider and explain how we considered medical opinions of an individual’s medical sources regardless of whether the medical evaluation, examination, or treatment occurred in a free or low cost health clinic for indigent individuals.

Comment: One commenter asked whether we intended to make two separate findings about the value and persuasiveness of medical opinions, or whether we intended to require one finding. The commenter opposed requiring two separate findings for each medical opinion because that would increase the articulation burden on our adjudicators.

Response: We appreciate the question and the opportunity to clarify that we are not requiring two separate findings. Our adjudicators need only explain how persuasive they found a medical opinion or prior administrative medical finding in their determinations or decisions. As we state in final 404.1520(c)(b) and 416.920(c)(b), “[w]e will articulate in our determination or decision how persuasive we find all of the medical opinions and all of the prior administrative medical findings in your case record.” There is no requirement that our adjudicators provide a second analysis about how valuable a medical

opinion or prior administrative medical finding is.

Comment: A few commenters said that our proposed rules about how we would articulate how we considered medical opinions, and that we would not articulate our consideration of disability examiner findings, statements on issues to the Commissioner, and decisions by other governmental agencies and nongovernmental entities, violated due process and 42 U.S.C. 405(b), which requires us to include in a determination or decision that is not fully favorable to an individual, a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the reason(s) upon which we based the determination or decision. Some of these commenters said reviewing courts would increase the number of remands because they would be unable to review our adjudicators’ rationale.

Response: Our current rules, the proposed rules, and these final rules are consistent with and further the goals of 42 U.S.C. 405(b) and the principles of due process. The statute does not require us to explain how we consider every piece of evidence we receive. Instead, section 405(b) requires us to include in a determination that is not fully favorable to an individual, a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the reason(s) upon which we based the determination or decision. The intent of the statute was not to impose a burdensome articulation requirement.⁵⁶ Rather, the intent was to remedy a prior concern that individuals were receiving notices that their claims for disability benefits had been denied without any personalized articulation of the evidence.⁵⁷

We will articulate how we considered the medical opinions from all medical sources and prior administrative medical findings in a claim. This articulation will include the supportability and consistency factors, which generally includes an assessment

of the supporting objective medical evidence and other medical evidence, and how consistent the medical opinion or prior administrative medical findings is with other evidence in the claim. Therefore, the final rules are consistent with the intent of the statute that we provide a statement of the case, setting forth a discussion of the evidence, and stating the reasons upon which we based the determination.

As to the comments that these rules do not provide due process, these final rules do not violate the Due Process Clause of the Fifth Amendment to the Constitution. The final rules do not categorize individuals based on their characteristics or deprive an individual of a protected property interest. The rules also ensure that our procedures are fair and provide individuals with appropriate procedural protections. Nothing in constitutional principles of equal protection is inconsistent with these final rules.

Comment: We received a few comments raising concern about the interactions between the proposed rules and some Federal statutes, and the interactions between the proposed rules and judicial review. A few commenters said our proposed rules were in conflict with 42 U.S.C. 405(g). One commenter said our proposed rules were in conflict with 42 U.S.C. 404(a). One commenter said our proposed rules violated the Ninth Circuit’s “credit-as-true doctrine.” Another commenter said the treating source rule provides for uniformity between Federal courts and us and minimizes delays to claimants by limiting unnecessary court reviews. A few commenters said courts would continue to defer to evidence from a claimant’s own medical sources regardless of the content of our rules.

Response: We do not agree with these comments. 42 U.S.C. 404(a) and 405(g) do not directly apply to the proposed or final regulatory sections. 42 U.S.C. 404(a) addresses how we assess underpayments and overpayments, and nothing in these final rules address these issues. Similarly, 42 U.S.C. 405(g) addresses procedures for individuals to appeal their decisions to Federal court, and these final rules do not affect these rights.

Federal courts are bound to uphold our decisions when they are supported by substantial evidence and when we have applied the appropriate legal standards in our decisions. While a court has the authority to review the validity of our regulations, the fact that some courts previously have adopted a credit as true rule does not mean that we are required to adopt such a rule in

⁵⁶ See section 305 of the Social Security Disability Amendments of 1980, Public Law 96–265, 94 Stat. 441, 457. In amending section 405(b), Congress intended for the required personalized denial notice to be “brief, informal, and not technical.” H.R. Conf. Rep. 96–944, at 58 (1980), and did not intend for it to be a voluminous document, S. Rep. 96–408 at 57 (1979).

⁵⁷ See H.R. Conf. Rep. 96–944, at 58 (1980) (noting that under the law at the time, “[t]here is no statutory provision setting a specific amount of information to explain the decision made on a claim for benefits.”); S. Rep. 96–408 at 56 (1979) (noting that under the law at the time, “[n]otices to claimants regarding the Secretary’s decision on their claim for disability benefits provides little guidance as to the causes for a denial.”)

our regulations.⁵⁸ Those courts that have adopted the credit as true rule have not done so based on any specific requirement of the Act, and the statute does not mandate that we apply such a rule.

In our view, the credit as true rule supplants the legitimate decisionmaking authority of our adjudicators, who make determinations or decisions based on authority delegated by the Commissioner. The credit as true rule is neither required by the Act nor by principles of due process. It is also inconsistent with the general rule that, when a court finds an error in an administrative agency's decision, the proper course of action in all but rare instances is to remand the case to the agency for further proceedings. Accordingly, we decline to adopt the credit as true rule here.

We expect that courts will defer to these regulations, which we adopted through notice and comment rulemaking procedures pursuant to the Commissioner's exceptionally broad rulemaking authority under the Act. The rules are essential for our administration of a massive and complex nationwide disability program where the need for efficiency is self-evident. The rules are neither arbitrary nor capricious, nor do they exceed the bounds of reasonableness. Under these circumstances, we are confident that our rules are valid.⁵⁹

Comment: A few commenters asked us to require MCs and PCs to identify what medical evidence they reviewed and disclose the amount of time spent reviewing each claimant's file to enable later decisionmakers to assess the supportability and consistency factors more effectively. These commenters also asked us to instruct our adjudicators to consider the completeness of the record at the time of review and the time spent reviewing the record when evaluating prior administrative medical findings.

Response: While we agree that the specific evidence an MC or PC reviewed is probative, we did not accept this comment because MCs and PCs are required to evaluate all of the evidence in the claim file at the time they make their medical findings under our rules. Consistent with 42 U.S.C. 405(b), our current rules also require that when we make an initial determination, our written notice will explain in simple and clear language what we have determined and the reasons for and the

effect of our determination. When we make a determination of disability that is in whole or in part unfavorable to an individual, our rules also require our written notice to "contain in understandable language a statement of the case setting forth the evidence on which our determination is based."⁶⁰ Adjudicators at subsequent levels of appeal can also determine what evidence already existed in the claim file when the MC or PC made his or her medical findings by reviewing data in the claims folder.

We also did not adopt the suggestion to measure and document MC and PC review time to help subsequent adjudicators consider supportability and consistency of their adjudicative findings because review time does not provide information about supporting evidence or consistency of the evidence.

Sections 404.1521 and 416.921—Establishing That You Have a Medically Determinable Impairment

Comment: One commenter asked us to align our requirements for establishing an impairment with the International Classification of Functioning (ICF) used by the World Health Organization.⁶¹ The ICF is a framework for describing and organizing information on functioning and disability. The commenter suggested that if we were to align our requirements for establishing an impairment with the ICF, medical sources who provide evidence to us could use a standardized language and conceptual basis for the definition and measurement of health and disability.

Response: While we are always looking for ways to improve how we adjudicate disability claims, we are not adopting the comment at this time. It is unclear how the ICF would be helpful in our adjudication of disability claims because the ICF's definition of disability differs from the requirements in the Act. The Act defines disability as "the inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."⁶²

In contrast, the ICF views "disability and functioning as outcomes of interactions between *health conditions* (diseases, disorders and injuries) and

contextual factors."⁶³ Included in these contextual factors "are external *environmental factors* (for example, social attitudes, architectural characteristics, legal and social structures, as well as climate, terrain, and so forth); and internal *personal factors*, which include gender, age, coping styles, social background, education, profession, past and current experience, overall behaviour pattern, character and other factors that influence how disability is experienced by the individual."⁶⁴ Therefore, an individual could have a "disability" as contemplated by the ICF without meeting the Act's definition of disability.

Sections 404.1522 and 416.922—What We Mean by an Impairment(s) That Is Not Severe

Comment: One commenter stated that, "controlling law on the statutory interpretation of 'severe' is that it should have the 'minimalist effect' on the activities of daily living."

Response: We did not adopt this comment because we proposed to move the current definition from current 404.1521(a) and 416.921(a) into proposed 404.1522(a) and 416.922(a) as part of the effort to reorganize our regulations for ease of use, not to change the current definition. The definition of "non-severe" impairment in our regulations has been the same since 1985,⁶⁵ and it has been substantially the same since we first defined the term in 1980.⁶⁶ The U.S. Supreme Court upheld the regulatory definition in *Bowen v. Yuckert*.⁶⁷

Sections 404.1523 and 416.923—Multiple Impairments

Comment: One commenter opposed proposed 404.1523 and 416.923, which explains how we consider an individual's multiple impairments, because he said we would not consider all impairments in combination.

Response: We decided to adopt these proposed revisions as part of our effort to make our rules easier to understand and use. These sections combine content from current 404.1522, 404.1523, 416.922, and 416.923 without any substantive change in language. These current sections discuss related issues—our policies for considering claims involving multiple impairments.

⁵⁸ See *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).

⁵⁹ See 5 U.S.C. 553 and E.O. 12866, as supplemented by E.O. 13563.

⁶⁰ Current 404.904 and 416.1404.

⁶¹ See World Health Organization, International Classification of Functioning, Disability and Health (ICF), <http://www.who.int/classifications/icf/en/>.

⁶² 42 U.S.C. 423(d)(1)(A) and 1382c(a)(3)(A).

⁶³ World Health Organization, Towards a Common Language for Functioning, Disability and Health—ICF, p. 10, 2002.

⁶⁴ *Id.*

⁶⁵ See 50 FR 8726, 8728 (March 5, 1985).

⁶⁶ See 45 FR 55566, 55588 (August 20, 1980).

⁶⁷ 482 U.S. 137 (1987).

Under the final rules, as under the current rules, we will consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity when we determine whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility. If we do find a medically severe combination of impairments, we will consider the combined impact of the impairments throughout the disability determination process. Since our final rules require us to consider the combined effect of an individual's impairments, we are adopting the text as proposed in final 404.1523 and 416.923.

Sections 404.1527 and 416.927—Evaluating Opinion Evidence for Claims Filed Before March 27, 2017

Comment: One commenter suggested that the phrase “typical for your condition(s),” as part of the definition of “treating source” in proposed 404.1527 and 416.927, which will be applied to claims filed before March 27, 2017, should include the population of indigent individuals who cannot afford psychotherapy as frequently as those who can afford to pay for more frequent sessions.

Response: We are not adopting this comment. The definition of “treating source” in proposed 404.1527 and 416.927, including the words “typical for your condition(s),” comes from our current definition of treating source in current 404.1502 and 416.902. We will continue to apply our current rules for evaluating evidence from a treating source, including this definition, to claims filed before March 27, 2017. We moved this definition to proposed 404.1527 and 416.927 to locate together more of the rules that we will use for claims filed before March 27, 2017.

For claims filed on or after March 27, 2017, the rules for considering medical opinions will not use the term “treating source” or the phrase “typical for your condition(s).”

Sections 404.1616 and 416.1016—Medical Consultants and Psychological Consultants

Comment: Several commenters opposed our proposal to recognize master's level psychologists licensed for independent practice as psychological consultants (PC) in proposed 404.1616 and 416.1016. These commenters said we should continue to follow our current rules in 404.1616(e) and 416.1016(e) because they recognize the

most qualified licensed psychologists, who are doctorate-level clinical psychologists, to be PCs. These commenters said we should maintain a higher level of qualifications for a psychologist to be a PC than we require a psychologist to be an acceptable medical source (AMS).

Response: We agree with these commenters and are not adopting our proposal to revise the qualifications to be a PC in these final rules. Instead, we will continue to follow our current requirements about who can be a PC in final 404.1616 and 416.1016.

Our rules only authorize us to recognize a psychologist to be a PC if he or she: (1) Is licensed or certified as a psychologist at the independent practice level of psychology by the State in which he or she practices; and (2)(i) Possesses a doctorate degree in psychology from a program in clinical psychology of an educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation; or (ii) Is listed in a national register of health service providers in psychology which we deem appropriate; and (3) Possesses 2 years of supervised clinical experience as a psychologist in health service, at least 1 year of which is post-masters degree.

Comment: One commenter said our proposed use of the term “every reasonable effort,” relating to a medical consultant (MC) or PC completing the medical portion of the case review and any applicable RFC assessment, in proposed 404.1616, 404.1617, 416.1016, and 416.1017, was too broad.

Response: We did not adopt this comment because the term “every reasonable effort” as used in the NPRM and in the final rules is not new. In fact, it has appeared in section 221(h) of the Act since 1984, and Congress retained the phrase when it amended section 221(h) through the Bipartisan Budget Act of 2015 (BBA) section 832 in 2015. We have adopted the proposed procedural rules we will use to make “every reasonable effort” to have qualified physicians, psychologists, and psychiatrists review claims to final rules 404.1617 and 416.1017.

Comment: Some commenters opposed our proposal to limit MCs to only licensed physicians. The commenters stated that speech-language pathologists were uniquely qualified to assess the level of functional impairment and ability related to communication disorders. One of these commenters asked us to require that speech-language pathologists review all claims related to communication disorders at the initial and reconsideration levels as medical advisors.

Response: We agree that speech-language pathologists are highly qualified to assess level of functional impairment and ability related to communication disorders; therefore, we have retained them as AMSs. However, section 221(h) of the Act, as amended by BBA section 832, states that we must make every reasonable effort to ensure that a qualified physician (in cases involving a physical impairment) or a qualified psychologist or psychiatrist (in cases involving a mental impairment) completes the medical portion of the case review. A speech-language pathologist is not a “qualified physician” and therefore section 221(h) of the Act does not authorize us to recognize them as MCs or PCs.

To help retain the expertise of non-physician AMSs like speech-language pathologists, we created the role of a medical advisor in our subregulatory instructions.⁶⁸ These medical sources can review the evidence in the claim and provide case analysis that the adjudicative team will consider as evidence from a medical source in accordance with final 404.1513(a), 404.1520b, 404.1520c, 404.1527, 416.913(a), 416.920b, 416.920c, and 416.927, as appropriate. However, we are not adopting the suggestion to require Speech-Language Pathologist medical advisor input in every claim involving communication disorders at this time. The adjudicative team will use its professional judgment to determine whether to consult with a medical advisor(s) and how to consider medical advisor input on any case.

Comment: One commenter asked us to revise our rules to state that an MC who is a pediatrician must evaluate any child claim involving a physical impairment and cited section 1614(a)(3)(I) of the Act, which mandates that we make reasonable efforts to have a qualified pediatrician or other appropriate specialist evaluate a child's case. Another commenter asked us to allow licensed physicians such as development/behavioral pediatricians, child neurologists, and some primary care providers to act as PCs in a child claim involving a mental impairment because there is a shortage of child psychologists and psychiatrists. Another commenter opposed our rules that authorize psychiatrists to review physical impairments.

Response: While we appreciate the commenters' concerns, we did not adopt

⁶⁸ See POMS DI 24501.001 The Disability Determination Services (DDS) Disability Examiner (DE), Medical Consultant (MC), and Psychological Consultant (PC) Team, and the Role of the Medical Advisor (MA), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0424501001>.

them because our current rules are already sufficient and consistent with the Act. Consistent with the Act's requirements in section 1614(a)(3)(I), our current rules already state that we will make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the child's impairment(s) evaluates the case of the child.⁶⁹ The Act does not require us to have only a pediatrician be an MC in child claims involving a physical impairment(s).

Section 221(h) of the Act, as amended by BBA section 832, states that when there is evidence indicating the existence of a mental impairment in a claim, we may not make an initial determination until we have made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity (RFC) assessment. If we make every reasonable effort to obtain the services of a licensed psychiatrist or qualified psychologist to review a claim involving a mental impairment, but the professional services are not obtained, a physician who is not a psychiatrist will review the mental impairment claim.⁷⁰

Historically, we have not regulated which specialty of MC or PC must review cases involving specific impairments because each Disability Determination Service (DDS) has unique staffing considerations. Due to the continually changing nature of the medical profession, any future guidance we may issue about which medical specialties may review claims involving specific impairments would be best placed in our subregulatory instructions.

Comment: A few commenters wanted us to recognize optometrists and podiatrists as MCs. They said that BBA section 832's requirement that a licensed physician review claims involving physical impairments still authorized us to have optometrists and podiatrists as MCs.

Response: We recognize the specialized expertise that these medical sources can bring to claims, which is why we authorized them to be MCs prior to BBA section 832's effective date. However, neither optometrists nor podiatrists are qualified physicians, as is required by section 221(h) of the Act, as amended by BBA section 832. To retain access to their expertise, we created the medical advisor role in our subregulatory instructions so that DDSs

may continue to request their expert analysis on claims.

Other Comments

Comment: Several commenters opposed the proposed policy changes in the NPRM that were inconsistent with the following Social Security Rulings (SSR): 96–2p, 96–5p, and 96–6p. Therefore, those commenters opposed rescinding the same SSRs.

Response: We explained in detail above and (as appropriate) in the preamble to our proposed rules, our reasons for adopting the policies in these final rules. Because the policies we are adopting in these final rules are inconsistent with those SSRs, we are rescinding them.

Comment: Some commenters disagreed with our proposed implementation process. These commenters said it would be difficult for adjudicators to follow different rules based on the filing date of the claim. One commenter said all claims should follow the new policies on the effective date, or in the alternative, fewer of the current policies should apply to claims filed before the effective date. The commenter also said that we should apply the proposed new policies about decisions from other governmental agencies and nongovernmental entities and about statements on issues reserved to the Commissioner to all claims.

Response: We carefully considered these comments and decided to implement these final rules consistent with our proposed implementation process. We are aware that individuals who filed claims before the effective date of these final rules may have requested evidence, including medical opinions from “treating sources,” based on our current policies. We are also cognizant that some of our existing rules may have engendered reliance interests that we need to consider. We proposed to implement some of these rules differently from our usual practice in recognition of these factors, which we believe still apply. However, to help adjudicators identify which rules they should follow, we revised the titles and introductory text in final 404.1520c, 404.1527, 416.920c, and 416.927.

Comment: A commenter stated that some of the changes proposed in the NPRM were not evidence-based or supported by “current data.” The commenter also raised concern about the speed and accuracy of disability determinations that we would make under the proposed rules, although the commenter did not specify which policies were of concern.

Response: We appreciate and agree with the commenter's desire for

evidence-based policies, and for efficient, fair, and policy-compliant disability determinations. We have explained at length in the preamble the reasons and the support for the policy changes. The primary reason that we are updating our rules is to reflect the current ways in which people receive medical treatment. As we implement these final rules, we will continue our current internal procedures for monitoring the quality and quantity of determinations to ensure that adjudicators continue to apply our rules timely and accurately.

Comment: One commenter asserted that we are required to include an analysis under the Regulatory Flexibility Act because the proposals would have a significant economic impact on a substantial number of small entities, such as law firms and non-profit organizations.

Response: We did not adopt this comment because we are only required to perform a Regulatory Flexibility Act analysis if small entities will be subject to the proposed rule. The comment did not explain how these final rules may have a significant economic impact on a substantial number of small entities. “Congress ‘did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.’”⁷¹ Only individuals may receive disability or blindness benefits under titles II and XVI of the Act. An individual who applies for disability or blindness benefits may enter into an agreement with an individual representative to help him or her with the claim, which may include a fee for services provided.⁷² However, our current regulations do not recognize any entities as representatives.⁷³ Therefore, as authorized by the Regulatory Flexibility Act,⁷⁴ we correctly certified below that these final rules will not have a significant economic impact on a substantial number of small entities because they affect individuals only.

Comment: Several commenters stated that the proposed rules would not make our decisions more accurate or decrease the time it takes for us to adjudicate a claim. These commenters also asserted that the proposed rules would create more appeals and delays.

⁷¹ *Cement Kiln Recycling Coalition v. Environmental Protection Agency*, 255 F.3d 855, 869 (D.C. Cir. 2001) (quoting *Mid-Texas Electrical Cooperative, Inc. v. Federal Energy Regulatory Commission*, 773 F.3d 327, 343 (D.C. Cir. 1985)).

⁷² See current 404.1720 and 416.1520.

⁷³ See current 404.1705 and 416.1505.

⁷⁴ 5 U.S.C. 605(b).

⁶⁹ Current 416.903(f).

⁷⁰ Current 404.1617(c) and 416.1017(c).

Response: We disagree that these rules will make our decisions less accurate or will increase the time it takes for us to adjudicate a claim. These final rules clarify some existing policies and revise others for increased transparency and balance. As we discussed at length above, we expect that the changes we are adopting in these final rules will further the fair and timely administration of our programs. We have made a number of changes to the proposed rules to address concerns raised by commenters about aspects of the proposed rules, and to enhance our goal of ensuring that we adjudicate claims fairly, accurately, and in a timely manner.

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed these final rules.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they affect individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules do not create any new or affect any existing collections and, therefore, do not require OMB approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; and 96.004, Social Security—Survivors Insurance)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping

requirements, Supplemental Security Income (SSI).

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we are amending part 404 subparts J, P, and Q, and part 416 subparts I, J, and N as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

- 1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

- 2. In § 404.906(b)(2), revise the fourth sentence to read as follows:

§ 404.906 Testing modifications to the disability determination procedures.

* * * * *

(b) * * *

(2) * * * However, before an initial determination is made in any case where there is evidence which indicates the existence of a mental impairment, the decisionmaker will make every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment pursuant to our existing procedures (see § 404.1617). * * *

* * * * *

- 3. In § 404.942, revise paragraph (f)(1) to read as follows:

§ 404.942 Prehearing proceedings and decisions by attorney advisors.

* * * * *

(f) * * *

(1) Authorize an attorney advisor to exercise the functions performed by an administrative law judge under §§ 404.1513a, 404.1520a, 404.1526, and 404.1546.

* * * * *

Subpart P—Determining Disability and Blindness

- 4. The authority citation for subpart P of part 404 is revised to read as follows:

Authority: Secs. 202, 205(a)–(b) and (d)–(h), 216(i), 221(a) and (h)–(j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)–(b) and (d)–(h), 416(i), 421(a) and (h)–(j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

- 5. Revise § 404.1502 to read as follows:

§ 404.1502 Definitions for this subpart.

As used in the subpart—

Acceptable medical source means a medical source who is a:

(1) Licensed physician (medical or osteopathic doctor);

(2) Licensed psychologist, which includes:

(i) A licensed or certified psychologist at the independent practice level; or

(ii) A licensed or certified school psychologist, or other licensed or certified individual with another title who performs the same function as a school psychologist in a school setting, for impairments of intellectual disability, learning disabilities, and borderline intellectual functioning only;

(3) Licensed optometrist for impairments of visual disorders, or measurement of visual acuity and visual fields only, depending on the scope of practice in the State in which the optometrist practices;

(4) Licensed podiatrist for impairments of the foot, or foot and ankle only, depending on whether the State in which the podiatrist practices permits the practice of podiatry on the foot only, or the foot and ankle;

(5) Qualified speech-language pathologist for speech or language impairments only. For this source, *qualified* means that the speech-language pathologist must be licensed by the State professional licensing agency, or be fully certified by the State education agency in the State in which he or she practices, or hold a Certificate of Clinical Competence in Speech-Language Pathology from the American Speech-Language-Hearing Association;

(6) Licensed audiologist for impairments of hearing loss, auditory processing disorders, and balance disorders within the licensed scope of practice only (with respect to claims filed (see § 404.614) on or after March 27, 2017);

(7) Licensed Advanced Practice Registered Nurse, or other licensed advanced practice nurse with another title, for impairments within his or her licensed scope of practice (only with respect to claims filed (see § 404.614) on or after March 27, 2017); or

(8) Licensed Physician Assistant for impairments within his or her licensed

scope of practice (only with respect to claims filed (see § 404.614) on or after March 27, 2017).

Commissioner means the Commissioner of Social Security or his or her authorized designee.

Laboratory findings means one or more anatomical, physiological, or psychological phenomena that can be shown by the use of medically acceptable laboratory diagnostic techniques. Diagnostic techniques include chemical tests (such as blood tests), electrophysiological studies (such as electrocardiograms and electroencephalograms), medical imaging (such as X-rays), and psychological tests.

Medical source means an individual who is licensed as a healthcare worker by a State and working within the scope of practice permitted under State or Federal law, or an individual who is certified by a State as a speech-language pathologist or a school psychologist and acting within the scope of practice permitted under State or Federal law.

Nonmedical source means a source of evidence who is not a medical source. This includes, but is not limited to:

- (1) You;
- (2) Educational personnel (for example, school teachers, counselors, early intervention team members, developmental center workers, and daycare center workers);
- (3) Public and private social welfare agency personnel; and
- (4) Family members, caregivers, friends, neighbors, employers, and clergy.

Objective medical evidence means signs, laboratory findings, or both.

Signs means one or more anatomical, physiological, or psychological abnormalities that can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception, and must also be shown by observable facts that can be medically described and evaluated.

State agency means an agency of a State designated by that State to carry out the disability or blindness determination function.

Symptoms means your own description of your physical or mental impairment.

We or us means, as appropriate, either the Social Security Administration or the State agency making the disability or blindness determination.

You or your means, as appropriate, the person who applies for benefits or for a period of disability, the person for whom an application is filed, or the person who is receiving benefits based on disability or blindness.

§ 404.1503 [Amended]

- 6. In § 404.1503, remove paragraph (e).
- 7. Revise § 404.1504 to read as follows:

§ 404.1504 Decisions by other governmental agencies and nongovernmental entities.

Other governmental agencies and nongovernmental entities—such as the Department of Veterans Affairs, the Department of Defense, the Department of Labor, the Office of Personnel Management, State agencies, and private insurers—make disability, blindness, employability, Medicaid, workers' compensation, and other benefits decisions for their own programs using their own rules. Because a decision by any other governmental agency or a nongovernmental entity about whether you are disabled, blind, employable, or entitled to any benefits is based on its rules, it is not binding on us and is not our decision about whether you are disabled or blind under our rules. Therefore, in claims filed (see § 404.614) on or after March 27, 2017, we will not provide any analysis in our determination or decision about a decision made by any other governmental agency or a nongovernmental entity about whether you are disabled, blind, employable, or entitled to any benefits. However, we will consider all of the supporting evidence underlying the other governmental agency or nongovernmental entity's decision that we receive as evidence in your claim in accordance with § 404.1513(a)(1) through (4).

§ 404.1508 [Removed and reserved]

- 8. Remove and reserve § 404.1508.
- 9. Revise § 404.1512 to read as follows:

§ 404.1512 Responsibility for evidence.

(a) *Your responsibility.*

(1) *General.* In general, you have to prove to us that you are blind or disabled. You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled (see § 404.1513). This duty is ongoing and requires you to disclose any additional related evidence about which you become aware. This duty applies at each level of the administrative review process,

including the Appeals Council level if the evidence relates to the period on or before the date of the administrative law judge hearing decision. We will consider only impairment(s) you say you have or about which we receive evidence. When you submit evidence received from another source, you must submit that evidence in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. If we ask you, you must inform us about:

- (i) Your medical source(s);
- (ii) Your age;
- (iii) Your education and training;
- (iv) Your work experience;
- (v) Your daily activities both before and after the date you say that you became disabled;
- (vi) Your efforts to work; and
- (vii) Any other factors showing how your impairment(s) affects your ability to work. In §§ 404.1560 through 404.1569, we discuss in more detail the evidence we need when we consider vocational factors.

(2) *Completeness.* The evidence in your case record must be complete and detailed enough to allow us to make a determination or decision about whether you are disabled or blind. It must allow us to determine—

- (i) The nature and severity of your impairment(s) for any period in question;
- (ii) Whether the duration requirement described in § 404.1509 is met; and
- (iii) Your residual functional capacity to do work-related physical and mental activities, when the evaluation steps described in § 404.1520(e) or (f)(1) apply.

(b) *Our responsibility.*

(1) *Development.* Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary or unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you get medical evidence from your own medical sources and entities that maintain your medical sources' evidence when you give us permission to request the reports.

(i) *Every reasonable effort* means that we will make an initial request for evidence from your medical source or entity that maintains your medical source's evidence, and, at any time between 10 and 20 calendar days after the initial request, if the evidence has not been received, we will make one

follow-up request to obtain the medical evidence necessary to make a determination. The medical source or entity that maintains your medical source's evidence will have a minimum of 10 calendar days from the date of our follow-up request to reply, unless our experience with that source indicates that a longer period is advisable in a particular case.

(ii) *Complete medical history* means the records of your medical source(s) covering at least the 12 months preceding the month in which you file your application. If you say that your disability began less than 12 months before you filed your application, we will develop your complete medical history beginning with the month you say your disability began unless we have reason to believe your disability began earlier. If applicable, we will develop your complete medical history for the 12-month period prior to the month you were last insured for disability insurance benefits (see § 404.130), the month ending the 7-year period you may have to establish your disability and you are applying for widow's or widower's benefits based on disability (see § 404.335(c)(1)), or the month you attain age 22 and you are applying for child's benefits based on disability (see § 404.350).

(2) *Obtaining a consultative examination.* We may ask you to attend one or more consultative examinations at our expense. See §§ 404.1517 through 404.1519t for the rules governing the consultative examination process. Generally, we will not request a consultative examination until we have made every reasonable effort to obtain evidence from your own medical sources. We may order a consultative examination while awaiting receipt of medical source evidence in some instances, such as when we know a source is not productive, is uncooperative, or is unable to provide certain tests or procedures. We will not evaluate this evidence until we have made every reasonable effort to obtain evidence from your medical sources.

(3) *Other work.* In order to determine under § 404.1520(g) that you are able to adjust to other work, we must provide evidence about the existence of work in the national economy that you can do (see §§ 404.1560 through 404.1569a), given your residual functional capacity (which we have already assessed, as described in § 404.1520(e)), age, education, and work experience.

■ 10. Revise § 404.1513 to read as follows:

§ 404.1513 Categories of evidence.

(a) *What we mean by evidence.* Subject to the provisions of paragraph (b), evidence is anything you or anyone else submits to us or that we obtain that relates to your claim. We consider evidence under §§ 404.1520b, 404.1520c (or under § 404.1527 for claims filed (see § 404.614) before March 27, 2017). We evaluate evidence we receive according to the rules pertaining to the relevant category of evidence. The categories of evidence are:

(1) *Objective medical evidence.* Objective medical evidence is medical signs, laboratory findings, or both, as defined in § 404.1502(f).

(2) *Medical opinion.* A medical opinion is a statement from a medical source about what you can still do despite your impairment(s) and whether you have one or more impairment-related limitations or restrictions in the following abilities:

(i) Your ability to perform physical demands of work activities, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping, or crouching);

(ii) Your ability to perform mental demands of work activities, such as understanding; remembering; maintaining concentration, persistence, or pace; carrying out instructions; or responding appropriately to supervision, co-workers, or work pressures in a work setting;

(iii) Your ability to perform other demands of work, such as seeing, hearing, or using other senses; and

(iv) Your ability to adapt to environmental conditions, such as temperature extremes or fumes. (For claims filed (see § 404.614) before March 27, 2017, see § 404.1527(a) for the definition of medical opinion.)

(3) *Other medical evidence.* Other medical evidence is evidence from a medical source that is not objective medical evidence or a medical opinion, including judgments about the nature and severity of your impairments, your medical history, clinical findings, diagnosis, treatment prescribed with response, or prognosis. (For claims filed (see § 404.614) before March 27, 2017, *other medical evidence* does not include a diagnosis, prognosis, or a statement that reflects a judgment(s) about the nature and severity of your impairment(s)).

(4) *Evidence from nonmedical sources.* Evidence from nonmedical sources is any information or statement(s) from a nonmedical source (including you) about any issue in your

claim. We may receive evidence from nonmedical sources either directly from the nonmedical source or indirectly, such as from forms we receive and our administrative records.

(5) *Prior administrative medical finding.* A prior administrative medical finding is a finding, other than the ultimate determination about whether you are disabled, about a medical issue made by our Federal and State agency medical and psychological consultants at a prior level of review (see § 404.900) in your current claim based on their review of the evidence in your case record, such as:

(i) The existence and severity of your impairment(s);

(ii) The existence and severity of your symptoms;

(iii) Statements about whether your impairment(s) meets or medically equals any listing in the Listing of Impairments in Part 404, Subpart P, Appendix 1;

(iv) Your residual functional capacity;

(v) Whether your impairment(s) meets the duration requirement; and

(vi) How failure to follow prescribed treatment (see § 404.1530) and drug addiction and alcoholism (see § 404.1535) relate to your claim.

(b) *Exceptions for privileged communications.*

(1) The privileged communications listed in paragraphs (b)(1)(i) and (b)(1)(ii) of this section are not evidence, and we will neither consider nor provide any analysis about them in your determination or decision. This exception for privileged communications applies equally whether your representative is an attorney or a non-attorney.

(i) Oral or written communications between you and your representative that are subject to the attorney-client privilege, unless you voluntarily disclose the communication to us.

(ii) Your representative's analysis of your claim, unless he or she voluntarily discloses it to us. This analysis means information that is subject to the attorney work product doctrine, but it does not include medical evidence, medical opinions, or any other factual matter that we may consider in determining whether or not you are entitled to benefits (see paragraph (b)(2) of this section).

(2) The attorney-client privilege generally protects confidential communications between an attorney and his or her client that are related to providing or obtaining legal advice. The attorney work product doctrine generally protects an attorney's analyses, theories, mental impressions, and notes. In the context of your

disability claim, neither the attorney-client privilege nor the attorney work product doctrine allow you to withhold factual information, medical opinions, or other medical evidence that we may consider in determining whether or not you are entitled to benefits. For example, if you tell your representative about the medical sources you have seen, your representative cannot refuse to disclose the identity of those medical sources to us based on the attorney-client privilege. As another example, if your representative asks a medical source to complete an opinion form related to your impairment(s), symptoms, or limitations, your representative cannot withhold the completed opinion form from us based on the attorney work product doctrine. The attorney work product doctrine would not protect the source's opinions on the completed form, regardless of whether or not your representative used the form in his or her analysis of your claim or made handwritten notes on the face of the report.

■ 11. Add § 404.1513a to read as follows:

§ 404.1513a Evidence from our Federal or State agency medical or psychological consultants.

The following rules apply to our Federal or State agency medical or psychological consultants that we consult in connection with administrative law judge hearings and Appeals Council reviews:

(a) In claims adjudicated by the State agency, a State agency medical or psychological consultant may make the determination of disability together with a State agency disability examiner or provide medical evidence to a State agency disability examiner when the disability examiner makes the initial or reconsideration determination alone (see § 404.1615(c)). The following rules apply:

(1) When a State agency medical or psychological consultant makes the determination together with a State agency disability examiner at the initial or reconsideration level of the administrative review process as provided in § 404.1615(c)(1), he or she will consider the evidence in your case record and make administrative findings about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or medically equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. These administrative medical findings are

based on the evidence in your case but are not in themselves evidence at the level of the administrative review process at which they are made. See § 404.1513(a)(5).

(2) When a State agency disability examiner makes the initial determination alone as provided in § 404.1615(c)(3), he or she may obtain medical evidence from a State agency medical or psychological consultant about one or more of the medical issues listed in paragraph (a)(1) of this section. In these cases, the State agency disability examiner will consider the medical evidence of the State agency medical or psychological consultant under §§ 404.1520b, 404.1520c, and 404.1527.

(3) When a State agency disability examiner makes a reconsideration determination alone as provided in § 404.1615(c)(3), he or she will consider prior administrative medical findings made by a State agency medical or psychological consultant at the initial level of the administrative review process, and any medical evidence provided by such consultants at the initial and reconsideration levels, about one or more of the medical issues listed in paragraph (a)(1)(i) of this section under §§ 404.1520b, 404.1520c, and 404.1527.

(b) Administrative law judges are responsible for reviewing the evidence and making administrative findings of fact and conclusions of law. They will consider prior administrative medical findings and medical evidence from our Federal or State agency medical or psychological consultants as follows:

(1) Administrative law judges are not required to adopt any prior administrative medical findings, but they must consider this evidence according to §§ 404.1520b, 404.1520c, and 404.1527, as appropriate, because our Federal or State agency medical or psychological consultants are highly qualified and experts in Social Security disability evaluation.

(2) Administrative law judges may also ask for medical evidence from expert medical sources. Administrative law judges will consider this evidence under §§ 404.1520b, 404.1520c, and 404.1527, as appropriate.

(c) When the Appeals Council makes a decision, it will consider prior administrative medical findings according to the same rules for considering prior administrative medical findings as administrative law judges follow under paragraph (b) of this section.

■ 12. Revise § 404.1518 (c) to read as follows:

§ 404.1518 If you do not appear at a consultative examination.

* * * * *

(c) *Objections by your medical source(s).* If any of your medical sources tell you that you should not take the examination or test, you should tell us at once. In many cases, we may be able to get the information we need in another way. Your medical source(s) may agree to another type of examination for the same purpose.

■ 13. Revise § 404.1519g (a) to read as follows:

§ 404.1519g Who we will select to perform a consultative examination.

(a) We will purchase a consultative examination only from a qualified medical source. The medical source may be your own medical source or another medical source. If you are a child, the medical source we choose may be a pediatrician.

* * * * *

■ 14. Revise § 404.1519h to read as follows:

§ 404.1519h Your medical source.

When, in our judgment, your medical source is qualified, equipped, and willing to perform the additional examination or test(s) for the fee schedule payment, and generally furnishes complete and timely reports, your medical source will be the preferred source for the purchased examination or test(s).

■ 15. Revise § 404.1519i to read as follows:

§ 404.1519i Other sources for consultative examinations.

We will use a different medical source than your medical source for a purchased examination or test in situations including, but not limited to, the following:

(a) Your medical source prefers not to perform such an examination or does not have the equipment to provide the specific data needed;

(b) There are conflicts or inconsistencies in your file that cannot be resolved by going back to your medical source;

(c) You prefer a source other than your medical source and have a good reason for your preference;

(d) We know from prior experience that your medical source may not be a productive source, such as when he or she has consistently failed to provide complete or timely reports; or

(e) Your medical source is not a qualified medical source as defined in § 404.1519g.

■ 16. Revise § 404.1519n(c)(6) to read as follows:

§ 404.1519n Informing the medical source of examination scheduling, report content, and signature requirements.

* * * * *

(c) * * *

(6) *A medical opinion.* Although we will ordinarily request a medical opinion as part of the consultative examination process, the absence of a medical opinion in a consultative examination report will not make the report incomplete. See § 404.1513(a)(3); and

* * * * *

■ 17. In § 404.1520a, revise the second sentence of paragraph (b)(1) and paragraph (d)(1) to read as follows:

§ 404.1520a Evaluation of mental impairments.

* * * * *

(b) * * *

(1) * * * See § 404.1521 for more information about what is needed to show a medically determinable impairment. * * *

* * * * *

(d) * * *

(1) If we rate the degrees of your limitation as “none” or “mild,” we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities (see § 404.1522).

* * * * *

■ 18. Revise § 404.1520b to read as follows:

§ 404.1520b How we consider evidence.

After we review all of the evidence relevant to your claim, we make findings about what the evidence shows.

(a) *Complete and consistent evidence.* If all of the evidence we receive, including all medical opinion(s), is consistent and there is sufficient evidence for us to determine whether you are disabled, we will make our determination or decision based on that evidence.

(b) *Incomplete or inconsistent evidence.* In some situations, we may not be able to make our determination or decision because the evidence in your case record is insufficient or inconsistent. We consider evidence to be insufficient when it does not contain all the information we need to make our determination or decision. We consider evidence to be inconsistent when it conflicts with other evidence, contains an internal conflict, is ambiguous, or when the medical evidence does not appear to be based on medically acceptable clinical or laboratory

diagnostic techniques. If the evidence in your case record is insufficient or inconsistent, we may need to take the additional actions in paragraphs (b)(1) through (4) of this section.

(1) If any of the evidence in your case record, including any medical opinion(s) and prior administrative medical findings, is inconsistent, we will consider the relevant evidence and see if we can determine whether you are disabled based on the evidence we have.

(2) If the evidence is consistent but we have insufficient evidence to determine whether you are disabled, or if after considering the evidence we determine we cannot reach a conclusion about whether you are disabled, we will determine the best way to resolve the inconsistency or insufficiency. The action(s) we take will depend on the nature of the inconsistency or insufficiency. We will try to resolve the inconsistency or insufficiency by taking any one or more of the actions listed in paragraphs (b)(2)(i) through (b)(2)(iv) of this section. We might not take all of the actions listed below. We will consider any additional evidence we receive together with the evidence we already have.

(i) We may recontact your medical source. We may choose not to seek additional evidence or clarification from a medical source if we know from experience that the source either cannot or will not provide the necessary evidence. If we obtain medical evidence over the telephone, we will send the telephone report to the source for review, signature, and return;

(ii) We may request additional existing evidence;

(iii) We may ask you to undergo a consultative examination at our expense (see §§ 404.1517 through 404.1519t); or

(iv) We may ask you or others for more information.

(3) When there are inconsistencies in the evidence that we cannot resolve or when, despite efforts to obtain additional evidence, the evidence is insufficient to determine whether you are disabled, we will make a determination or decision based on the evidence we have.

(c) *Evidence that is inherently neither valuable nor persuasive.* Paragraphs (c)(1) through (c)(3) apply in claims filed (see § 404.614) on or after March 27, 2017. Because the evidence listed in paragraphs (c)(1) through (c)(3) of this section is inherently neither valuable nor persuasive to the issue of whether you are disabled or blind under the Act, we will not provide any analysis about how we considered such evidence in our determination or decision, even under § 404.1520c:

(1) *Decisions by other governmental agencies and nongovernmental entities.* See § 404.1504.

(2) *Disability examiner findings.*

Findings made by a State agency disability examiner made at a previous level of adjudication about a medical issue, vocational issue, or the ultimate determination about whether you are disabled.

(3) *Statements on issues reserved to the Commissioner.* The statements listed in paragraphs (c)(3)(i) through (c)(3)(viii) of this section would direct our determination or decision that you are or are not disabled or blind within the meaning of the Act, but we are responsible for making the determination or decision about whether you are disabled or blind:

(i) Statements that you are or are not disabled, blind, able to work, or able to perform regular or continuing work;

(ii) Statements about whether or not you have a severe impairment(s);

(iii) Statements about whether or not your impairment(s) meets the duration requirement (see § 404.1509);

(iv) Statements about whether or not your impairment(s) meets or medically equals any listing in the Listing of Impairments in Part 404, Subpart P, Appendix 1;

(v) Statements about what your residual functional capacity is using our programmatic terms about the functional exertional levels in Part 404, Subpart P, Appendix 2, Rule 200.00 instead of descriptions about your functional abilities and limitations (see § 404.1545);

(vi) Statements about whether or not your residual functional capacity prevents you from doing past relevant work (see § 404.1560);

(vii) Statements that you do or do not meet the requirements of a medical-vocational rule in Part 404, Subpart P, Appendix 2; and

(viii) Statements about whether or not your disability continues or ends when we conduct a continuing disability review (see § 404.1594).

■ 19. Add § 404.1520c to read as follows:

§ 404.1520c How we consider and articulate medical opinions and prior administrative medical findings for claims filed on or after March 27, 2017.

For claims filed (see § 404.614) on or after March 27, 2017, the rules in this section apply. For claims filed before March 27, 2017, the rules in § 404.1527 apply.

(a) *How we consider medical opinions and prior administrative medical findings.* We will not defer or give any specific evidentiary weight, including

controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from your medical sources. When a medical source provides one or more medical opinions or prior administrative medical findings, we will consider those medical opinions or prior administrative medical findings from that medical source together using the factors listed in paragraphs (c)(1) through (c)(5) of this section, as appropriate. The most important factors we consider when we evaluate the persuasiveness of medical opinions and prior administrative medical findings are supportability (paragraph (c)(1) of this section) and consistency (paragraph (c)(2) of this section). We will articulate how we considered the medical opinions and prior administrative medical findings in your claim according to paragraph (b) of this section.

(b) *How we articulate our consideration of medical opinions and prior administrative medical findings.* We will articulate in our determination or decision how persuasive we find all of the medical opinions and all of the prior administrative medical findings in your case record. Our articulation requirements are as follows:

(1) *Source-level articulation.* Because many claims have voluminous case records containing many types of evidence from different sources, it is not administratively feasible for us to articulate in each determination or decision how we considered all of the factors for all of the medical opinions and prior administrative medical findings in your case record. Instead, when a medical source provides multiple medical opinion(s) or prior administrative medical finding(s), we will articulate how we considered the medical opinions or prior administrative medical findings from that medical source together in a single analysis using the factors listed in paragraphs (c)(1) through (c)(5) of this section, as appropriate. We are not required to articulate how we considered each medical opinion or prior administrative medical finding from one medical source individually.

(2) *Most important factors.* The factors of supportability (paragraph (c)(1) of this section) and consistency (paragraph (c)(2) of this section) are the most important factors we consider when we determine how persuasive we find a medical source's medical opinions or prior administrative medical findings to be. Therefore, we will explain how we considered the supportability and consistency factors for a medical source's medical opinions or prior

administrative medical findings in your determination or decision. We may, but are not required to, explain how we considered the factors in paragraphs (c)(3) through (c)(5) of this section, as appropriate, when we articulate how we consider medical opinions and prior administrative medical findings in your case record.

(3) *Equally persuasive medical opinions or prior administrative medical findings about the same issue.* When we find that two or more medical opinions or prior administrative medical findings about the same issue are both equally well-supported (paragraph (c)(1) of this section) and consistent with the record (paragraph (c)(2) of this section) but are not exactly the same, we will articulate how we considered the other most persuasive factors in paragraphs (c)(3) through (c)(5) of this section for those medical opinions or prior administrative medical findings in your determination or decision.

(c) *Factors.* We will consider the following factors when we consider the medical opinion(s) and prior administrative medical finding(s) in your case:

(1) *Supportability.* The more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinion(s) or prior administrative medical finding(s), the more persuasive the medical opinions or prior administrative medical finding(s) will be.

(2) *Consistency.* The more consistent a medical opinion(s) or prior administrative medical finding(s) is with the evidence from other medical sources and nonmedical sources in the claim, the more persuasive the medical opinion(s) or prior administrative medical finding(s) will be.

(3) *Relationship with the claimant.* This factor combines consideration of the issues in paragraphs (c)(3)(i) through (v) of this section.

(i) *Length of the treatment relationship.* The length of time a medical source has treated you may help demonstrate whether the medical source has a longitudinal understanding of your impairment(s).

(ii) *Frequency of examinations.* The frequency of your visits with the medical source may help demonstrate whether the medical source has a longitudinal understanding of your impairment(s).

(iii) *Purpose of the treatment relationship.* The purpose for treatment you received from the medical source may help demonstrate the level of

knowledge the medical source has of your impairment(s).

(iv) *Extent of the treatment relationship.* The kinds and extent of examinations and testing the medical source has performed or ordered from specialists or independent laboratories may help demonstrate the level of knowledge the medical source has of your impairment(s).

(v) *Examining relationship.* A medical source may have a better understanding of your impairment(s) if he or she examines you than if the medical source only reviews evidence in your folder.

(4) *Specialization.* The medical opinion or prior administrative medical finding of a medical source who has received advanced education and training to become a specialist may be more persuasive about medical issues related to his or her area of specialty than the medical opinion or prior administrative medical finding of a medical source who is not a specialist in the relevant area of specialty.

(5) *Other factors.* We will consider other factors that tend to support or contradict a medical opinion or prior administrative medical finding. This includes, but is not limited to, evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of our disability program's policies and evidentiary requirements. When we consider a medical source's familiarity with the other evidence in a claim, we will also consider whether new evidence we receive after the medical source made his or her medical opinion or prior administrative medical finding makes the medical opinion or prior administrative medical finding more or less persuasive.

(d) *Evidence from nonmedical sources.* We are not required to articulate how we considered evidence from nonmedical sources using the requirements in paragraphs (a)–(c) in this section.

■ 20. Revise § 404.1521 to read as follows:

§ 404.1521 Establishing that you have a medically determinable impairment(s).

If you are not doing substantial gainful activity, we will then determine whether you have a medically determinable physical or mental impairment(s) (see § 404.1520(a)(4)(ii)). Your impairment(s) must result from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. Therefore, a physical or mental impairment must be established by objective medical evidence from an

acceptable medical source. We will not use your statement of symptoms, a diagnosis, or a medical opinion to establish the existence of an impairment(s). After we establish that you have a medically determinable impairment(s), then we determine whether your impairment(s) is severe.

■ 21. Revise § 404.1522 to read as follows:

§ 404.1522 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s)*. An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities*. When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

■ 22. Revise § 404.1523 to read as follows:

§ 404.1523 Multiple impairments.

(a) *Unrelated severe impairments*. We cannot combine two or more unrelated severe impairments to meet the 12-month duration test. If you have a severe impairment(s) and then develop another unrelated severe impairment(s) but neither one is expected to last for 12 months, we cannot find you disabled, even though the two impairments in combination last for 12 months.

(b) *Concurrent impairments*. If you have two or more concurrent impairments that, when considered in combination, are severe, we must determine whether the combined effect of your impairments can be expected to continue to be severe for 12 months. If one or more of your impairments improves or is expected to improve within 12 months, so that the combined effect of your remaining impairments is no longer severe, we will find that you do not meet the 12-month duration test.

(c) *Combined effect*. In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such

impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, we will consider the combined impact of the impairments throughout the disability determination process. If we do not find that you have a medically severe combination of impairments, we will determine that you are not disabled (see § 404.1520).

■ 23. In § 404.1525, revise the last sentence in paragraph (c)(2) to read as follow

§ 404.1525 Listing of Impairments in appendix 1.

* * * * *

(c) * * *

(2) * * * Even if we do not include specific criteria for establishing a diagnosis or confirming the existence of your impairment, you must still show that you have a severe medically determinable impairment(s), as defined in § 404.1521.

* * * * *

■ 24. In § 404.1526, revise paragraphs (d) and (e) to read as follows:

§ 404.1526 Medical equivalence.

* * * * *

(d) *Who is a designated medical or psychological consultant?* A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. See § 404.1616 of this part for the necessary qualifications for medical consultants and psychological consultants and the limitations on what medical consultants who are not physicians can evaluate.

(e) *Who is responsible for determining medical equivalence?*

(1) In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 404.1616 of this part) has the overall responsibility for determining medical equivalence.

(2) For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's

reconsideration determination is changed under § 404.918 of this part, with the Associate Commissioner for Disability Policy or his or her delegate.

(3) For cases at the administrative law judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the administrative law judge or Appeals Council.

■ 25. Revise § 404.1527 to read as follows:

§ 404.1527 Evaluating opinion evidence for claims filed before March 27, 2017.

For claims filed (see § 404.614) before March 27, 2017, the rules in this section apply. For claims filed on or after March 27, 2017, the rules in § 404.1520c apply.

(a) *Definitions*.

(1) *Medical opinions*. Medical opinions are statements from acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.

(2) *Treating source*. Treating source means your own acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you. Generally, we will consider that you have an ongoing treatment relationship with an acceptable medical source when the medical evidence establishes that you see, or have seen, the source with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for your medical condition(s). We may consider an acceptable medical source who has treated or evaluated you only a few times or only after long intervals (e.g., twice a year) to be your treating source if the nature and frequency of the treatment or evaluation is typical for your condition(s). We will not consider an acceptable medical source to be your treating source if your relationship with the source is not based on your medical need for treatment or evaluation, but solely on your need to obtain a report in support of your claim for disability. In such a case, we will consider the acceptable medical source to be a nontreating source.

(b) *How we consider medical opinions*. In determining whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive. See § 404.1520b.

(c) *How we weigh medical opinions*. Regardless of its source, we will

evaluate every medical opinion we receive. Unless we give a treating source's medical opinion controlling weight under paragraph (c)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) *Examining relationship.* Generally, we give more weight to the medical opinion of a source who has examined you than to the medical opinion of a medical source who has not examined you.

(2) *Treatment relationship.* Generally, we give more weight to medical opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's medical opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's medical opinion controlling weight, we apply the factors listed in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, as well as the factors in paragraphs (c)(3) through (c)(6) of this section in determining the weight to give the medical opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's medical opinion.

(i) *Length of the treatment relationship and the frequency of examination.* Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the medical source's medical opinion more weight than we would give it if it were from a nontreating source.

(ii) *Nature and extent of the treatment relationship.* Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing

the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her medical opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's medical opinion more weight than we would give it if it were from a nontreating source.

(3) *Supportability.* The more a medical source presents relevant evidence to support a medical opinion, particularly medical signs and laboratory findings, the more weight we will give that medical opinion. The better an explanation a source provides for a medical opinion, the more weight we will give that medical opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their medical opinions will depend on the degree to which they provide supporting explanations for their medical opinions. We will evaluate the degree to which these medical opinions consider all of the pertinent evidence in your claim, including medical opinions of treating and other examining sources.

(4) *Consistency.* Generally, the more consistent a medical opinion is with the record as a whole, the more weight we will give to that medical opinion.

(5) *Specialization.* We generally give more weight to the medical opinion of a specialist about medical issues related to his or her area of specialty than to the medical opinion of a source who is not a specialist.

(6) *Other factors.* When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the medical opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that a medical source has, regardless of the source of that understanding, and the extent to which a medical source is familiar with the other information in your case record are relevant factors that we will consider in deciding the weight to give to a medical opinion.

(d) *Medical source opinions on issues reserved to the Commissioner.* Opinions on some issues, such as the examples that follow, are not medical opinions, as described in paragraph (a)(1) of this section, but are, instead, opinions on

issues reserved to the Commissioner because they are administrative findings that are dispositive of a case; *i.e.*, that would direct the determination or decision of disability.

(1) *Opinions that you are disabled.* We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are "disabled" or "unable to work" does not mean that we will determine that you are disabled.

(2) *Other opinions on issues reserved to the Commissioner.* We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from medical sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in appendix 1 to this subpart, your residual functional capacity (see §§ 404.1545 and 404.1546), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Commissioner.

(3) We will not give any special significance to the source of an opinion on issues reserved to the Commissioner described in paragraphs (d)(1) and (d)(2) of this section.

(e) *Evidence from our Federal or State agency medical or psychological consultants.* The rules in § 404.1513a apply except that when an administrative law judge gives controlling weight to a treating source's medical opinion, the administrative law judge is not required to explain in the decision the weight he or she gave to the prior administrative medical findings in the claim.

(f) *Opinions from medical sources who are not acceptable medical sources and from nonmedical sources.*

(1) *Consideration.* Opinions from medical sources who are not acceptable medical sources and from nonmedical sources may reflect the source's judgment about some of the same issues addressed in medical opinions from acceptable medical sources. Although we will consider these opinions using the same factors as listed in paragraph (c)(1) through (c)(6) in this section, not every factor for weighing opinion evidence will apply in every case because the evaluation of an opinion from a medical source who is not an acceptable medical source or from a nonmedical source depends on the

particular facts in each case. Depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an acceptable medical source or from a nonmedical source may outweigh the medical opinion of an acceptable medical source, including the medical opinion of a treating source. For example, it may be appropriate to give more weight to the opinion of a medical source who is not an "acceptable medical source" if he or she has seen the individual more often than the treating source, has provided better supporting evidence and a better explanation for the opinion, and the opinion is more consistent with the evidence as a whole.

(2) *Articulation.* The adjudicator generally should explain the weight given to opinions from these sources or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the case. In addition, when an adjudicator determines that an opinion from such a source is entitled to greater weight than a medical opinion from a treating source, the adjudicator must explain the reasons in the notice of decision in hearing cases and in the notice of determination (that is, in the personalized disability notice) at the initial and reconsideration levels, if the determination is less than fully favorable.

§ 404.1528 [Removed and Reserved]

■ 26. Remove and reserve § 404.1528.

■ 27. In § 404.1529, revise paragraph (a), the second and third sentences of paragraph (c)(1), the introductory text of paragraph (c)(3), and the third sentence of paragraph (c)(4) to read as follows:

§ 404.1529 How we evaluate symptoms, including pain.

(a) *General.* In determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence. We will consider all of your statements about your symptoms, such as pain, and any description your medical sources or nonmedical sources may provide about how the symptoms affect your activities of daily living and your ability to work. However, statements about your pain or other symptoms will not alone establish that you are disabled. There must be objective medical evidence from an acceptable medical source that shows

you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and that, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings, and statements about how your symptoms affect you. We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work.

* * * * *

(c) * * *

(1) * * * In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence from your medical sources and nonmedical sources about how your symptoms affect you. We also consider the medical opinions as explained in § 404.1520c. * * *

* * * * *

(3) *Consideration of other evidence.*

Because symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. The information that your medical sources or nonmedical sources provide about your pain or other symptoms (e.g., what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions that your medical sources or nonmedical sources report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your

symptoms, evidence submitted by your medical sources, and observations by our employees and other persons.

Section 404.1520c explains in detail how we consider medical opinions and prior administrative medical findings about the nature and severity of your impairment(s) and any related symptoms, such as pain. Factors relevant to your symptoms, such as pain, which we will consider include:

* * * * *

(4) * * * We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your history, the signs and laboratory findings, and statements by your medical sources or other persons about how your symptoms affect you.

* * * * *

* * * * *

■ 28. Revise § 404.1530(a) to read as follows:

§ 404.1530 Need to follow prescribed treatment.

(a) *What treatment you must follow.*

In order to get benefits, you must follow treatment prescribed by your medical source(s) if this treatment is expected to restore your ability to work.

* * * * *

■ 29. Amend § 404.1579 by revising the second sentence of paragraph (b)(1) and the second sentence of paragraph (b)(4) to read as follows:

§ 404.1579 How we will determine whether your disability continues or ends.

* * * * *

(b) * * *

(1) * * * A determination that there has been a decrease in medical severity must be based on improvement in the symptoms, signs, and/or laboratory findings associated with your impairment(s). * * *

* * * * *

(4) * * * We will consider all evidence you submit and that we obtain from your medical sources and nonmedical sources. * * *

* * * * *

■ 30. Amend § 404.1594 by revising the second sentence of paragraph (b)(1), the sixth sentence in Example 1, the second sentence of paragraph (b)(6), and the fourth sentence of paragraph (c)(3)(v) to read as follows:

§ 404.1594 How we will determine whether your disability continues or ends.

* * * * *

(b) * * *

(1) * * * A determination that there has been a decrease in medical severity

must be based on improvement in the symptoms, signs, and/or laboratory findings associated with your impairment(s).

Example 1: * * * When we reviewed your claim, your medical source, who has treated you, reported that he or she had seen you regularly every 2 to 3 months for the past 2 years. * * *

* * * * *

(6) * * * We will consider all evidence you submit and that we obtain from your medical sources and nonmedical sources. * * *

* * * * *

(c) * * *

(3) * * *

(v) * * * If you are able to engage in substantial gainful activity, we will determine whether an attempt should be made to reconstruct those portions of the missing file that were relevant to our most recent favorable medical decision (e.g., work history, medical evidence, and the results of consultative examinations). * * *

* * * * *

■ 31. Amend *Appendix 1 to subpart P of part 404* as follows:

- a. Revise the second, third, and fourth sentences of 2.00B.1.a;
- b. Revise 2.00B.1.b;
- c. Revise 2.00B.1.c;
- d. Revise the fourth sentence of 7.00H;
- e. Revise the second sentence of 8.00C.3;
- f. Revise the first sentence 8.00E.3.a;
- g. Revise 12.00C.1;
- h. Revise the fourth sentence of 14.00H;
- i. Revise the second, third, and fourth sentences of 102.00B.1.a;
- j. Revise 102.00B.1.b;
- k. Revise 102.00B.1.c;
- l. Revise the fourth sentence of 107.00G;
- m. Revise the second sentence of 108.00C.3.;
- n. Revise the first sentence 108.00E.3.a;
- o. Revise 112.00.C.1;
- p. Revise the fourth sentence of 114.00H.

The revisions read as follows:

Appendix 1 to Subpart P of Part 404—

2.00 * * *

B. * * *

1. * * *

a. * * * We generally require both an otologic examination and audiometric testing to establish that you have a medically determinable impairment that causes your hearing loss. You should have this audiometric testing within 2 months of the otologic examination. Once we have evidence that you have a medically determinable impairment, we can use the results of later audiometric testing to assess

the severity of your hearing loss without another otologic examination. * * *

b. The otologic examination must be performed by a licensed physician (medical or osteopathic doctor) or audiologist. It must include your medical history, your description of how your hearing loss affects you, and the physician's or audiologist's description of the appearance of the external ears (pinnae and external ear canals), evaluation of the tympanic membranes, and assessment of any middle ear abnormalities.

c. Audiometric testing must be performed by, or under the direct supervision of, a licensed audiologist or an otolaryngologist.

* * * * *

7.00 * * *

H. * * * (See sections 404.1521, 404.1529, 416.921, and 416.929 of this chapter.) * * *

* * * * *

8.00 * * *

C. * * *

3. * * * We assess the impact of symptoms as explained in §§ 404.1521, 404.1529, 416.921, and 416.929 of this chapter. * * *

* * * * *

E. * * *

3. * * *

a. *General.* We need documentation from an acceptable medical source to establish that you have a medically determinable impairment. * * *

12.00 * * *

C. * * *

1. *General.* We need objective medical evidence from an acceptable medical source to establish that you have a medically determinable mental disorder. We also need evidence to assess the severity of your mental disorder and its effects on your ability to function in a work setting. We will determine the extent and kinds of evidence we need from medical and nonmedical sources based on the individual facts about your disorder. For additional evidence requirements for intellectual disorder (12.05), see 12.00H. For our basic rules on evidence, see §§ 404.1512, 404.1513, 404.1520b, 416.912, 416.913, and 416.920b of this chapter. For our rules on evaluating medical opinions, see §§ 404.1520c, 404.1527, 416.920c, and 416.927 of this chapter. For our rules on evidence about your symptoms, see §§ 404.1529 and 416.929 of this chapter.

* * * * *

14.00 * * *

H. * * * See §§ 404.1521, 404.1529, 416.921, and 416.929. * * *

* * * * *

102.00 * * *

B. * * *

1. * * *

a. * * * We generally require both an otologic examination and audiometric testing to establish that you have a medically determinable impairment that causes your hearing loss. You should have this audiometric testing within 2 months of the otologic examination. Once we have evidence that you have a medically determinable impairment, we can use the results of later audiometric testing to assess the severity of your hearing loss without another otologic examination. * * *

b. The otologic examination must be performed by a licensed physician (medical or osteopathic doctor) or audiologist. It must include your medical history, your description of how your hearing loss affects you, and the physician's or audiologist's description of the appearance of the external ears (pinnae and external ear canals), evaluation of the tympanic membranes, and assessment of any middle ear abnormalities.

c. Audiometric testing must be performed by, or under the direct supervision of, a licensed audiologist or an otolaryngologist.

* * * * *

107.00 * * *

G. * * * (See sections 416.921 and 416.929 of this chapter.) * * *

* * * * *

108.00. * * *

C. * * *

3. * * * We assess the impact of symptoms as explained in §§ 416.921 and 416.929 of this chapter.

* * * * *

E. * * *

3. * * *

a. *General.* We need documentation from an acceptable medical source to establish that you have a medically determinable impairment. * * *

* * * * *

112.00 * * *

C. * * *

1. *General.* We need objective medical evidence from an acceptable medical source to establish that you have a medically determinable mental disorder. We also need evidence to assess the severity of your mental disorder and its effects on your ability to function age-appropriately. We will determine the extent and kinds of evidence we need from medical and nonmedical sources based on the individual facts about your disorder. For additional evidence requirements for intellectual disorder (112.05), see 112.00H. For our basic rules on evidence, see §§ 416.912, 416.913, and 416.920b of this chapter. For our rules on evaluating medical opinions, see §§ 416.1520c and 416.927 of this chapter. For our rules on evidence about your symptoms, see § 416.929 of this chapter.

* * * * *

114.00 * * *

H. * * * See §§ 416.921 and 416.929.

* * *

* * * * *

Subpart Q—Determinations of Disability

■ 32. The authority citation for subpart Q of part 404 continues to read as follows:

Authority: Secs. 205(a), 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a), 421, and 902(a)(5)).

§ 404.1615 [Amended]

■ 33. In § 404.1615, remove paragraph (d) and redesignate paragraphs (e) through (g) as paragraphs (d) through (f).

■ 34. Revise § 404.1616 to read as follows:

§ 404.1616 Medical consultants and psychological consultants.

(a) *What is a medical consultant?* A medical consultant is a member of a team that makes disability determinations in a State agency (see § 404.1615), or who is a member of a team that makes disability determinations for us when we make disability determinations ourselves. The medical consultant completes the medical portion of the case review and any applicable residual functional capacity assessment about all physical impairment(s) in a claim.

(b) *What qualifications must a medical consultant have?* A medical consultant is a licensed physician, as defined in § 404.1502(a)(1).

(c) *What is a psychological consultant?* A psychological consultant is a member of a team that makes disability determinations in a State agency (see § 404.1615), or who is a member of a team that makes disability determinations for us when we make disability determinations ourselves. The psychological consultant completes the medical portion of the case review and any applicable residual functional capacity assessment about all mental impairment(s) in a claim. When we are unable to obtain the services of a qualified psychiatrist or psychologist despite making every reasonable effort (see § 404.1617) in a claim involving a mental impairment(s), a medical consultant will evaluate the mental impairment(s).

(d) *What qualifications must a psychological consultant have?* A psychological consultant can be either a licensed psychiatrist or psychologist. We will only consider a psychologist qualified to be a psychological consultant if he or she:

(1) Is licensed or certified as a psychologist at the independent practice level of psychology by the State in which he or she practices; and

(2)(i) Possesses a doctorate degree in psychology from a program in clinical psychology of an educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation; or

(ii) Is listed in a national register of health service providers in psychology which the Commissioner of Social Security deems appropriate; and

(3) Possesses 2 years of supervised clinical experience as a psychologist in health service, at least 1 year of which is post-masters degree.

(e) *Cases involving both physical and mental impairments.* In a case where

there is evidence of both physical and mental impairments, the medical consultant will evaluate the physical impairments in accordance with paragraph (a) of this section, and the psychological consultant will evaluate the mental impairment(s) in accordance with paragraph (c) of this section.

■ 35. In § 404.1617, revise the section heading and paragraph (a) to read as follows:

§ 404.1617 Reasonable efforts to obtain review by a physician, psychiatrist, and psychologist.

(a) When the evidence of record indicates the existence of a physical impairment, the State agency must make every reasonable effort to ensure that a medical consultant completes the medical portion of the case review and any applicable residual functional capacity assessment. When the evidence of record indicates the existence of a mental impairment, the State agency must make every reasonable effort to ensure that a psychological consultant completes the medical portion of the case review and any applicable residual functional capacity assessment. The State agency must determine if additional physicians, psychiatrists, and psychologists are needed to make the necessary reviews. When it does not have sufficient resources to make the necessary reviews, the State agency must attempt to obtain the resources needed. If the State agency is unable to obtain additional physicians, psychiatrists, and psychologists because of low salary rates or fee schedules, it should attempt to raise the State agency's levels of compensation to meet the prevailing rates for these services. If these efforts are unsuccessful, the State agency will seek assistance from us. We will assist the State agency as necessary. We will also monitor the State agency's efforts and where the State agency is unable to obtain the necessary services, we will make every reasonable effort to provide the services using Federal resources.

* * * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart I—Determining Disability and Blindness

■ 36. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h,

1383(a), (c), (d)(1), and (p), and 1383b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

■ 37. Revise § 416.902 to read as follows:

§ 416.902 Definitions for this subpart.

As used in the subpart—

(a) *Acceptable medical source* means a medical source who is a:

(1) Licensed physician (medical or osteopathic doctor);

(2) Licensed psychologist, which includes:

(i) A licensed or certified psychologist at the independent practice level; or

(ii) A licensed or certified school psychologist, or other licensed or certified individual with another title who performs the same function as a school psychologist in a school setting, for impairments of intellectual disability, learning disabilities, and borderline intellectual functioning only;

(3) Licensed optometrist for impairments of visual disorders, or measurement of visual acuity and visual fields only, depending on the scope of practice in the State in which the optometrist practices;

(4) Licensed podiatrist for impairments of the foot, or foot and ankle only, depending on whether the State in which the podiatrist practices permits the practice of podiatry on the foot only, or the foot and ankle;

(5) Qualified speech-language pathologist for speech or language impairments only. For this source, *qualified* means that the speech-language pathologist must be licensed by the State professional licensing agency, or be fully certified by the State education agency in the State in which he or she practices, or hold a Certificate of Clinical Competence in Speech-Language Pathology from the American Speech-Language-Hearing Association;

(6) Licensed audiologist for impairments of hearing loss, auditory processing disorders, and balance disorders within the licensed scope of practice only (with respect to claims filed (see § 416.325) on or after March 27, 2017);

(7) Licensed Advanced Practice Registered Nurse, or other licensed advanced practice nurse with another title, for impairments within his or her licensed scope of practice (only with respect to claims filed (see § 416.325) on or after March 27, 2017); or

(8) Licensed Physician Assistant for impairments within his or her licensed scope of practice (only with respect to claims filed (see § 416.325) on or after March 27, 2017).

(b) *Adult* means a person who is age 18 or older.

(c) *Child* means a person who has not attained age 18.

(d) *Commissioner* means the Commissioner of Social Security or his or her authorized designee.

(e) *Disability redetermination* means a redetermination of your eligibility based on disability using the rules for new applicants appropriate to your age, except the rules pertaining to performance of substantial gainful activity. For individuals who are working and for whom a disability redetermination is required, we will apply the rules in §§ 416.260 through 416.269. In conducting a disability redetermination, we will not use the rules for determining whether disability continues set forth in § 416.994 or § 416.994a. (See § 416.987.)

(f) *Impairment(s)* means a medically determinable physical or mental impairment or a combination of medically determinable physical or mental impairments.

(g) *Laboratory findings* means one or more anatomical, physiological, or psychological phenomena that can be shown by the use of medically acceptable laboratory diagnostic techniques. Diagnostic techniques include chemical tests (such as blood tests), electrophysiological studies (such as electrocardiograms and electroencephalograms), medical imaging (such as X-rays), and psychological tests.

(h) *Marked and severe functional limitations*, when used as a phrase, means the standard of disability in the Social Security Act for children claiming SSI benefits based on disability. It is a level of severity that meets, medically equals, or functionally equals the listings. (See §§ 416.906, 416.924, and 416.926a.) The words “marked” and “severe” are also separate terms used throughout this subpart to describe measures of functional limitations; the term “marked” is also used in the listings. (See §§ 416.924 and 416.926a.) The meaning of the words “marked” and “severe” when used as part of the phrase marked and severe functional limitations is not the same as the meaning of the separate terms “marked” and “severe” used elsewhere in 404 and 416. (See §§ 416.924(c) and 416.926a(e).)

(i) *Medical source* means an individual who is licensed as a healthcare worker by a State and working within the scope of practice permitted under State or Federal law, or an individual who is certified by a State as a speech-language pathologist or a school psychologist and acting within the scope of practice permitted under State or Federal law.

(j) *Nonmedical source* means a source of evidence who is not a medical source. This includes, but is not limited to:

(1) You;

(2) Educational personnel (for example, school teachers, counselors, early intervention team members, developmental center workers, and daycare center workers);

(3) Public and private social welfare agency personnel; and

(4) Family members, caregivers, friends, neighbors, employers, and clergy.

(k) *Objective medical evidence* means signs, laboratory findings, or both.

(l) *Signs* means one or more anatomical, physiological, or psychological abnormalities that can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception and must also be shown by observable facts that can be medically described and evaluated.

(m) *State agency* means an agency of a State designated by that State to carry out the disability or blindness determination function.

(n) *Symptoms* means your own description of your physical or mental impairment.

(o) *The listings* means the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter. When we refer to an impairment(s) that “meets, medically equals, or functionally equals the listings,” we mean that the impairment(s) meets or medically equals the severity of any listing in appendix 1 of subpart P of part 404 of this chapter, as explained in §§ 416.925 and 416.926, or that it functionally equals the severity of the listings, as explained in § 416.926a.

(p) *We or us* means, as appropriate, either the Social Security Administration or the State agency making the disability or blindness determination.

(q) *You, your, me, my and I* mean, as appropriate, the person who applies for benefits, the person for whom an application is filed, or the person who is receiving benefits based on disability or blindness.

■ 38. In § 416.903, remove paragraph (e), redesignate paragraph (f) as paragraph (e), and revise the newly redesignated paragraph (e) to read as follows:

§ 416.903 Who makes disability and blindness determinations.

* * * * *

(e) *Determinations for childhood impairments.* In making a determination under title XVI with respect to the disability of a child, we will make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the child's impairment(s) evaluates the case of the child.

■ 39. Revise § 416.904 to read as follows:

§ 416.904 Decisions by other governmental agencies and nongovernmental ties.

Other governmental agencies and nongovernmental entities—such as the Department of Veterans Affairs, the Department of Defense, the Department of Labor, the Office of Personnel Management, State agencies, and private insurers—make disability, blindness, employability, Medicaid, workers' compensation, and other benefits decisions for their own programs using their own rules. Because a decision by any other governmental agency or a nongovernmental entity about whether you are disabled, blind, employable, or entitled to any benefits is based on its rules, it is not binding on us and is not our decision about whether you are disabled or blind under our rules. Therefore, in claims filed (see § 416.325) on or after March 27, 2017, we will not provide any analysis in our determination or decision about a decision made by any other governmental agency or a nongovernmental entity about whether you are disabled, blind, employable, or entitled to any benefits. However, we will consider all of the supporting evidence underlying the other governmental agency or nongovernmental entity's decision that we receive as evidence in your claim in accordance with § 416.913(a)(1) through (4).

§ 416.908 [Removed and reserved].

■ 40. Remove and reserve § 416.908.

■ 41. Revise § 416.912 to read as follows:

§ 416.912 Responsibility for evidence.

(a) *Your responsibility.*

(1) *General.* In general, you have to prove to us that you are blind or disabled. You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled (see § 416.913). This duty is ongoing and requires you to disclose any additional related evidence about

which you become aware. This duty applies at each level of the administrative review process, including the Appeals Council level if the evidence relates to the period on or before the date of the administrative law judge hearing decision. We will consider only impairment(s) you say you have or about which we receive evidence. When you submit evidence received from another source, you must submit that evidence in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. If we ask you, you must inform us about:

- (i) Your medical source(s);
- (ii) Your age;
- (iii) Your education and training;
- (iv) Your work experience;
- (v) Your daily activities both before and after the date you say that you became disabled;
- (vi) Your efforts to work; and
- (vii) Any other factors showing how your impairment(s) affects your ability to work, or, if you are a child, your functioning. In §§ 416.960 through 416.969, we discuss in more detail the evidence we need when we consider vocational factors.

(2) *Completeness.* The evidence in your case record must be complete and detailed enough to allow us to make a determination or decision about whether you are disabled or blind. It must allow us to determine—

- (i) The nature and severity of your impairment(s) for any period in question;
- (ii) Whether the duration requirement described in § 416.909 is met; and
- (iii) Your residual functional capacity to do work-related physical and mental activities, when the evaluation steps described in §§ 416.920(e) or (f)(1) apply, or, if you are a child, how you typically function compared to children your age who do not have impairments.

(3) *Statutory blindness.* If you are applying for benefits on the basis of statutory blindness, we will require an examination by a physician skilled in diseases of the eye or by an optometrist, whichever you may select.

(b) *Our responsibility.*

(1) *Development.* Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary or unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you get medical evidence from your own medical

sources and entities that maintain your medical sources' evidence when you give us permission to request the reports.

(i) *Every reasonable effort* means that we will make an initial request for evidence from your medical source or entity that maintains your medical source's evidence, and, at any time between 10 and 20 calendar days after the initial request, if the evidence has not been received, we will make one follow-up request to obtain the medical evidence necessary to make a determination. The medical source or entity that maintains your medical source's evidence will have a minimum of 10 calendar days from the date of our follow-up request to reply, unless our experience with that source indicates that a longer period is advisable in a particular case.

(ii) *Complete medical history* means the records of your medical source(s) covering at least the 12 months preceding the month in which you file your application. If you say that your disability began less than 12 months before you filed your application, we will develop your complete medical history beginning with the month you say your disability began unless we have reason to believe your disability began earlier.

(2) *Obtaining a consultative examination.* We may ask you to attend one or more consultative examinations at our expense. See §§ 416.917 through 416.919t for the rules governing the consultative examination process. Generally, we will not request a consultative examination until we have made every reasonable effort to obtain evidence from your own medical sources. We may order a consultative examination while awaiting receipt of medical source evidence in some instances, such as when we know a source is not productive, is uncooperative, or is unable to provide certain tests or procedures. We will not evaluate this evidence until we have made every reasonable effort to obtain evidence from your medical sources.

(3) *Other work.* In order to determine under § 416.920(g) that you are able to adjust to other work, we must provide evidence about the existence of work in the national economy that you can do (see §§ 416.960 through 416.969a), given your residual functional capacity (which we have already assessed, as described in § 416.920(e)), age, education, and work experience.

■ 42. Revise § 416.913 to read as follows:

§ 416.913 Categories of evidence.

(a) *What we mean by evidence.* Subject to the provisions of paragraph (b), evidence is anything you or anyone else submits to us or that we obtain that relates to your claim. We consider evidence under §§ 416.920b, 416.920c (or under § 416.927 for claims filed (see § 416.325) before March 27, 2017). We evaluate evidence we receive according to the rules pertaining to the relevant category of evidence. The categories of evidence are:

(1) *Objective medical evidence.* Objective medical evidence is medical signs, laboratory findings, or both, as defined in § 416.902(k).

(2) *Medical opinion.* A medical opinion is a statement from a medical source about what you can still do despite your impairment(s) and whether you have one or more impairment-related limitations or restrictions in the abilities listed in paragraphs (a)(2)(i)(A) through (D) and (a)(2)(ii)(A) through (F) of this section. (For claims filed (see § 416.325) before March 27, 2017, see § 416.927(a) for the definition of medical opinion.)

(i) Medical opinions in adult claims are about impairment-related limitations and restrictions in:

(A) Your ability to perform physical demands of work activities, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping, or crouching);

(B) Your ability to perform mental demands of work activities, such as understanding; remembering; maintaining concentration, persistence, or pace; carrying out instructions; or responding appropriately to supervision, co-workers, or work pressures in a work setting;

(C) Your ability to perform other demands of work, such as seeing, hearing, or using other senses; and

(D) Your ability to adapt to environmental conditions, such as temperature extremes or fumes.

(ii) Medical opinions in child claims are about impairment-related limitations and restrictions in your abilities in the six domains of functioning:

(A) Acquiring and using information (see § 416.926a(g));

(B) Attending and completing tasks (see § 416.926a(h));

(C) Interacting and relating with others (see § 416.926a(i));

(D) Moving about and manipulating objects (see § 416.926a(j));

(E) Caring for yourself (see § 416.926a(k)); and

(F) Health and physical well-being (see § 416.926a(l)).

(3) *Other medical evidence.* Other medical evidence is evidence from a medical source that is not objective medical evidence or a medical opinion, including judgments about the nature and severity of your impairments, your medical history, clinical findings, diagnosis, treatment prescribed with response, or prognosis. (For claims filed (see § 416.325) before March 27, 2017, *other medical evidence* does not include a diagnosis, prognosis, or a statement that reflects a judgment(s) about the nature and severity of your impairment(s)).

(4) *Evidence from nonmedical sources.* Evidence from nonmedical sources is any information or statement(s) from a nonmedical source (including you) about any issue in your claim. We may receive evidence from nonmedical sources either directly from the nonmedical source or indirectly, such as from forms we receive and our administrative records.

(5) *Prior administrative medical finding.* A prior administrative medical finding is a finding, other than the ultimate determination about whether you are disabled, about a medical issue made by our Federal and State agency medical and psychological consultants at a prior level of review (see § 416.1400) in your current claim based on their review of the evidence in your case record, such as:

(i) The existence and severity of your impairment(s);

(ii) The existence and severity of your symptoms;

(iii) Statements about whether your impairment(s) meets or medically equals any listing in the Listing of Impairments in Part 404, Subpart P, Appendix 1;

(iv) If you are a child, statements about whether your impairment(s) functionally equals the listings in Part 404, Subpart P, Appendix 1;

(v) If you are an adult, your residual functional capacity;

(vi) Whether your impairment(s) meets the duration requirement; and

(vii) How failure to follow prescribed treatment (see § 416.930) and drug addiction and alcoholism (see § 416.935) relate to your claim.

(b) *Exceptions for privileged communications.*

(1) The privileged communications listed in paragraphs (b)(1)(i) and (b)(1)(ii) of this section are not evidence, and we will neither consider nor provide any analysis about them in your determination or decision. This exception for privileged communications applies equally

whether your representative is an attorney or a non-attorney.

(i) Oral or written communications between you and your representative that are subject to the attorney-client privilege, unless you voluntarily disclose the communication to us.

(ii) Your representative's analysis of your claim, unless he or she voluntarily discloses it to us. This analysis means information that is subject to the attorney work product doctrine, but it does not include medical evidence, medical opinions, or any other factual matter that we may consider in determining whether or not you are entitled to benefits (see paragraph (b)(2) of this section).

(2) The attorney-client privilege generally protects confidential communications between an attorney and his or her client that are related to providing or obtaining legal advice. The attorney work product doctrine generally protects an attorney's analyses, theories, mental impressions, and notes. In the context of your disability claim, neither the attorney-client privilege nor the attorney work product doctrine allow you to withhold factual information, medical opinions, or other medical evidence that we may consider in determining whether or not you are entitled to benefits. For example, if you tell your representative about the medical sources you have seen, your representative cannot refuse to disclose the identity of those medical sources to us based on the attorney-client privilege. As another example, if your representative asks a medical source to complete an opinion form related to your impairment(s), symptoms, or limitations, your representative cannot withhold the completed opinion form from us based on the attorney work product doctrine. The attorney work product doctrine would not protect the source's opinions on the completed form, regardless of whether or not your representative used the form in his or her analysis of your claim or made handwritten notes on the face of the report.

■ 43. Add § 416.913a to read as follows:

§ 416.913a Evidence from our Federal or State agency medical or psychological consultants.

The following rules apply to our Federal or State agency medical or psychological consultants that we consult in connection with administrative law judge hearings and Appeals Council reviews:

(a) In claims adjudicated by the State agency, a State agency medical or psychological consultant may make the determination of disability together with

a State agency disability examiner or provide medical evidence to a State agency disability examiner when the disability examiner makes the initial or reconsideration determination alone (see § 416.1015(c) of this part). The following rules apply:

(1) When a State agency medical or psychological consultant makes the determination together with a State agency disability examiner at the initial or reconsideration level of the administrative review process as provided in § 416.1015(c)(1), he or she will consider the evidence in your case record and make administrative findings about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or medically equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. These administrative medical findings are based on the evidence in your case but are not in themselves evidence at the level of the administrative review process at which they are made. See § 416.913(a)(5).

(2) When a State agency disability examiner makes the initial determination alone as provided in § 416.1015(c)(3), he or she may obtain medical evidence from a State agency medical or psychological consultant about one or more of the medical issues listed in paragraph (a)(1) of this section. In these cases, the State agency disability examiner will consider the medical evidence of the State agency medical or psychological consultant under §§ 416.920b, 416.920c, and 416.927.

(3) When a State agency disability examiner makes a reconsideration determination alone as provided in § 416.1015(c)(3), he or she will consider prior administrative medical findings made by a State agency medical or psychological consultant at the initial level of the administrative review process, and any medical evidence provided by such consultants at the initial and reconsideration levels, about one or more of the medical issues listed in paragraph (a)(1)(i) of this section under §§ 416.920b, 416.920c, and 416.927.

(b) Administrative law judges are responsible for reviewing the evidence and making administrative findings of fact and conclusions of law. They will consider prior administrative medical findings and medical evidence from our Federal or State agency medical or psychological consultants as follows:

(1) Administrative law judges are not required to adopt any prior administrative medical findings, but they must consider this evidence according to §§ 416.920b, 416.920c, and 416.927, as appropriate, because our Federal or State agency medical or psychological consultants are highly qualified and experts in Social Security disability evaluation.

(2) Administrative law judges may also ask for medical evidence from expert medical sources. Administrative law judges will consider this evidence under §§ 416.920b, 416.920c, and 416.927, as appropriate.

(c) When the Appeals Council makes a decision, it will consider prior administrative medical findings according to the same rules for considering prior administrative medical findings as administrative law judges follow under paragraph (b) of this section.

■ 44. Revise § 416.918 paragraph (c) to read as follows:

§ 416.918 If you do not appear at a consultative examination.

* * * * *

(c) *Objections by your medical source(s).* If any of your medical sources tell you that you should not take the examination or test, you should tell us at once. In many cases, we may be able to get the information we need in another way. Your medical source(s) may agree to another type of examination for the same purpose.

■ 45. Revise § 416.919(a) to read as follows:

§ 416.919g Who we will select to perform a consultative examination.

(a) We will purchase a consultative examination only from a qualified medical source. The medical source may be your own medical source or another medical source. If you are a child, the medical source we choose may be a pediatrician.

* * * * *

■ 46. Revise § 416.919h to read as follows:

§ 416.919h Your medical source.

When, in our judgment, your medical source is qualified, equipped, and willing to perform the additional examination or test(s) for the fee schedule payment, and generally furnishes complete and timely reports, your medical source will be the preferred source for the purchased examination or test(s).

■ 47. Revise § 416.919i to read as follows:

§ 416.919i Other sources for consultative examinations.

We will use a different medical source than your medical source for a purchased examination or test in situations including, but not limited to, the following:

(a) Your medical source prefers not to perform such an examination or does not have the equipment to provide the specific data needed;

(b) There are conflicts or inconsistencies in your file that cannot be resolved by going back to your medical source;

(c) You prefer a source other than your medical source and have a good reason for your preference;

(d) We know from prior experience that your medical source may not be a productive source, such as when he or she has consistently failed to provide complete or timely reports; or

(e) Your medical source is not a qualified medical source as defined in § 416.919g.

■ 48. Revise § 416.919n paragraph (c)(6) to read as follows:

§ 416.919n Informing the medical source of examination scheduling, report content, and signature requirements.

* * * * *

(c) * * *

(6) A medical opinion. Although we will ordinarily request a medical opinion as part of the consultative examination process, the absence of a medical opinion in a consultative examination report will not make the report incomplete. See § 416.913(a)(3); and

* * * * *

■ 49. In § 416.920a, revise the second sentence of paragraphs (b)(1) and (d)(1) to read as follows:

§ 416.920a Evaluation of mental impairments.

* * * * *

(b) * * *

(1) * * * See § 416.921 for more information about what is needed to show a medically determinable impairment. * * *

* * * * *

(d) * * *

(1) If we rate the degrees of your limitation as “none” or “mild,” we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities (see § 416.922).

* * * * *

■ 50. Revise § 416.920b to read as follows:

§ 416.920b How we consider evidence.

After we review all of the evidence relevant to your claim, we make findings about what the evidence shows.

(a) *Complete and consistent evidence.* If all of the evidence we receive, including all medical opinion(s), is consistent and there is sufficient evidence for us to determine whether you are disabled, we will make our determination or decision based on that evidence.

(b) *Incomplete or inconsistent evidence.* In some situations, we may not be able to make our determination or decision because the evidence in your case record is insufficient or inconsistent. We consider evidence to be insufficient when it does not contain all the information we need to make our determination or decision. We consider evidence to be inconsistent when it conflicts with other evidence, contains an internal conflict, is ambiguous, or when the medical evidence does not appear to be based on medically acceptable clinical or laboratory diagnostic techniques. If the evidence in your case record is insufficient or inconsistent, we may need to take the additional actions in paragraphs (b)(1) through (4) of this section.

(1) If any of the evidence in your case record, including any medical opinion(s) and prior administrative medical findings, is inconsistent, we will consider the relevant evidence and see if we can determine whether you are disabled based on the evidence we have.

(2) If the evidence is consistent but we have insufficient evidence to determine whether you are disabled, or if after considering the evidence we determine we cannot reach a conclusion about whether you are disabled, we will determine the best way to resolve the inconsistency or insufficiency. The action(s) we take will depend on the nature of the inconsistency or insufficiency. We will try to resolve the inconsistency or insufficiency by taking any one or more of the actions listed in paragraphs (b)(2)(i) through (b)(2)(iv) of this section. We might not take all of the actions listed below. We will consider any additional evidence we receive together with the evidence we already have.

(i) We may recontact your medical source. We may choose not to seek additional evidence or clarification from a medical source if we know from experience that the source either cannot or will not provide the necessary evidence. If we obtain medical evidence over the telephone, we will send the telephone report to the source for review, signature, and return;

(ii) We may request additional existing evidence;

(iii) We may ask you to undergo a consultative examination at our expense (see §§ 416.917 through 416.919t); or

(iv) We may ask you or others for more information.

(3) When there are inconsistencies in the evidence that we cannot resolve or when, despite efforts to obtain additional evidence, the evidence is insufficient to determine whether you are disabled, we will make a determination or decision based on the evidence we have.

(c) *Evidence that is inherently neither valuable nor persuasive.* Paragraphs (c)(1) through (c)(3) apply in claims filed (see § 416.325) on or after March 27, 2017. Because the evidence listed in paragraphs (c)(1)–(c)(3) of this section is inherently neither valuable nor persuasive to the issue of whether you are disabled or blind under the Act, we will not provide any analysis about how we considered such evidence in our determination or decision, even under § 416.920c:

(1) *Decisions by other governmental agencies and nongovernmental entities.* See § 416.904.

(2) *Disability examiner findings.*

Findings made by a State agency disability examiner made at a previous level of adjudication about a medical issue, vocational issue, or the ultimate determination about whether you are disabled.

(3) *Statements on issues reserved to the Commissioner.* The statements listed in paragraphs (c)(3)(i) through (c)(3)(ix) of this section would direct our determination or decision that you are or are not disabled or blind within the meaning of the Act, but we are responsible for making the determination or decision about whether you are disabled or blind:

(i) Statements that you are or are not disabled, blind, able to work, or able to perform regular or continuing work;

(ii) Statements about whether or not you have a severe impairment(s);

(iii) Statements about whether or not your impairment(s) meets the duration requirement (see § 416.909);

(iv) Statements about whether or not your impairment(s) meets or medically equals any listing in the Listing of Impairments in Part 404, Subpart P, Appendix 1;

(v) If you are a child, statements about whether or not your impairment(s) functionally equals the listings in Part 404 Subpart P Appendix 1 (see § 416.926a);

(vi) If you are an adult, statements about what your residual functional capacity is using our programmatic

terms about the functional exertional levels in Part 404, Subpart P, Appendix 2, Rule 200.00 instead of descriptions about your functional abilities and limitations (see § 416.945);

(vii) If you are an adult, statements about whether or not your residual functional capacity prevents you from doing past relevant work (see § 416.960);

(viii) If you are an adult, statements that you do or do not meet the requirements of a medical-vocational rule in Part 404, Subpart P, Appendix 2; and

(ix) Statements about whether or not your disability continues or ends when we conduct a continuing disability review (see § 416.994).

■ 51. Add § 416.920c to read as follows:

§ 416.920c How we consider and articulate medical opinions and prior administrative medical findings for claims filed on or after March 27, 2017.

For claims filed (see § 416.325) on or after March 27, 2017, the rules in this section apply. For claims filed before March 27, 2017, the rules in § 416.927 apply.

(a) *How we consider medical opinions and prior administrative medical findings.* We will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from your medical sources. When a medical source provides one or more medical opinions or prior administrative medical findings, we will consider those medical opinions or prior administrative medical findings from that medical source together using the factors listed in paragraphs (c)(1) through (c)(5) of this section, as appropriate. The most important factors we consider when we evaluate the persuasiveness of medical opinions and prior administrative medical findings are supportability (paragraph (c)(1) of this section) and consistency (paragraph (c)(2) of this section). We will articulate how we considered the medical opinions and prior administrative medical findings in your claim according to paragraph (b) of this section.

(b) *How we articulate our consideration of medical opinions and prior administrative medical findings.* We will articulate in our determination or decision how persuasive we find all of the medical opinions and all of the prior administrative medical findings in your case record. Our articulation requirements are as follows:

(1) *Source-level articulation.* Because many claims have voluminous case records containing many types of

evidence from different sources, it is not administratively feasible for us to articulate in each determination or decision how we considered all of the factors for all of the medical opinions and prior administrative medical findings in your case record. Instead, when a medical source provides multiple medical opinion(s) or prior administrative medical finding(s), we will articulate how we considered the medical opinions or prior administrative medical findings from that medical source together in a single analysis using the factors listed in paragraphs (c)(1) through (c)(5) of this section, as appropriate. We are not required to articulate how we considered each medical opinion or prior administrative medical finding from one medical source individually.

(2) *Most important factors.* The factors of supportability (paragraph (c)(1) of this section) and consistency (paragraph (c)(2) of this section) are the most important factors we consider when we determine how persuasive we find a medical source's medical opinions or prior administrative medical findings to be. Therefore, we will explain how we considered the supportability and consistency factors for a medical source's medical opinions or prior administrative medical findings in your determination or decision. We may, but are not required to, explain how we considered the factors in paragraphs (c)(3) through (c)(5) of this section, as appropriate, when we articulate how we consider medical opinions and prior administrative medical findings in your case record.

(3) *Equally persuasive medical opinions or prior administrative medical findings about the same issue.* When we find that two or more medical opinions or prior administrative medical findings about the same issue are both equally well-supported (paragraph (c)(1) of this section) and consistent with the record (paragraph (c)(2) of this section) but are not exactly the same, we will articulate how we considered the other most persuasive factors in paragraphs (c)(3) through (c)(5) of this section for those medical opinions or prior administrative medical findings in your determination or decision.

(c) *Factors.* We will consider the following factors when we consider the medical opinion(s) and prior administrative medical finding(s) in your case:

(1) *Supportability.* The more relevant the objective medical evidence and supporting explanations presented by a medical source are to support his or her medical opinion(s) or prior

administrative medical finding(s), the more persuasive the medical opinions or prior administrative medical finding(s) will be.

(2) *Consistency.* The more consistent a medical opinion(s) or prior administrative medical finding(s) is with the evidence from other medical sources and nonmedical sources in the claim, the more persuasive the medical opinion(s) or prior administrative medical finding(s) will be.

(3) *Relationship with the claimant.* This factor combines consideration of the issues in paragraphs (c)(3)(i)–(v) of this section.

(i) *Length of the treatment relationship.* The length of time a medical source has treated you may help demonstrate whether the medical source has a longitudinal understanding of your impairment(s).

(ii) *Frequency of examinations.* The frequency of your visits with the medical source may help demonstrate whether the medical source has a longitudinal understanding of your impairment(s).

(iii) *Purpose of the treatment relationship.* The purpose for treatment you received from the medical source may help demonstrate the level of knowledge the medical source has of your impairment(s).

(iv) *Extent of the treatment relationship.* The kinds and extent of examinations and testing the medical source has performed or ordered from specialists or independent laboratories may help demonstrate the level of knowledge the medical source has of your impairment(s).

(v) *Examining relationship.* A medical source may have a better understanding of your impairment(s) if he or she examines you than if the medical source only reviews evidence in your folder.

(4) *Specialization.* The medical opinion or prior administrative medical finding of a medical source who has received advanced education and training to become a specialist may be more persuasive about medical issues related to his or her area of specialty than the medical opinion or prior administrative medical finding of a medical source who is not a specialist in the relevant area of specialty.

(5) *Other factors.* We will consider other factors that tend to support or contradict a medical opinion or prior administrative medical finding. This includes, but is not limited to, evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of our disability program's policies and evidentiary requirements. When we consider a medical source's familiarity

with the other evidence in a claim, we will also consider whether new evidence we receive after the medical source made his or her medical opinion or prior administrative medical finding makes the medical opinion or prior administrative medical finding more or less persuasive.

(d) *Evidence from nonmedical sources.* We are not required to articulate how we considered evidence from nonmedical sources using the requirements in paragraphs (a) through (c) in this section.

■ 52. Revise § 416.921 to read as follows:

§ 416.921 Establishing that you have a medically determinable impairment(s).

If you are not doing substantial gainful activity, we will then determine whether you have a medically determinable physical or mental impairment(s) (see § 416.920(a)(4)(ii)). Your impairment(s) must result from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. Therefore, a physical or mental impairment must be established by objective medical evidence from an acceptable medical source. We will not use your statement of symptoms, a diagnosis, or a medical opinion to establish the existence of an impairment(s). After we establish that you have a medically determinable impairment(s), then we determine whether your impairment(s) is severe.

■ 53. Revise § 416.922 to read as follows:

§ 416.922 What we mean by an impairment(s) that is not severe in an adult.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

■ 54. Revise § 416.923 to read as follows:

§ 416.923 Multiple impairments.

(a) *Unrelated severe impairments.* We cannot combine two or more unrelated severe impairments to meet the 12-month duration test. If you have a severe impairment(s) and then develop another unrelated severe impairment(s) but neither one is expected to last for 12 months, we cannot find you disabled, even though the two impairments in combination last for 12 months.

(b) *Concurrent impairments.* If you have two or more concurrent impairments that, when considered in combination, are severe, we must determine whether the combined effect of your impairments can be expected to continue to be severe for 12 months. If one or more of your impairments improves or is expected to improve within 12 months, so that the combined effect of your remaining impairments is no longer severe, we will find that you do not meet the 12-month duration test.

(c) *Combined effect.* In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, we will consider the combined impact of the impairments throughout the disability determination process. If we do not find that you have a medically severe combination of impairments, we will determine that you are not disabled (see §§ 416.920 and 416.924).

■ 55. In § 416.924a, revise paragraph (a) introductory text, the last sentence of paragraph (a)(1)(i), the last sentence of (a)(1)(iii), and the section heading of paragraph (a)(2) to read as follows:

§ 416.924a Considerations in determining disability for children.

(a) *Basic considerations.* We consider all evidence in your case record (see § 416.913). The evidence in your case record may include information from medical sources (such as your pediatrician or other physician; psychologist; qualified speech-language pathologist; and physical, occupational, and rehabilitation therapists) and nonmedical sources (such as your parents, teachers, and other people who know you).

(1) * * *

(i) * * * (See § 416.920c.)

* * * * *

(iii) * * * When a medical source has accepted and relied on such information to reach a diagnosis, we may consider this information to be a sign, as defined in § 416.902(l).

(2) *Statements from nonmedical sources.* * * *

* * * * *

■ 56. Amend § 416.924b by revising the first sentence of paragraph (b)(3) to read as follows:

§ 416.924b Age as a factor of evaluation in the sequential evaluation process for children.

* * * * *

(b) * * *

(3) Notwithstanding the provisions in paragraph (b)(1) of this section, we will not compute a corrected chronological age if the medical evidence shows that your medical source has already considered your prematurity in his or her assessment of your development.

* * *

■ 57. In § 416.925, revise the last sentence in paragraph (c)(2) to read as follows:

§ 416.925 Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter.

* * * * *

(c) * * *

(2) * * * Even if we do not include specific criteria for establishing a diagnosis or confirming the existence of your impairment, you must still show that you have a severe medically determinable impairment(s), as defined in §§ 416.921 and 416.924(c).

* * * * *

■ 58. In § 416.926, revise paragraphs (d) and (e) to read as follows:

§ 416.926 Medical equivalence for adults and children.

* * * * *

(d) *Who is a designated medical or psychological consultant?* A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. See § 416.1016 of this part for the necessary qualifications for medical consultants and psychological consultants and the limitations on what medical consultants who are not physicians can evaluate.

(e) *Who is responsible for determining medical equivalence?*

(1) In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016 of this part) has the overall responsibility for determining medical equivalence.

(2) For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418 of this part, with the Associate Commissioner for Disability Policy or his or her delegate.

(3) For cases at the administrative law judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the administrative law judge or Appeals Council.

■ 59. Amend § 416.926a by revising the second sentence of paragraph (b)(3) to read as follows:

§ 416.926a Functional equivalence for children.

* * * * *

(b) * * *

(3) * * * We will ask for information from your medical sources who can give us medical evidence, including medical opinions, about your limitations and restrictions. * * *

* * * * *

■ 60. Revise § 416.927 to read as follows:

§ 416.927 Evaluating opinion evidence for claims filed before March 27, 2017.

For claims filed (see § 416.325) before March 27, 2017, the rules in this section apply. For claims filed on or after March 27, 2017, the rules in § 416.920c apply.

(a) *Definitions.*

(1) *Medical opinions.* Medical opinions are statements from acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.

(2) *Treating source.* Treating source means your own acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you. Generally, we will consider that you have an ongoing treatment relationship with an acceptable medical source when the medical evidence

establishes that you see, or have seen, the source with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for your medical condition(s). We may consider an acceptable medical source who has treated or evaluated you only a few times or only after long intervals (e.g., twice a year) to be your treating source if the nature and frequency of the treatment or evaluation is typical for your condition(s). We will not consider an acceptable medical source to be your treating source if your relationship with the source is not based on your medical need for treatment or evaluation, but solely on your need to obtain a report in support of your claim for disability. In such a case, we will consider the acceptable medical source to be a nontreating source.

(b) *How we consider medical opinions.* In determining whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive. See § 416.920b.

(c) *How we weigh medical opinions.* Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's medical opinion controlling weight under paragraph (c)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) *Examining relationship.* Generally, we give more weight to the medical opinion of a source who has examined you than to the medical opinion of a medical source who has not examined you.

(2) *Treatment relationship.* Generally, we give more weight to medical opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's medical opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's medical opinion controlling weight, we apply the factors listed in paragraphs (c)(2)(i) and

(c)(2)(ii) of this section, as well as the factors in paragraphs (c)(3) through (c)(6) of this section in determining the weight to give the medical opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's medical opinion.

(i) *Length of the treatment relationship and the frequency of examination.* Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the medical source's medical opinion more weight than we would give it if it were from a nontreating source.

(ii) *Nature and extent of the treatment relationship.* Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her medical opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's medical opinion more weight than we would give it if it were from a nontreating source.

(3) *Supportability.* The more a medical source presents relevant evidence to support a medical opinion, particularly medical signs and laboratory findings, the more weight we will give that medical opinion. The better an explanation a source provides for a medical opinion, the more weight we will give that medical opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their medical opinions will depend on the degree to which they provide supporting explanations for their medical opinions. We will evaluate the degree to which these medical opinions consider all of the pertinent evidence in your claim, including medical opinions of treating and other examining sources.

(4) *Consistency.* Generally, the more consistent a medical opinion is with the

record as a whole, the more weight we will give to that medical opinion.

(5) *Specialization.* We generally give more weight to the medical opinion of a specialist about medical issues related to his or her area of specialty than to the medical opinion of a source who is not a specialist.

(6) *Other factors.* When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the medical opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that a medical source has, regardless of the source of that understanding, and the extent to which a medical source is familiar with the other information in your case record are relevant factors that we will consider in deciding the weight to give to a medical opinion.

(d) *Medical source opinions on issues reserved to the Commissioner.* Opinions on some issues, such as the examples that follow, are not medical opinions, as described in paragraph (a)(1) of this section, but are, instead, opinions on issues reserved to the Commissioner because they are administrative findings that are dispositive of a case; *i.e.*, that would direct the determination or decision of disability.

(1) *Opinions that you are disabled.* We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are "disabled" or "unable to work" does not mean that we will determine that you are disabled.

(2) *Other opinions on issues reserved to the Commissioner.* We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from medical sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in appendix 1 to subpart P of part 404 of this chapter, your residual functional capacity (see §§ 416.945 and 416.946), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Commissioner.

(3) We will not give any special significance to the source of an opinion on issues reserved to the Commissioner

described in paragraphs (d)(1) and (d)(2) of this section.

(e) *Evidence from our Federal or State agency medical or psychological consultants.* The rules in § 416.913a apply except that when an administrative law judge gives controlling weight to a treating source's medical opinion, the administrative law judge is not required to explain in the decision the weight he or she gave to the prior administrative medical findings in the claim.

(f) *Opinions from medical sources who are not acceptable medical sources and from nonmedical sources.*

(1) *Consideration.* Opinions from medical sources who are not acceptable medical sources and from nonmedical sources may reflect the source's judgment about some of the same issues addressed in medical opinions from acceptable medical sources. Although we will consider these opinions using the same factors as listed in paragraph (c)(1) through (c)(6) in this section, not every factor for weighing opinion evidence will apply in every case because the evaluation of an opinion from a medical source who is not an acceptable medical source or from a nonmedical source depends on the particular facts in each case. Depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an acceptable medical source or from a nonmedical source may outweigh the medical opinion of an acceptable medical source, including the medical opinion of a treating source. For example, it may be appropriate to give more weight to the opinion of a medical source who is not an "acceptable medical source" if he or she has seen the individual more often than the treating source, has provided better supporting evidence and a better explanation for the opinion, and the opinion is more consistent with the evidence as a whole.

(2) *Articulation.* The adjudicator generally should explain the weight given to opinions from these sources or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the case. In addition, when an adjudicator determines that an opinion from such a source is entitled to greater weight than a medical opinion from a treating source, the adjudicator must explain the reasons in the notice of decision in hearing cases and in the notice of determination (that is, in the personalized disability notice) at the

initial and reconsideration levels, if the determination is less than fully favorable.

§ 416.928 [Removed and Reserved]

■ 61. Remove and reserve § 416.928.

■ 62. In § 416.929, revise paragraph (a), the second and third sentences of paragraph (c)(1), the introductory text of paragraph (c)(3), and the third sentence of paragraph (c)(4) to read as follows:

§ 416.929 How we evaluate symptoms, including pain.

(a) *General.* In determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence. We will consider all of your statements about your symptoms, such as pain, and any description your medical sources or nonmedical sources may provide about how the symptoms affect your activities of daily living and your ability to work (or, if you are a child, your functioning). However, statements about your pain or other symptoms will not alone establish that you are disabled. There must be objective medical evidence from an acceptable medical source that shows you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and that, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings, and statements about how your symptoms affect you. We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work (or if you are a child, your functioning).

* * * * *

(c) * * *

(1) * * * In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence from your medical sources and nonmedical sources about how your symptoms affect you. We also consider

the medical opinions as explained in § 416.920c. * * *

* * * * *

(3) *Consideration of other evidence.* Because symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. The information that your medical sources or nonmedical sources provide about your pain or other symptoms (e.g., what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions that your medical sources or nonmedical sources report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your medical sources, and observations by our employees and other persons. If you are a child, we will also consider all of the evidence presented, including evidence submitted by your medical sources (such as physicians, psychologists, and therapists) and nonmedical sources (such as educational agencies and personnel, parents and other relatives, and social welfare agencies). Section 416.920c explains in detail how we consider medical opinions and prior administrative medical findings about the nature and severity of your impairment(s) and any related symptoms, such as pain. Factors relevant to your symptoms, such as pain, which we will consider include:

* * * * *

(4) * * * We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your history, the signs and laboratory findings, and statements by your medical sources or other persons about how your symptoms affect you.

* * *

* * * * *

■ 63. Revise § 416.930(a) to read as follows:

§ 416.930 Need to follow prescribed treatment.

(a) *What treatment you must follow.* In order to get benefits, you must follow treatment prescribed by your medical source(s) if this treatment is expected to restore your ability to work.

* * * * *

■ 64. Amend § 416.993 by revising the seventh and ninth sentences of paragraph (b) to read as follows:

§ 416.993 Medical evidence in continuing disability review cases.

* * * * *

(b) * * * See § 416.912(b)(1)(i) concerning what we mean by every reasonable effort. * * * See § 416.912(b)(1)(ii).

* * * * *

■ 65. Amend § 416.994 by revising the last sentence in paragraph (b)(1)(i), the sixth sentence in example 1, the second sentence of paragraph (b)(1)(vi), and the fourth sentence of (b)(2)(iv)(E) to read as follows:

§ 416.994 How we will determine whether your disability continues or ends.

* * * * *

(b) * * *

(1) * * *

(i) * * * A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs, or laboratory findings associated with your impairment(s).

Example 1: * * * When we reviewed your claim your medical source who has treated you reported that he or she had seen you regularly every 2 to 3 months for the past 2 years. * * *

* * * * *

(vi) * * * We will consider all evidence you submit and that we obtain from your medical sources and nonmedical sources. * * *

* * * * *

(2) * * *

(iv) * * *

(E) * * * If you are able to engage in substantial gainful activity, we will determine whether an attempt should be made to reconstruct those portions of the missing file that were relevant to our most recent favorable medical decision (e.g., work history, medical evidence, and the results of consultative examinations). * * *

■ 66. Amend § 416.994a by revising the second sentence of paragraph (a)(2), the first sentence in paragraph (c)(2), the fourth sentence of paragraph (d), and paragraph (i)(1) to read as follows:

§ 416.994a How we will determine whether your disability continues or ends, and whether you are and have been receiving treatment that is medically necessary and available, disabled children.

(a) * * *

(2) * * * We will consider all evidence you submit and that we obtain from your medical and nonmedical sources. * * *

* * *

(c) * * *

(2) The terms symptoms, signs, and laboratory findings are defined in § 416.902. * * *

(d) * * * If not, we will determine whether an attempt should be made to reconstruct those portions of the missing file that were relevant to our most recent favorable determination or decision (e.g., school records, medical evidence, and the results of consultative examinations). * * *

* * *

(i) * * *

(1) *What we mean by treatment that is medically necessary.* Treatment that is medically necessary means treatment that is expected to improve or restore your functioning and that was prescribed by your medical source. If you do not have a medical source, we will decide whether there is treatment that is medically necessary that could have been prescribed by a medical source. The treatment may include (but is not limited to)—

* * *

Subpart J—Determinations of Disability

■ 67. The authority citation for subpart J of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1614, 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382c, 1383, and 1383b).

§ 416.1015 [Amended]

■ 68. Revise § 416.1015 by removing paragraph (d) and redesignating paragraphs (e) through (h) as paragraphs (d) through (g).

■ 69. Revise § 416.1016 to read as follows:

§ 416.1016 Medical consultants and psychological consultants.

(a) *What is a medical consultant?* A medical consultant is a member of a team that makes disability determinations in a State agency (see § 416.1015), or who is a member of a team that makes disability determinations for us when we make disability determinations ourselves. The medical consultant completes the medical portion of the case review and

any applicable residual functional capacity assessment about all physical impairment(s) in a claim.

(b) *What qualifications must a medical consultant have?* A medical consultant is a licensed physician, as defined in § 416.902(a)(1).

(c) *What is a psychological consultant?* A psychological consultant is a member of a team that makes disability determinations in a State agency (see § 416.1015), or who is a member of a team that makes disability determinations for us when we make disability determinations ourselves. The psychological consultant completes the medical portion of the case review and any applicable residual functional capacity assessment about all mental impairment(s) in a claim. When we are unable to obtain the services of a qualified psychiatrist or psychologist despite making every reasonable effort (see § 416.1017) in a claim involving a mental impairment(s), a medical consultant will evaluate the mental impairment(s).

(d) *What qualifications must a psychological consultant have?* A psychological consultant can be either a licensed psychiatrist or psychologist. We will only consider a psychologist qualified to be a psychological consultant if he or she:

(1) Is licensed or certified as a psychologist at the independent practice level of psychology by the State in which he or she practices; and

(2)(i) Possesses a doctorate degree in psychology from a program in clinical psychology of an educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation; or

(ii) Is listed in a national register of health service providers in psychology which the Commissioner of Social Security deems appropriate; and

(3) Possesses 2 years of supervised clinical experience as a psychologist in health service, at least 1 year of which is post-masters degree.

(e) *Cases involving both physical and mental impairments.* In a case where there is evidence of both physical and mental impairments, the medical consultant will evaluate the physical impairments in accordance with paragraph (a) of this section, and the psychological consultant will evaluate the mental impairment(s) in accordance with paragraph (c) of this section.

■ 70. Revise § 416.1017(a) to read as follows:

§ 416.1017 Reasonable efforts to obtain review by a qualified psychiatrist or psychologist.

(a) When the evidence of record indicates the existence of a physical impairment, the State agency must make every reasonable effort to ensure that a medical consultant completes the medical portion of the case review and any applicable residual functional capacity assessment. When the evidence of record indicates the existence of a mental impairment, the State agency must make every reasonable effort to ensure that a psychological consultant completes the medical portion of the case review and any applicable residual functional capacity assessment. The State agency must determine if additional physicians, psychiatrists, and psychologists are needed to make the necessary reviews. When it does not have sufficient resources to make the necessary reviews, the State agency must attempt to obtain the resources needed. If the State agency is unable to obtain additional physicians, psychiatrists, and psychologists because of low salary rates or fee schedules, it should attempt to raise the State agency's levels of compensation to meet the prevailing rates for these services. If these efforts are unsuccessful, the State agency will seek assistance from us. We will assist the State agency as necessary. We will also monitor the State agency's efforts and where the State agency is unable to obtain the necessary services, we will make every reasonable effort to provide the services using Federal resources.

* * *

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 71. The authority for subpart N continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 72. In § 416.1406(b)(2), revise the fourth sentence to read as follows:

§ 416.1406 Testing modifications to the disability determination procedures.

* * *

(b) * * *

(2) * * * However, before an initial determination is made in any case where there is evidence which indicates the existence of a mental impairment, the decisionmaker will make every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of

the case review and any applicable residual functional capacity assessment pursuant to our existing procedures (see § 416.1017). * * *

* * * * *

■ 73. In § 416.1442, revise paragraph (f)(1) to read as follows:

§ 416.1442 Prehearing proceedings and decisions by attorney advisors.

* * * * *

(f) * * *

(1) Authorize an attorney advisor to exercise the functions performed by an administrative law judge under

§§ 416.913a, 416.920a, 416.926, and 416.946.

* * * * *

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Part VI

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23 CFR Part 490

National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program and Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program; Final Rules

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****23 CFR Part 490**

[Docket No. FHWA–2013–0053]

RIN 2125–AF53

National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The purpose of this final rule is to establish measures for State departments of transportation (State DOT) to use to carry out the National Highway Performance Program (NHPP) and to assess the condition of the following: Pavements on the National Highway System (NHS) (excluding the Interstate System), bridges carrying the NHS which includes on- and off-ramps connected to the NHS, and pavements on the Interstate System. The NHPP is a core Federal-aid highway program that provides support for the condition and performance of the NHS and the construction of new facilities on the NHS. The NHPP also ensures that investments of Federal-aid funds in highway construction are directed to support progress toward the achievement of performance targets established in a State's asset management plan for the NHS. This final rule establishes regulations for the new performance aspects of the NHPP that address measures, targets, and reporting. The FHWA is in the process of creating a new public Web site to help communicate the national performance story. The Web site will likely include infographics, tables, charts, and descriptions of the performance data that State DOTs report to FHWA. The FHWA issues this final rule based on sec. 1203 of MAP–21, which identifies national transportation goals and requires the Secretary to promulgate rules to establish performance measures and standards in specified Federal-aid highway program areas.

DATES: This final rule is effective February 17, 2017. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of February 17, 2017.

FOR FURTHER INFORMATION CONTACT: For technical information: Francine Shaw–Whitson, Office of Infrastructure, 202–366–8028. For legal information: Anne Christenson, Office of Chief Counsel, 202–366–0740, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION**Electronic Access and Filing**

The notice of proposed rulemaking (NPRM) was published at 80 FR 326 on January 5, 2015, and all comments received may be viewed online at <http://www.regulations.gov>. Electronic retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Web site at <http://www.orf.gov> and the Government Printing Office's Web site at <http://www.gpo.gov>.

Table of Contents for Supplementary Information

- I. Executive Summary
 - A. Incorporating the FAST Act
 - B. Purpose of the Regulatory Action
 - C. Summary of Major Provisions of the Regulatory Action in Question
 - D. Costs and Benefits
- II. Acronyms and Abbreviations
- III. Background
- IV. Summary of the NPRM
- V. Discussion of Comments
 - A. Summary of Comments
 - B. Discussion of Public Comments
- VI. Section-by-Section Discussion of the General Information and National Performance Management Measures for the National Highway Performance Program: Pavement and Bridge
 - A. Subpart A—General Information
 - B. Subpart C—National Performance Management Measures for the NHPP Pavement Performance Measures
 - C. Subpart D—National Performance Management Measures for the NHPP Bridge Performance Measures
- VII. Rulemaking Analyses and Notices

I. Executive Summary**A. Incorporating the FAST Act**

On December 4, 2015, the President signed the Fixing America's Surface Transportation Act (FAST) Act (Pub. L. 114–94) into law. For the most part, the FAST Act is consistent with the new performance management elements introduced by MAP–21. For convenience and accurate historical context, this rule will refer to MAP–21 throughout the preamble to signify the fundamental changes MAP–21 made to States' authorities and responsibilities

for overseeing the implementation of performance management. For this final rule, there are two areas where the FAST Act made changes to performance management requirements.

The first change is sec. 119(e)(7), title 23, United States Code (23 U.S.C. 119(e)(7)), which relates to the requirement for a significant progress determination for NHPP targets. The FAST Act amended this provision to remove the term “2 consecutive reports.” The FHWA has incorporated this change into the final rule by removing the term “2 consecutive determinations,” which was proposed in section 490.109(f) of the NPRM, published January 5, 2015 (80 FR 326). In section 490.109(f) of the NPRM, FHWA proposed that if FHWA determines that a State DOT has not made significant progress toward achieving NHPP targets in two consecutive FHWA determinations, then that State DOT would document the actions it will take to achieve the targets in its next Biennial Performance Report. The FAST Act changed this requirement. Due to the FAST Act, the final rule requires State DOTs to take action when they do not make significant progress for each biennial determination (instead of 2 consecutive biennial determinations) made by FHWA.

The second change made by the FAST Act is removal of the term “2 consecutive reports” in 23 U.S.C. 119(f)(1)(A), which relates to triggering the penalty for Interstate pavement condition that has fallen below the minimum condition level established under this rule. In section 490.317 of the NPRM, FHWA proposed that it would determine annually whether or not a State DOT's Interstate pavement condition is below the minimum condition level. If FHWA determines that a State DOT's Interstate pavement condition is below the minimum condition level for the “most recent 2 years,” then that State DOT would be subject to the penalty under 23 U.S.C. 119(f)(1)(A). A description and example application on this penalty is available for review on the docket. Due to the FAST Act, the final rule subjects State DOTs to the penalty under 23 U.S.C. 119(f)(1)(A) if FHWA determines that its Interstate pavement condition has fallen below the minimum condition level for the most recent year (instead of most recent 2 years).

B. Purpose of the Regulatory Action

The MAP–21 (Pub. L. 112–141) transforms the Federal-aid highway program by establishing new requirements for performance

management to ensure the most efficient investment of Federal transportation funds. Performance management increases the accountability and transparency of the Federal-aid highway program and provides a framework to support improved investment decisionmaking through a focus on performance outcomes for key national transportation goals.

As part of performance management, recipients of Federal-aid highway funds will make transportation investments to achieve performance targets that make progress toward national goals. The national performance goal for bridge and pavement condition is to maintain the condition of highway infrastructure assets in a state of good repair. The purpose of this final rule is to implement MAP-21 and FAST Act performance management requirements.

Prior to MAP-21, there were no explicit requirements for State DOTs to demonstrate how their transportation program supported national performance outcomes. State DOTs were not required to measure condition or performance, establish targets, assess progress toward targets, or report on condition or performance in a nationally consistent manner that FHWA could use to assess the entire system. Without State DOTs reporting on the above factors, it is difficult for FHWA to look at the effectiveness of the Federal-aid highway program as a means to address surface transportation performance at a national level.

This final rule is one of several rulemakings that DOT has or is conducting to implement MAP-21's new performance management framework. The collective rulemakings will establish the regulations needed to more effectively evaluate and report on surface transportation performance across the Nation. This final rule will:

- Require State DOTs to maintain their bridges and pavements at or above a minimum condition level;
- Provide for greater consistency in the reporting of condition and performance;
- Require the establishment of targets that can be aggregated at the national level;
- Improve transparency by requiring consistent reporting on progress through a public reporting system;
- Require State DOTs to make significant progress toward meeting their targets; and
- Establish requirements for State DOTs that have not met or made significant progress toward meeting their targets.

State DOTs and metropolitan planning organizations (MPO) will be

expected to use the information and data generated as a result of the new regulations to inform their transportation planning and programming decisions. The new performance aspects of the Federal-aid highway program that result from this rule will provide FHWA the ability to better communicate a national performance story and to more reliably assess the impacts of Federal funding investments. The FHWA is in the process of creating a new public Web site to help communicate the national performance story. The Web site will likely include infographics, tables, charts, and descriptions of the performance data that State DOTs would be reporting to FHWA.

The FHWA is required to establish performance measures to assess performance in 12 areas¹ generalized as follows: (1) Serious injuries per vehicle miles traveled (VMT); (2) fatalities per VMT; (3) number of serious injuries; (4) number of fatalities; (5) pavement condition on the Interstate System; (6) pavement condition on the non-Interstate NHS; (7) bridge condition on the NHS; (8) traffic congestion; (9) on-road mobile source emissions; (10) freight movement on the Interstate System; (11) performance of the Interstate System; and (12) performance of the non-Interstate NHS. This rulemaking is the second of three that establish performance measures for State DOTs and MPOs to use to carry out Federal-aid highway programs and to assess performance in each of these 12 areas. This final rule establishes national measures for pavement condition on the Interstate System and non-Interstate NHS and bridge condition on the NHS (numbers 5, 6 and 7 in the above list). Other rulemakings have or will establish national measures for the remaining areas.

State DOTs will be required to establish performance targets and assess performance in 12 areas² established by MAP-21, and FHWA will assess³ their progress toward meeting targets in 10 of these areas⁴ in accordance with MAP-21 and the FAST Act. State DOTs that

¹ These areas are listed within 23 U.S.C. 150(c), which requires the Secretary to establish measures to assess performance or condition.

² These areas are listed within 23 U.S.C. 150(c), which requires the Secretary to establish measures to assess performance or condition.

³ 23 U.S.C. 148(i) and 23 U.S.C. 119(e)(7).

⁴ Serious injuries per vehicle VMT; fatalities per VMT; number of serious injuries; number of fatalities; pavement condition on the Interstate System; pavement condition on the non-Interstate NHS; bridge condition on the NHS; performance of the Interstate System; and performance of the non-Interstate NHS under MAP-21. Freight movement on the Interstate System under the FAST Act.

fail to meet or make significant progress toward meeting pavement and bridge condition performance targets in a biennial performance reporting period will be required to document the actions they will undertake to achieve their targets in their next biennial performance report.

This final rule establishes performance measures to assess pavement and bridge conditions on the Interstate System and non-Interstate NHS for the purpose of carrying out the NHPP. The four measures to assess pavement condition are: (1) Percentage of pavements on the Interstate System in Good condition; (2) percentage of pavements on the Interstate System in Poor condition; (3) percentage of pavements on the NHS (excluding the Interstate System) in Good condition; and (4) percentage of pavements on the NHS (excluding the Interstate System) in Poor condition. The two performance measures for assessing bridge condition are: (1) Percentage of NHS bridges classified as in Good condition; and (2) percentage of NHS bridges classified as in Poor condition.

This final rule also establishes the minimum level for pavement condition for the Interstate System as required by the statute and incorporates the minimum condition level for bridges carrying the NHS which includes on- and off-ramps connected to the NHS as established by the statute. In addition, this final rule establishes the process for State DOTs and MPOs to use to establish and report targets and the process that FHWA will use to assess the progress State DOTs have made in achieving targets.

Lastly, FHWA recognizes that implementation of the performance management requirements in this final rule will evolve with time for a variety of reasons such as: The introduction of new technologies that allow for the collection of more nationally consistent and/or reliable performance data; shifts in national priorities for the focus of a goal area; new federal requirements; or the emergence of improved approaches to measure condition/performance in supporting investment decisions and national goals. The FHWA is committed to performing a retrospective review of this rule after the first performance period, to assess the effectiveness of the requirements to identify any necessary changes to better support investment decisions through performance-based planning and programming and to ensure the most efficient investment of Federal transportation funds. In implementation of this rule, FHWA realizes that there are multiple ways that State DOTs and MPOs can make

decisions to achieve more efficient and cost effective investments; as part of a retrospective review, FHWA will also utilize implementation surveys to identify how agencies complying with the rule are developing their programs and selecting their projects to achieve targets.

C. Summary of the Major Provisions of the Regulatory Action in Question

This final rule retains the majority of the major provisions of the NPRM but makes significant changes by:

- Originally anticipating the rule's effective date as fall 2016, FHWA has now postponed the Baseline Performance Period Report and subsequent biennial reports by 2 years relative to those described in the NPRM (*i.e.*, from 2016 to 2018);

- Removing the requirements for State DOTs to declare and describe NHS limits in their Baseline Performance Period Report;

- Adding guidance for MPO target establishment to address situations where metropolitan planning areas extend across multiple States;

- Removing the requirement to use the Metropolitan Planning Agreement as the means to document how MPOs report their established and adjusted targets to their respective State DOTs;

- Clarifying the list of extenuating circumstances that may prevent a State DOT from making significant progress to include the sudden discontinuation of federally furnished data due to lack of Federal funding;

- Removing references to provisional American Association of State Highway and Transportation Officials (AASHTO) standards to ensure consistency in reporting year over year (including references to PP68–14, PP69–14, and PP70–14);

- Providing an option for State DOTs to report Present Serviceability Rating (PSR) for highways with a posted speed limit under 40 miles per hour (MPH) in place of International Roughness Index (IRI), cracking, rutting, and faulting;

- Changing the threshold for pavements with Poor IRI condition to greater than 170 inches per mile for all areas, rather than the NPRM's proposed threshold of 220 inches per mile for urbanized areas with a population greater than 1 million people;

- Changing the threshold for Poor crack rating for asphalt pavement sections from greater than 10 percent to greater than 20 percent and the threshold for Poor crack rating for jointed concrete pavement sections from greater than 10 percent to greater than 15 percent;

- Changing the threshold for Good faulting rating for jointed concrete pavement sections from less than 0.05 inch to less than 0.1 inch;

- Revising the network coverage of data reporting requirements for Interstate pavement condition from both directions of mainline highways to single, inventory direction of mainline highways;

- Changing the approach in dealing with missing, unresolved, or invalid pavement data;

- Removing the proposed language on rating sections with missing, unresolved, or invalid data as Poor condition; and

- Revising the requirements for reporting on sections with missing, unresolved, or invalid data. In the final rule, no more than 5 percent of the network is to be represented with missing, unresolved, or invalid data due to construction, closure, disaster, flood, deterioration or any other reasons;

- Revising the equation for calculating the percentage of missing, unresolved, or invalid data so that it is based on total lane-miles of the system excluding bridges and unpaved and "other" surface types instead of total lane-miles of the system;

- Adjusting the minimum condition standards for pavement condition on the Interstate highways for Alaska because Highway Performance Monitoring System (HPMS) data indicated that a regional adjustment was needed for this State;

- Revising the definition and computation for the classification of structurally deficient; and

- Providing a transition period for implementing the revised definition and computation for the classification of structurally deficient, and using the new calculations for deck area of culverts and border bridges.

The FHWA updated these and other elements in this final rule based on the review and analysis of comments received. For additional detail on all the changes FHWA made in the final rule, please refer to Section VI of this document. The following is a summary of the final rule. Section references below refer to sections of the regulatory text for title 23 of the Code of Federal Regulations (23 CFR).

This final rule adds to subpart A general information applicable to part 490, to include requirements for target establishment, reporting on progress, and how determinations would be made on whether State DOTs have made significant progress toward NHPP targets. Subpart A also includes definitions and clarifies terminology associated with target establishment,

reporting, and making significant progress. Lastly, subpart A incorporates by reference the HPMS Field Manual, the Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges, Report No. FHWA–PD–96–001 (December 1995) and errata, and several of the AASHTO standards. Section 490.105 describes the process to be used by State DOTs and MPOs to establish targets for each of the four pavement and two bridge measures. The State DOTs will establish 2- and 4-year targets for a 4-year performance period for the condition of infrastructure assets. State DOTs will establish their first statewide targets 1 year after the effective date of this rule. The MPOs will establish targets by either supporting a State DOT's statewide target, or defining a target unique to the metropolitan area each time State DOTs establish a target. The MPOs have up to 180 days after State DOTs establish their pavement and bridge condition targets to establish their own targets. The FHWA has placed a timeline on the docket that illustrates how this transition could be implemented.

Section 490.107 identifies performance reporting requirements for State DOTs and MPOs. The State DOT will submit its established targets in a baseline report at the beginning of the performance period and report progress at the midpoint and end of the performance period. State DOTs will be allowed to adjust their 4-year target at the midpoint of the performance period. The MPOs are not required to provide separate reporting to FHWA. However, State DOTs and MPOs will need to coordinate and mutually agree to a target establishment reporting process. Coordination will also be required between State DOTs and MPOs if a State DOT adjusts its 4-year target at the midpoint of the performance period.

Section 490.109 establishes the method FHWA will use to determine if State DOTs have achieved or have made significant progress toward the achievement of their NHPP targets. Significant progress will be determined from an analysis of estimated condition/performance and measured condition/performance of each of the NHPP targets. If applicable, State DOTs will have the opportunity to discuss why targets were not achieved or significant progress was not made. If a State DOT fails to achieve significant progress in a biennial performance reporting period, then it is required to document the actions they will undertake to achieve their targets in the next biennial performance report (though encouraged to document sooner).

Subparts C and D establish performance measures and other related requirements to assess pavement and bridge conditions. In subparts C and D, sections 490.305 and 490.405 establish program-specific definitions to ensure that the performance measures are clear and consistent.

Sections 490.307 and 490.407 require that State DOTs and MPOs use a total of six measures to assess the condition of pavements and bridges on the NHS. The pavement measures will be applicable to both Interstate and non-Interstate NHS mainline roads and the bridge measures would be applicable for all bridges carrying the NHS which includes on- and off-ramps connected to the NHS. Both the pavement and bridge measures will reflect the percentage of the system in Good and Poor condition. The measure calculations will utilize data documented in the HPMS and in the National Bridge Inventory (NBI).

Section 490.315 establishes the minimum level for condition of pavements on the Interstate System as required by 23 U.S.C. 150(c)(3)(A)(iii).

Section 490.411 incorporates the minimum level for condition of bridges as required by 23 U.S.C. 119(f)(2).

D. Costs and Benefits

The FHWA estimated the incremental costs associated with the new requirements that represent a change to current practices of State DOTs and MPOs.⁵ The FHWA also estimated the incremental costs associated with the new requirements proposed in this regulatory action. The new requirements represent a change to the current practices of State DOTs and MPOs. The FHWA derived the costs of the new requirements by assessing the expected increase in the level of labor effort for FHWA, State DOTs, and MPOs to standardize and update data collection and reporting systems and establish and report targets.

The FHWA derived the costs of each of these components by assessing the expected increase in level of labor effort and additional capital needed to standardize and update State DOT data collection and reporting systems and to establish and report targets. The FHWA sought opinions from pavement and bridge subject matter experts (SMEs) to estimate impacts of the final rule. Cost estimates were developed based on assumptions based on information received from SMEs.

To estimate costs, FHWA multiplied the level of effort, expressed in labor

hours, with a corresponding loaded wage rate that varied by the type of laborer needed to perform the activity.⁶ Where necessary, capital costs were also included. Following this approach, the 10-year undiscounted incremental costs to comply with this rule are \$156.0 million.

The final rule's 10-year undiscounted cost (\$156.0 million in 2014 dollars) decreased from the proposed rule (\$196.4 million in 2012 dollars). The FHWA made several changes that affected the cost estimate. These changes include updating costs to 2014 dollars from 2012 dollars and labor costs to reflect current Bureau of Labor Statistics (BLS) data. In addition, FHWA revised the final rule Regulatory Impact Analysis (RIA) to reflect: (1) The deferment of the effective date; (2) the postponed implementation of establishing and updating performance targets, reporting on performance targets, and assessing significant progress toward achieving performance targets; (3) a decrease in the number of MPOs expected to establish quantifiable targets and upgrade software; (4) the costs of coordinating the establishment of targets in accordance with 23 CFR 450; (5) a decrease in pavement data collection requirements for State DOTs; and (6) added effort for State DOTs to collect data on the non-Interstate NHS.

The FHWA expects that the rule will result in significant benefits, although they are not easily quantifiable. The rule will yield greater accountability because MAP-21 mandated reporting increases visibility and transparency. The data reported to FHWA will be consistent across the States and will be comprehensive, which will allow for a clear national picture of the status of pavement and bridge conditions. In addition, this data would be available to the public and would be used to communicate a national performance story. The FHWA is developing a public Web site to share performance related information. In addition, the rule will help focus the Federal-aid highway program on achieving balanced performance outcomes.

The FHWA used a break-even analysis as the primary approach to quantify benefits. For both pavements and bridges, FHWA focused its analysis on vehicle operating costs (VOC) savings. The FHWA estimated the number of road miles of deficient pavement that will have to be improved (Table 5, Section VII, Rulemaking Analysis and Notices) and the number

of posted bridges that will have to be avoided (Table 6, Section VII, Rulemaking Analysis and Notices) in order for the benefits of the rule to justify the costs. The results of the break-even analysis quantified the dollar value of the benefits that the rule must generate to outweigh the threshold value, the estimated cost of the rule, which is \$156.0 million in undiscounted dollars. The results show that the rule must result in the net improvement of approximately 71 miles of pavement (*i.e.*, from Poor condition) from its current base case projection, and three 1-year-long bridge postings will need to be avoided over 10 years, to generate enough benefits to outweigh the cost of the rule. The FHWA believes that the benefits of this rule will surpass this threshold. Therefore, the benefits of the rule are anticipated to outweigh the costs.

Relative to the proposed rule, the threshold for the pavement break-even analysis decreased in the final rule. Specifically, the number of NHS miles in Poor condition needing improvement to Fair condition decreased from 435 to 71 in the final rule. The break-even point was affected by an adjustment to the weighted average incremental cost per VMT related to maintenance and repair particularly by updating the VMT vehicle class weights, a decrease in the undiscounted 10-year cost of the pavement rule, an increase in the total VMT that are in poor, and an increase in the number of NHS miles estimated to be in poor condition based on more recent performance data.

The threshold for the bridge break-even analysis increased in the final rule relative to the proposed rule. Specifically, the number of year-long bridge postings that need to be reduced increased from two to three in the final rule. The break-even point increased due to the following updates to input data:

- The average detour for bridges posted with weight limits of at least 40 percent below the legal load decreased from 20 miles to 10.45 miles, and
- The percentage of trucks of total average annual daily traffic on posted bridges decreased from 12.6 percent to 9.7 percent.

The below table displays the Office of Management and Budget (OMB) A-4 Accounting Statement as a summary of the cost and benefits calculated for this rule.

⁵ See Table 4 in Section VII, Rulemaking Analysis and Notices.

⁶ Bureau of Labor Statistics Employee Cost Index, 2014.

OMB A-4—ACCOUNTING STATEMENT

Category	Estimates			Units			Source/citation
	Primary	Low	High	Year dollar	Discount rate (percent)	Period covered	
Benefits:							
Annualized Monetized (\$ millions/year)	None	None	None	NA	7	NA	Not Quantified.
Annualized Quantified	None	None	None	NA	3	NA	Not Quantified.
Qualitative	None	None	None	NA	7	NA	Not Quantified.
Qualitative	With regard to the pavement condition measures, the rule is cost-beneficial if it results in the net improvement of approximately 71 miles of pavement (i.e., from poor condition to good) per year, or 710 miles over 10 years, from its current base case projection. With regard to the bridge condition measures, 0.3 year-long bridge postings will need to be avoided per year, or 3 year-long bridge postings over 10 years, in order for benefits to justify costs. Because of these low thresholds, FHWA determines that the rule benefits outweigh the costs.						Final Rule RIA.
Costs:							
Annualized Monetized (\$/year)	\$17,100,924	.....	.....	2014	7	10 Years	Final Rule RIA.
Annualized Quantified	\$16,232,012	.....	.....	2014	3	10 Years	Final Rule RIA.
Annualized Quantified	None	None	None	2014	7	10 Years	Final Rule RIA.
Annualized Quantified	None	None	None	2014	3	10 Years	Final Rule RIA.
Qualitative							
Transfers	None						
From/To	From:			To:			
Effects:							
State, Local, and/or Tribal Government	\$17,026,477	.....	.....	2014	7	10 Years	Final Rule RIA.
State, Local, and/or Tribal Government	\$16,161,365	.....	.....	2014	3	10 Years	Final Rule RIA.
Small Business	Not expected to have a significant impact on a substantial number of small entities.			NA	NA	NA	Final Rule RIA.

II. Acronyms and Abbreviations

Acronym or abbreviation	Term
AASHTO	American Association of State Highway and Transportation Officials.
AC	Asphalt-Concrete.
ACPA	American Concrete Pavement Association.
ADA	Americans with Disabilities Act.
Alaska DOT&PF	Alaska Department of Transportation and Public Facilities.
AMPO	Association of Metropolitan Planning Organizations.
ASCE	American Society of Civil Engineers.
ASR	Alkali Silica Reactivity.
CDOT	Colorado Department of Transportation.
CIP	Capital Improvement Program.
CFR	Code of Federal Regulations.
CMAQ	Congestion Mitigation and Air Quality Improvement Program.
COMPASS	Community of Planners Association of Southwestern Idaho.
CRCP	Continuously Reinforced Concrete Pavements.
DOT	U.S. Department of Transportation.
State DOT	State Department of Transportation.
EIA	Energy Information Administration.
EO	Executive Order.
FHWA	Federal Highway Administration.
FAST Act	Fixing America's Surface Transportation Act.
FTA	Federal Transit Administration.
HPMS	Highway Performance Monitoring System.
HSIP	Highway Safety Improvement Program.
HSP	Highway Safety Plan.
IRI	International Roughness Index.
LRP/LRTP	Long Range Plan/Long Range Transportation Plan.
MAP-21	Moving Ahead for Progress in the 21st Century Act.
MARC	Mid-American Regional Council.
MEPDG	Mechanistic-Empirical Pavement Design Guide ⁷ .
MPH	Miles per hour.
MPO	Metropolitan Planning Organization.
MTC	Metropolitan Transportation Commission.

Acronym or abbreviation	Term
MTP	Metropolitan Transportation Plan.
NARA	National Archives and Records Administration.
NARC	National Association of Regional Councils.
NBI	National Bridge Inventory.
NBIS	National Bridge Inspection Standards.
NHPP	National Highway Performance Program.
NCHRP	National Cooperative Highway Research Program.
NHS	National Highway System.
NPRM	Notice of Proposed Rulemaking.
NYMTC	New York Metropolitan Transportation Council.
NYSAMPO	New York State Association of Metropolitan Planning Organizations.
OMB	Office of Management and Budget.
PCA	Portland Cement Association.
PCCP or Jointed PCCP	Portland Cement Concrete Pavements.
PCI	Pavement Condition Index.
PRA	Paperwork Reduction Act.
PSR	Present Serviceability Rating.
PSRC	Puget Sound Regional Council.
RIA	Regulatory Impact Analysis.
RIN	Regulatory Identification Number.
ROW	Right of Way.
RSL	Remaining Service Life.
Secretary	Secretary of the U.S. Department of Transportation.
SHSP	Strategic Highway Safety Plan.
SME	Subject Matter Expert.
TEMPO	Association of Texas Metropolitan Planning Organizations.
TMA	Transportation Management Area.
TAMP	Transportation Asset Management Plan.
UMRA	Unfunded Mandates Reform Act of 1995.
U.S.C.	United States Code.
VMT	Vehicle Miles Traveled.
VOC	Vehicle Operating Costs.

⁷ <http://onlinepubs.trb.org/onlinepubs/archive/mepdg/home.htm>.

III. Background

The DOT's proposal regarding MAP-21's performance requirements is being presented through several rulemakings, some of which were referenced in the above discussions. As a summary, these rulemaking actions are listed below and should be referenced for a complete picture of performance management implementation. The summary below describes the main provisions that DOT plans to propose for each rulemaking.

On January 5, 2015, FHWA published an NPRM (80 FR 326) proposing the following: (1) The definition of national measures for the condition of NHS pavements and bridges; (2) the process to be used by State DOTs and MPOs to establish their pavement and bridge condition related performance targets that reflect the measures proposed in the NPRM; (3) the process State DOTs must follow to report on progress toward meeting or making significant progress toward meeting pavement and bridge condition related performance targets; (4) a methodology to be used to assess State DOTs' compliance with the target achievement provision specified under 23 U.S.C. 148(i); and (5) the minimum levels for the condition of pavement on the Interstate System and bridges carrying the NHS which

includes on- and off-ramps connected to the NHS.

On March 15, 2016, FHWA published a final rule (81 FR 13882) covering the safety-related elements of the Federal-aid Highway Performance Measures Rulemaking that included the following: (1) The definitions that are applicable to the new 23 CFR part 490; (2) the process to be used by State DOTs and MPOs to establish their safety-related performance targets that reflect the safety measures; (3) a methodology to be used to assess State DOTs' compliance with the target achievement provision specified under 23 U.S.C. 148(i); and (4) the process State DOTs must follow to report on progress toward meeting or making significant progress toward meeting safety-related performance targets. The final rule also included a discussion of the collective rulemaking actions FHWA intends to take to implement MAP-21 and FAST Act performance related provisions.

The FHWA published a third Federal-aid Highway Performance Measures Rulemaking (Regulatory Identification Number (RIN) 2125-AF54) on April 22, 2016, FR Vol. 81, No. 78. In this NPRM, FHWA proposed national measures for the remaining areas under 23 U.S.C. 150(c) that were not discussed under the first and second measure rules. The

third rulemaking effort includes the following measure areas: (1) National Management Performance Measures for Performance of the Interstate System and non-Interstate NHS; (2) Freight Movement on the Interstate System and the Congestion Mitigation and Air Quality Improvement Program (CMAQ) Traffic Congestion; (3) CMAQ On-Road Mobile Source Emissions; (4) the State DOT and MPO target establishment requirements for the Federal-aid highway program; and (5) performance progress reporting requirements and timing.

When FHWA began implementation of MAP-21, the three related Federal-aid highway performance measure rules were to be published at the same time to allow for a single, common effective date for all three rules. While FHWA recognizes that one common effective date could be easier for State DOTs and MPOs to implement, the process to develop and implement all of the Federal-aid highway performance measures required in MAP-21 has been lengthy. In light of this, instead of waiting for all three rules to be final before implementing the MAP-21 performance measure requirements, each of three Federal-aid highway performance measures rules will have individual effective dates. This would

allow FHWA, State DOTs, and MPOs to begin implementing some of the performance requirements much sooner than waiting for the rulemaking process to be complete for all three rules. The FHWA also believes that a staggered approach to implementation (*i.e.*, implementing one set of requirements at the onset and adding on requirements over time) will better help State DOTs and MPOs transition to a performance based framework. The FHWA expects that even though the effective date for each rule would occur as that rule is finalized, the second rule would ultimately be aligned with the third rule through a common performance period and reporting requirements for the proposed measures. A timeline for Biennial Performance Reports is shown in Figure 1 in section 490.105(e)(1).

Although FHWA believes that individual implementation dates will help State DOTs and MPOs transition to performance based planning, to lessen any potential burden of staggered effective dates, FHWA will provide guidance to State DOTs and MPOs on how to carry out the new performance requirements.

In addition to providing this guidance, FHWA is committed to providing stewardship to State DOTs and MPOs to assist them as they take steps to manage and improve the performance of the highway system. As a Federal agency, FHWA is in a unique position to use resources at a national level to capture and share strategies that can improve performance. The FHWA will continue to dedicate resources at the national level to provide technical assistance, technical tools, and guidance to State DOTs and MPOs to assist them in making more effective investment decisions. It is FHWA's intent to be engaged at a local and national level to provide resources and assistance from the onset to identify opportunities to improve performance and to increase the chances for full State DOT and MPO compliance of new performance related regulations. The FHWA technical assistance activities include conducting national research studies, improving analytical modeling tools, identifying and promoting best practices, preparing guidance materials, and developing data quality assurance tools.

IV. Summary of the Notice of Proposed Rulemaking

The NPRM published on January 5, 2015 (80 FR 326), was one of several NPRMs that FHWA issued to implement sec. 1203 of MAP-21, which establishes performance management as a way to transform the Federal-aid highway program and refocus it on national

transportation goals, increase accountability and transparency of the program. The NPRM proposed a set of national measures for State DOTs to use to assess the condition of pavement and bridges on the NHS in support of MAP-21's national goal of maintaining the condition of highway infrastructure assets in a state of good repair.

After a period of engagement and outreach with State DOTs, MPOs, and other stakeholders and a review of nationally recognized reports, FHWA's NPRM proposed six national performance measures that rated the percentage of all mainline pavements on the NHS (excluding the Interstate System), bridges carrying the NHS which includes on- and off-ramps connected to the NHS, and mainline pavements on the Interstate System in either Good or Poor condition. The ratings proposed in the NPRM were derived from several quantitative metrics that addressed physical characteristics of pavement and bridge condition and were tracked and reported regularly to FHWA by State DOTs in the HPMS and the NBI. The NPRM also proposed a minimum level of condition for pavements on the Interstate System as required by the statute. The NPRM also incorporated the minimum condition level for NHS bridges, as stated in 23 U.S.C. 119(f)(2). To support the new measures, the NPRM proposed to establish standardized data requirements that prescribed State DOTs' pavement and bridge condition data gathering practices. These requirements specified the data elements State DOTs must collect, methods for collecting those data elements, and the spatial and temporal coverage of the data they collect. The NPRM's proposed data requirements ensured more accurate calculation of the proposed national pavement and bridge performance measures based on State DOTs' data.

The NPRM also proposed to establish the processes for State DOTs and MPOs to establish and report progress toward achieving targets, and the process for FHWA to determine whether State DOTs have made significant progress in achieving targets.

The measures, data requirements, and related processes included in the NPRM were selected by FHWA after careful determination that they represented the best choices for achieving greater consistency among State DOTs in compiling accurate infrastructure condition information, following processes for target setting, and reviewing progress toward targets. In turn, FHWA expected the measures to enhance accountability and support a

strong national focus on the condition of the Nation's highways, while minimizing the number of measures needed and maintaining reasonable flexibility for State DOTs as they manage risk, differing priorities, and fiscal constraints. Lastly, FHWA anticipated that the proposed measures could be implemented in the timeframe required under MAP-21, without introducing a considerable burden on State DOTs.

Pavement Condition Measures

The four pavement condition measures proposed in the NPRM were: (1) Percentage of pavements on the Interstate System in Good condition; (2) Percentage of pavements on the Interstate System in Poor condition; (3) Percentage of pavements on the NHS (excluding the Interstate System) in Good condition; and (4) Percentage of pavements on the NHS (excluding the Interstate System) in Poor condition.

Pavement Data Requirements and Metrics

Under the NPRM, performance ratings of Good, Fair, or Poor condition for pavement were determined by FHWA using a combination of several metrics derived from data elements collected by State DOTs and reported to the HPMS. These metrics collectively provided a way to quantify pavement condition in terms of roughness and cracking for all pavement types, rutting for asphalt pavement surfaces, and faulting (misalignment between concrete slabs) for jointed concrete pavement surfaces. Roughness affects users' travel speeds, safety, comfort, and transportation costs. Cracking, rutting, and faulting are considered surface indicators of structural deterioration in different pavement types. Since 2010, most State DOTs have reported roughness, cracking, rutting, and faulting data annually to FHWA through HPMS.

The NPRM specified that data for the roughness, cracking, rutting, and faulting metrics must be collected consistent with practices outlined in the HPMS Field Manual (A draft of the updated HPMS Field Manual was placed on the docket with the NPRM at FHWA-2013-0053).

Calculation of Pavement Measures

The proposed pavement measures were designed to reflect a pavement's predominant condition, represented by roughness, cracking, rutting, and faulting data elements, as applicable. For a section of pavement to be rated in Good condition, the absolute values for all relevant metrics need to exceed thresholds specified in the NPRM.

Conversely, a section of asphalt or jointed concrete pavement would be rated in Poor condition if any two of three relevant metrics were below specified threshold values. A section of Continuously Reinforced Concrete Pavement would be rated in Poor condition if the two relevant metrics are below the specified threshold values. The FHWA explained that a measurement approach that focused only on increasing Good conditions or reducing Poor conditions may result in practices that would not optimize the benefits of infrastructure investments.

Bridge Condition Measures

The two bridge condition measures proposed in the NPRM were: (1) Percentage of NHS bridge deck area classified as in Good condition and (2) Percentage of NHS bridge deck area classified as in Poor condition.

Bridge Data Requirements and Metrics

Under the NPRM, performance ratings of Good or Poor condition for bridges were determined by FHWA using a combination of several metrics collected by each Federal agency, State DOT, and tribal government as part of their NBI submittals (specifically deck, superstructure, substructure, and culverts). These metrics provide an overall characterization of the general physical condition of the entire bridge component being rated. The NBI database was established in 1972 and State DOTs have been required to submit annual NBI reports to FHWA since 1978. The NBI is a highly consistent set of national data for evaluating and monitoring the condition and performance of bridges that is based on National Bridge Inspection Standards (NBIS) for the proper and uniform inspection and evaluation of highway bridges. The NPRM further proposed to weight the classifications by the respective deck area of the bridge and express condition totals as a percentage of the total bridge deck area on the NHS in a State.

Calculation of Bridge Measures

The NPRM's proposed bridge measures reflected the lowest component condition rating for the bridge, based on the NBI condition ratings for deck, superstructure, substructure, and culverts. For a bridge to be classified as in Good condition, all the relevant metrics need to equal the values specified in the NPRM. Similarly, a bridge would be classified as in Poor condition if any of the relevant metrics equal the values specified in the NPRM.

State Departments of Transportation and Metropolitan Planning Organizations Pavement and Bridge Performance Targets

The NPRM described a process by which the six pavement and bridge condition performance measures would be used by State DOTs and MPOs to establish quantifiable statewide performance targets to be achieved over a 4-year performance period, with the first performance period starting in 2016. Under the NPRM, a State DOT or MPO could consider a number of factors (e.g., funding availability and local transportation priorities) that could impact the targets they ultimately establish for pavement and bridge system conditions. According to the NPRM, State DOTs would establish 2- and 4-year targets for the six pavement and bridge condition measures 1 year after the effective date of the rule. The MPOs would establish targets by either supporting the State DOT's statewide target, or defining a target unique to the metropolitan planning area each time the State DOT establishes a target. In accordance with MAP-21, the NPRM provided MPOs a 180-day period following the date at which the State DOT established their pavement and bridge targets. Furthermore, the NPRM proposed a minimum level of condition for Interstate System pavements of no more than 5 percent of pavement lane miles in Poor condition, and reiterated the MAP-21 requirement of no more than 10 percent of the deck area of bridges on the NHS classified as structurally deficient.

State Departments of Transportation and Metropolitan Planning Organization Pavement and Bridge Performance Reporting

The NPRM proposed that State DOTs submit biennial reports to FHWA on the condition and performance of the NHS. Under the NPRM, State DOTs submitted their targets in a baseline report at the beginning of each performance period and reported progress in achieving targets at the midpoint and end of the performance period. State DOTs were allowed to adjust their 4-year target at the midpoint of the performance period. The MPOs were not required to provide separate reporting to FHWA. However, State DOTs and MPOs needed to agree on a reporting process in the Metropolitan Planning Agreement.

Determination of Significant Progress

The NPRM proposed the method for FHWA to determine if State DOTs achieved significant progress toward their target from an analysis of

estimated condition/performance and measured condition/performance of each of the targets. If applicable, State DOTs could have the opportunity to discuss why targets were not achieved or significant progress was not made. If a State DOT failed to achieve significant progress in two consecutive biennial determinations, then the State DOT was required to document in their next biennial performance report, and encouraged to document sooner, the actions they would undertake to achieve their targets.

V. Discussion of Comments

The FHWA received 127 public comment submissions to the docket. This included letters from 42 State DOTs, 13 MPOs, 19 counties or local government agencies, 16 industry associations, and several other submissions from individuals, advocacy organizations, and private industry members. One submission contained over 1,000 duplicates of a letter expressing support for the rule and appreciation to FHWA for responding to public comment on the first performance management NPRM related to safety. The comment submissions covered a number of topics in the proposed rule, with the most substantive comments on establishment of targets, reporting, the significant progress determination process, pavement condition performance measures, and bridge condition performance measures.

Of the 127 public comment submissions received, the majority expressed overall support for the rule. Commenters expressed general concerns over NHS ownership, the performance period timespan, the start of the reporting cycle, target adjustment, significant progress determination and timing, incorporation by reference, and minimum condition penalties. For pavement condition measures specifically, commenters had mixed opinions regarding the use of the IRI and other metrics and expressed concern over the proposed extent of data collection, the treatment of missing data, and the proposed minimum condition level. For bridge condition measures specifically, commenters expressed mixed opinions about the use of element level data and expressed opposition to the proposed definition of structurally deficient.

The FHWA thanks all commenters for their responses to the NPRM. The FHWA carefully considered the comments received from the stakeholders.

Selected Topics for Which FHWA Requested Comments

In the NPRM, FHWA requested comments on different topics related to the rulemaking. Several of those had an impact on the final rule and are discussed in this section. The others are discussed in the section-by-section analysis.

Purpose and Approach of the Regulatory Action

The FHWA received general support of the performance management concept and its proposed implementation from State DOTs, industry groups, and private citizens.⁸ The FHWA also received several comments that opposed specific portions of the proposed rule from State DOTs, industry, local governments, and advocacy groups.⁹ Some of these same commenters shared their overall support of the rule.

A number of State DOTs and MPOs took issue with the assumptions and levels of cost analysis associated with the requirements of the NPRM reflected in the benefit-cost analysis and suggested that it be reconsidered.¹⁰ These comments are discussed in more detail in Section VI. In terms of benefits, Fugro Roadware, a firm that manufactures and operates equipment that is used to measure the pavement conditions on State and municipal networks, asserted that the “entire pavement and traffic assessment management process has been shown to improve the quality of road networks without an overall increase of funding. . . .”

Finally, FHWA received numerous comments that fell outside of the scope

of the rulemaking. The American Motorcyclist Association, for example, endorsed the design standards that advance the safety of motorcycle use. The advocacy group Perils for Pedestrians commented that more pedestrians are injured by falls than vehicles. The American Society of Civil Engineers (ASCE) requested FHWA incorporate Life Cycle Costs into performance management rules. Finally, private citizens (1) requested an addition to the proposed rule to promote small business during the inspection and accounting for each new project; (2) advocated for improved standards for design and construction of longitudinal joints in pavements; (3) endorsed the goals for Safety and Asset Management Rules as well as incentives to increase public transit; and “(4) suggested the rule require the use of compact joints on highways to extend the pavement’s lifetime.”

Public Comments in Response to FHWA’s Questions in the NPRM

In the NPRM, FHWA requested comments on certain topics related to the pavement and bridge condition performance measures rulemaking. Comments received in response are summarized below.

Does the approach to performance measures support the nine implementation principles?

The FHWA listed nine principles in the NPRM preamble that were considered in the development of the proposed regulation.¹¹ Overall,

¹¹ Nine principles used in the development of proposed regulations for national performance management measures under 23 U.S.C. 150(c), www.regulations.gov, Docket FHWA–2013–0053:

- i. Provide for a National Focus—focus the performance requirements on outcomes that can be reported at a national level.
- ii. Minimize the Number of Measures—identify only the most necessary measures that will be required for target establishment and progress reporting. Limit the number of measures to no more than two per area specified under 23 U.S.C. 150(c).
- iii. Ensure for Consistency—provide a sufficient level of consistency, nationally, in the establishment of measures, the process to set targets and report expectations, and the approach to assess progress so that transportation performance can be presented in a credible manner at a national level.
- iv. Phase in Requirements—allow for sufficient time to comply with new requirements and consider approaches to phase in new approaches to measuring, target establishment, and reporting performance.
- v. Increase Accountability and Transparency—consider an approach that will provide the public and decision makers a better understanding of Federal transportation investment needs and return on investments.
- vi. Consider Risk—recognize that risks in the target establishment process are inherent, and that performance can be impacted by many factors outside the control of the entity required to establish the targets.

commenters (AASHTO and the State DOTs of Alabama, Connecticut, Georgia, Maryland, New Jersey, New York State, Oregon, and Texas, and private entity Steve Mueller Consultancy) supported FHWA’s nine principle approach. However, the New York Metropolitan Transportation Council (NYMTC) felt the NPRM was inconsistent with the nine principles in relationship to linking financial penalties to the single nationwide [*sic*, statewide] targets for pavement and bridges causing inconsistency with the principles of: (1) Understand that Priorities Differ (“Single targets do not acknowledge regional differences in infrastructure age. . . .”), (2) Recognize Fiscal Constraints (“These targets and penalties have the effect of limiting flexibility we have for investing in assets across our systems at the state, regional, and local levels, as we deem appropriate.”), and (3) Provide for Flexibility (“Tying penalties to the specific measures in § 490.317 and § 490.413 and requiring [S]tates to focus spending on two specific components of the transportation system (Interstate pavement and NHS bridges) is the antithesis of flexibility.”) NYSDOT (New York State Department of Transportation) and other NYMTC members are responsible for the entire transportation system in the region, and all approach asset management from a system-level perspective (including both NHS and non-NHS assets). These thresholds and associated penalties could lead to an exclusive focus on Interstate pavement and NHS bridges at the expense of the remainder of the system.”

In addition, the Northeast Pavement Preservation Partnership (NEPPP) felt most of the principles were covered but that FHWA did not address the following principles: (1) Recognize Fiscal Constraints—“The proposed performance measures do not encourage optimal investment. It can be argued that they instead encourage worst-first mentality, since there is a target for percent poor, and since there are bins

vii. Understand that Priorities Differ—recognize that State DOTs and MPOs must establish targets across a wide range of performance areas, and that they will need to make performance trade-offs to establish priorities, which can be influenced by local and regional needs.

viii. Recognize Fiscal Constraints—provide for an approach that encourages the optimal investment of Federal funds to maximize performance but recognize that, when operating with scarce resources, performance cannot always be improved.

ix. Provide for Flexibility—recognize that the MAP–21 requirements are the first steps that will transform the Federal-aid highway program to a performance-based program and that State DOTs, MPOs, and other stakeholders will be learning a great deal as implementation occurs.

⁸ The State DOTs of Alaska, Florida, Georgia, Illinois, Iowa, Louisiana, Maine, Minnesota, Missouri, New Hampshire, New York, Oregon, Vermont, Virginia, and Washington State; and AASHTO, Cemex USA, National Asphalt Pavement Association, National Association of Regional Councils, National Center for Pavement Preservation, New York Metropolitan Transportation Council, New York State Association of Metropolitan Planning Organizations, Northeast Pavement Preservation Partnership, Oversight Committee for the California Local Streets and Roads Needs Assessment, Southern California Association of Governments, Southeast Michigan Council of Governments, Southeast Pavement Preservation Partnership, and Transportation for America, Blake Rubenstein.

⁹ State DOTs of Alaska, Idaho, New York, North Dakota, Oregon, South Dakota, Rhode Island, and Wyoming; the City of Santa Rosa, CA and the Seattle DOT; and Agile Assets, American Road and Transportation Builders Association, Center for American Progress, Michigan Transport Commission and Asset Management, and Transportation for America.

¹⁰ Atlanta Regional Commission, Texas Association of Metropolitan Planning Organizations, Transportation for America, and State DOTs of Colorado, Rhode Island, North Carolina, Mississippi, Oklahoma, Michigan, Georgia, Louisiana, and Oregon.

(i.e., percent good, percent fair, and percent poor)). Optimal investment could much more readily be achieved with an overall Index or RSL approach, where pavement preservation is encouraged along with rehabilitation.”); and (2) Provide for Flexibility—(“It is not apparent in the rules how flexibility is provided for. No provision is made for allowing a [State] DOT to implement and manage toward different measures which may be more cost-effective.”). The National Asphalt Pavement Association (NAPA) made similar arguments in regard to principle (1) “Recognize Fiscal Constraints—(“NAPA is concerned that the proposed rule could lead to poor decisions (i.e., “worst first”) in order to comply with the NPRM minimum pavement condition, rather than decisions that factor in the long-term preservation and performance of pavements.”); and (2) Provide for Flexibility—(“Agencies should have flexibility to make decisions that balance preserving good/fair pavements with improving and rehabilitating poor pavements.”)

While the following commenters generally agreed that FHWA’s approach to performance measures was consistent with the nine principles, they also identified areas that were lacking. Georgia DOT stated that the approach in the proposed rule may not fully support the principle of recognizing fiscal constraints or provide for an approach that encourages the optimal investment of Federal funds to maximize performance.

The NYMTC and the Georgia and Maryland DOTs stated that limited funding could prevent targets and minimums from being achievable and that imposing the proposed penalties could result in worsening of other assets. Moreover, the NYMTC commented that with no long term funding solution for national or State transportation programs, States may not have a defensible way to establish targets or make changes to their investment strategies.

The NEPPP also commented that the proposed rule will not allow a State DOT to implement and manage their program toward different measures or metrics that encourage a balanced program based on asset management pavement preservation conceptions.

Several commenters cited concerns over flexibility in the rule tied to implementation principles. The NYS DOT commented that States should not be forced to use specific performance targets or measures. The New Jersey DOT raised concerns about reporting requirements, commenting that they will need to maintain “two sets of

books,” one for national performance reporting and one to manage their network, using appropriate pavement management and asset management principles.

Suggestions for How FHWA Can Best Assist State DOTs and MPOs To Maximize Opportunities for Successful Implementation of the Proposed Performance Measures

Generally, States expressed a desire for more training materials, technical assistance, and technical guidance so that they can implement the rule accurately and efficiently. Several commenters, including AASHTO and the State DOTs of Connecticut, Louisiana, New Jersey, and Oregon, expressed a desire for additional technical assistance and guidance detailing the process FHWA will use to compute the overall pavement condition measures. Commenters also requested guidance on target setting best practices for State DOTs and MPOs. The Maryland DOT suggested that FHWA provide a contact person or Web link for technical assistance activities. In addition, the Alabama DOT commented that more guidance be given on data quality. They argued that the training materials have lacked information in statistical methodology and note, “it is simple to determine if a dataset is reasonable; it is quite a different matter to determine if the dataset is correct.”

Should the measures reflect additional factors such as facility location, functional class, level of use, environment, or impact it may have on other aspects of transportation performance?

The American Concrete Pavement Association (ACPA) and Portland Cement Association (PCA) requested that FHWA modify the proposed rule to provide a better assessment of the performance of our highways and bridges. A private citizen, Joyce Dillard, commented that the measures should reflect level of use, environment, and overweight trucks. Acknowledging that there is limited funding and increasing needs, Oregon DOT commented that adding additional factors could help show progress. The commenter suggested adding measures such as functional class, progress made on other deficiencies (e.g., painting, vertical clearance, and rail), and risk. Additionally, for bridges specifically, the commenter suggested looking at mitigation measures to reduce vulnerability to seismic activity and scour. In addition, the New York City DOT recommended that traffic counts on bridges could be a useful measure to

collect. The commenter noted that that traffic counts are an important variable that quantifies a bridge’s performance and life expectancy.

Appropriateness of the Proposed Threshold Criteria To Determine Good, Fair, and Poor Ratings

• *Concerns with Pavements:*

Commenters stated that agencies will be driven to overemphasize treatments that lower cracking and improve ride quality on pavements that currently rank as Poor at the cost of solutions that extend the performance life of the pavements that currently rank as Good or Fair (e.g., surface treatments). In addition, commenters noted that although pavement types referenced in the NPRM (Portland Cement Concrete Pavements and Continuously Reinforced Concrete Pavements (CRCP)) make up the vast majority of the NHS, other pavement surfaces exist in small quantities.

Should FHWA establish a minimum condition threshold that would become more stringent over time?

Commenters provided mixed opinions on the establishment of a minimum condition threshold that would become more stringent over time. Several commenters expressed concern that pressure to meet a difficult minimum condition threshold may push States to implement a worst-first approach to pavement preservation, which would run counter to the asset management principles and planning approach advocated by FHWA.¹² The Oregon DOT commented that a problem with pavement performance measures is that they “discourage proven, cost effective, pavement preservation techniques.” Agencies that are under pressure to meet performance targets may implement a worst-first approach.

Other State DOTs and AASHTO recommended FHWA evaluate the effects of the national level performance measures, targets and minimum condition levels to ensure that these policies have a positive impact on management approaches.

¹² State DOTs of Arkansas and Mississippi, the Southern California Association of Governments, the Seattle Department of Transportation.

VI. Section-by-Section Discussion of the General Information and National Performance Management Measures for the National Highway Performance Program: Pavement and Bridge

A. Subpart A—General Information

Discussion of Section 490.101 General Definitions

In the NPRM, FHWA proposed several definitions to be used in this regulation.

Only Washington State DOT commented on the definition for the term “HPMS” and they agreed with the definition. The FHWA retains the definition for HPMS.

In the NPRM, the term “full extent” was defined as “continuous collection and evaluation of pavement condition data over the entire length of the roadway.” The term “mainline highways” was defined as “the through travel lanes of any highway exclude ramps, shoulders, turn lanes, crossovers, rest areas, and other pavement surfaces that are not part of the roadway normally travelled by through traffic.”

Only Washington State DOT commented on the definition for “full extent” and they agreed with the definition. The State DOTs of Connecticut, Maine, New Hampshire, Vermont, and Washington State and AASHTO agreed with the definition of “mainline highways.” However, Colorado DOT stated that the definition conflicts with section 490.309(c)(1)(i) requiring data for the full extent of the mainline highway of the NHS which would indicate that State DOTs need to collect data on all through travel lanes. The Colorado DOT added that the intent is that States collect one lane’s worth of data on NHS. The FHWA described in the NPRM that section 490.309(c) applies to Through Lanes, Surface Type, and Structure Type Data Items, while section 490.309(b) requires that State DOTs report IRI, rutting, faulting, and Cracking Percent only apply to the rightmost travel lane or one consistent lane, if the rightmost travel lane is not accessible. Based on this, FHWA believes that the definitions of “mainline highways” and “full extent” do not conflict with other sections in this rule. The FHWA retains those definitions in the final rule.

The Washington State DOT agreed with the definitions for “metric” and “measure,” and Mid-America Regional Council appreciated the distinction between the two terms. The FHWA retains the definitions for “metric” and “measure.”

The Puget Sound Regional Council (PSRC) urged FHWA to consider

allowing MPOs to establish performance targets that “encompass all areas within their planning boundary rather than only the Federally designated metropolitan planning area.” They added that this definition of area would allow for consistent infrastructure condition targets for the full region in the event the MPO target differs from the State target. To eliminate the ambiguity with the term “metropolitan planning area,” FHWA includes the definition for “metropolitan planning area” in this regulation as the term defined in the Statewide and Nonmetropolitan and Metropolitan Transportation Planning Regulations at 23 CFR 450.104. This term is used consistently as the extent of an MPO target that represents performance outcomes of the transportation network within the area. So the definition has been included to ensure consistency in interpretation by readers.

In the NPRM, the term “non-urbanized area” was defined as “any geographic area that is not an ‘urbanized area’ under either 23 U.S.C. 101(a)(34).” The FHWA received comments from Washington State and Virginia DOTs on the definition for “non-urbanized area.” The Washington State DOT supported the proposed definition. The Virginia State DOT pointed out that the proposed definition is missing a citation because only one citation (23 U.S.C. 101(a)(34)) was provided after the word “either.” The FHWA appreciates the comments from both agencies and examined the definition for better clarification while maintaining consistency with section 490.105(e)(3)(ii), which specifies a single collective non-urbanized area target and is consistent with the language in the final rule for safety performance measures. The FHWA also recognizes the word “either” was inadvertently included in the proposed definition. As a result, FHWA revised the definition for “non-urbanized area” to clearly indicate that a non-urbanized area is a single, collective area comprising all of the areas in the State that are not “urbanized areas” defined under 23 U.S.C. 101(a)(34).

Only Washington State DOT commented on the definition for the term “performance period,” agreeing with the proposed definition. The FHWA retains the definition for “performance period.”

The Washington State DOT agreed with the definition for “target.” The Minnesota DOT recommended the term “plan outcome” as opposed to “target” because they said that Minnesota DOT uses the term “target” to identify an aspirational performance objective to define investment need, as opposed to

an objective that they expect to achieve within the constraints of the resources currently available.” The FHWA appreciates Minnesota DOT’s suggestion on the term. However, FHWA retains the term “target” in the final rule because the term is referenced in the statute (23 U.S.C. 150(d), 134(h), 135(d), and 119(e)).

As discussed in section 490.309 (Using Structure Type to Identify and Exclude Bridges) and section 490.405, FHWA moves the definition of “bridge” from subpart D (*i.e.*, section 490.405) to this section in subpart A to use the term in a consistent manner throughout this rule. The FHWA strikes the term “this section” in the definition of “bridge” and replaces with the term “this Part” to ensure that the definition of “bridge” in this section applies to both subparts in the final rule. Therefore, the definition of “bridge” in the final rule is: “Bridge, as used in this Part, is defined in § 650.305 of this title, the National Bridge Inspection Standards.” Please see discussion sections for sections 490.309 and 490.405 for more detail.

Finally, FHWA retains the definitions for “National Bridge Inventory” as proposed in the NPRM. There were no substantive comments regarding the definition.

Discussion of Section 490.103 Data Requirements

The FHWA proposed in section 490.103 of the NPRM, the data requirements that apply to more than one subpart in part 490. Additional proposed data requirements that are unique to each subpart are included and discussed in their respective subpart.

Some comments from AASHTO and the State DOTs of Alaska and Connecticut referenced section 490.103 in their respective letters, but their comments were on the incorporation by reference of the HPMS Field Manual and NBI Coding Guide. Please refer to the discussion on section 490.111 on incorporation by reference for response and discussion.

There were no direct comments on section 490.103(a). However, FHWA did correct the referenced subparts in section 490.103(a) by changing “B and C” to “C and D” so that the regulatory text correctly refers to the subparts in the final rule.

In section 490.103(b), FHWA proposed that State DOTs submit urbanized area boundaries reported to HPMS in the year the Baseline Performance Period Report is due. Section 490.105(d)(3) specifies that the urbanized boundaries used in the Baseline Performance Period Report are

applicable for the entire performance period, regardless of whether FHWA approves adjustments to the urbanized area boundary during the performance period. This provision was proposed because the urbanized area boundaries and resulting non-urbanized area boundary have the potential to change on varying schedules; and changing a boundary during a performance period may lead to changes in the measures reported for the area, which could impact how an established target relates to actual measured performance. The FHWA also explained in the NPRM that State DOT submitted boundary information would be the authoritative data source for: (1) The target scope for the additional targets for urbanized and non-urbanized areas (section 490.105(e)(3)); (2) progress reporting (section 490.107(b)); and (3) IRI rating (section 490.313(b)(1)) for the pavement condition measures identified in section 490.105(c)(1) through (3).

The FHWA received four comments directly related to the urbanized area boundary. The Missouri State DOT supported that State DOT-submitted boundary information should be the authoritative data source for the target scope for the additional targets for urbanized and non-urbanized areas. The Oregon State DOT commented that keeping urbanized area constant for the performance measures' entire 4-year performance period is "too inflexible and may not reflect how investment decisions are actually made during the performance period due to changing route priorities." They added that the proposed approach "looks backward in the mirror, rather than forward which is needed to incorporate up to date planning and policy." The FHWA agrees with Oregon State DOT in that at the time of target establishment, agencies should be looking forward by incorporating up-to-date planning and policy decisions and anticipate future changes. Although planning and policy decisionmaking should be "forward-looking," for the purpose of assessing the impact of investment on condition/performance, FHWA believes preserving consistent boundaries throughout a performance period is essential to consistently assess target achievement during a performance period. The Texas State DOT and Texas Association of Metropolitan Planning Organizations commented that guidance is needed on where an urbanized area boundary will be set in relation to bridges. They stated that in some cases, the midpoint of the structure has been used as the boundary. There should be a determination regarding this issue in

relation to how these bridges are classified at urban/rural boundaries and, in the case of two adjacent MPO planning area boundaries, to which MPO area the structure is assigned. Considering these comments, FHWA plans to issue guidance on urbanized and non-urbanized target establishment, which will address issues related to bridge boundaries.

Because the threshold values for IRI metric no longer depend on the location (*i.e.*, urbanized area with a population greater than 1 million) of pavement sections which is discussed in section 490.313(b)(1), FHWA revises sections 490.103(b) and 490.107(b)(1)(ii)(D) to remove the term "IRI rating determination."

Section 490.103(c) is reserved.

No direct comment was received for section 490.103(d), and FHWA retains the language as proposed in the NPRM. Please see revised section 490.105(d)(3) for discussion on NHS limits and refer to the section 490.111 discussion section on the incorporation by reference.

Discussion of Section 490.105 Establishment of Performance Targets

In section 490.105 of the NPRM, FHWA proposed the minimum requirements that would be followed by State DOTs and MPOs in the establishment of targets for all measures identified in section 490.105(c). These requirements were proposed to implement the 23 U.S.C. 150(d) and 23 U.S.C. 134(h)(2) target establishment provisions in a manner that provides for the consistency necessary to evaluate and report progress at a State, MPO, and national level, while also providing a degree of flexibility for State DOTs and MPOs.

A couple of general comments on section 490.105 were received by FHWA. The Oregon State DOT expressed their appreciation for the proposed rule allowing State DOTs to establish performance targets "without the unnecessary burden of an FHWA target approval process." However, the Virginia State DOT commented that the proposed rule is "unclear on what may occur if FHWA disagrees with a State's proposed performance target and/or a State's strategy to meet that performance target." They added that the "rule does not indicate what actions FHWA may take in such a situation, the rule as proposed sets up a possible point of future conflict between States and FHWA on how the State manages its resources in order to effectively manage its highway infrastructure to meet traffic demands and assure public safety." However, the Virginia State DOT noted

that they are in favor of the proposal's approach to States establishing targets. In response to the comment from Virginia State DOT, FHWA notes that there is no language in the NPRM or this rule related to FHWA's approval or rejection of established targets by State DOTs and MPOs because the statutory language in MAP-21 provides that State DOTs and MPOs have the ability to establish their own targets and MAP-21 does not provide FHWA the authority to approve or reject State DOT or MPO established targets. In the discussion for section 409.109 in the NPRM, FHWA stated that "State DOTs would, through a transparent and public process, want to establish or adjust targets that strive to improve the overall performance of the Interstate and National Highway systems." The North Carolina State DOT requested clarification of the meaning of "transparent and public" in regard to the target establishment process. They asked if FHWA considered that State DOTs are already required to hold public hearings when they select projects for the Statewide Transportation Improvement Program (STIP), and if this would satisfy the target establishment requirement. The FHWA does not prescribe specific methods for making the target establishment process transparent and public. Please refer to the final Planning Rule¹³ for performance requirements for the statewide transportation plan and STIP, including any requirements to include targets in the planning documents and the methods for developing those documents.

The Center for American Progress stated that MAP-21 established that a clear goal of Federal policy is to "maintain the highway infrastructure asset system in a state of good repair." They added that "Congress did not intend for States to set their performance goals to include assets being in worse condition in the future than they currently are." A letter from Steve Mueller Consultancy stated it would be "wrong to accept declining conditions on our roads of national importance." They added that State DOTs and MPOs should reprioritize their expenditure plans to change because the declining condition is "unacceptable."

However, comments from AASHTO, Association of Metropolitan Planning Organizations (AMPO), Metropolitan Transportation Commission, Mid-America Regional Council, New York

¹³ Final Rule on Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning (Regulatory Identification Number (RIN) 2125-AF52) on May 27, 2016, FR Vol. 81, No. 103.

Metropolitan Transportation Council, city of Seattle Department of Transportation, an anonymous citizen, and the State DOTs of Alaska, Arkansas, California, Connecticut, Florida, Idaho, Iowa, Maine, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, Washington State, and Wyoming stated that State DOTs and MPOs should have the flexibility to establish targets, including targets that have condition/performance holding steady or, in some situations, declining. They added that targets indicating declined condition/performance are discussed in the preamble of the NPRM but not in the proposed rule itself. These commenters recommended that specific language be included in the rule.

The FHWA believes that State DOTs and MPOs have the authority to establish their targets at their discretion. Moreover, as stated previously in this section, MAP-21 does not provide FHWA the authority to approve or reject State DOT or MPO established targets. The FHWA believes that this rule does not hinder the ability of State DOTs and MPOs to establish targets that have performance holding steady or, declining targets. Thus, FHWA believes that specific language describing potential target level scenarios in the regulatory language is unnecessary. Therefore, FHWA retains the language in section 490.105(a). The FHWA did add “of this section” to the paragraph to meet the publication requirements of the **Federal Register**, and improve the clarity and consistency of the text. This addition did not change the intent of the original text in the NPRM.

In section 490.105(b), FHWA proposed in the NPRM that State DOTs and MPOs shall establish performance targets for the HSIP measures in accordance with section 490.209. The Alaska Department of Transportation and Public Facilities (Alaska DOT&PF) recommended that this paragraph should be removed because section 490.209 is not part of this rulemaking. The FHWA disagrees with the comment because FHWA felt this paragraph is necessary to point out target establishment requirements related to the HSIP measures that are different from this subpart. Therefore, FHWA retains the language in section 490.105(b).

The FHWA did not receive any substantive comments regarding section 490.105(c), therefore, FHWA made no changes.

Discussion of Section 490.105(d) Ownership

Section 490.105(d) specifies that the targets established by State DOTs and MPOs shall, regardless of ownership, represent the transportation network or geographic area, including bridges that cross State borders, that are applicable to the pavement and bridge condition measures. Title 23 U.S.C. 150(c)(3) requires the establishment of measures for State DOTs to use to assess the condition of pavements on the Interstate System, the condition of pavements on the NHS (excluding the Interstate), and the condition of bridges carrying the NHS which includes on- and off-ramps connected to the NHS for the purpose of carrying out the NHPP. Additionally, 23 U.S.C. 150(d) requires State DOTs to establish performance targets that reflect the established measures. Furthermore, 23 U.S.C. 119(e)(7) specifies State requirements when it does not achieve or make significant progress toward achieving the established performance measures targets for the NHS.

To implement the statutory provisions of 23 U.S.C. 150(c)(3), FHWA proposed that the pavement condition measures in subpart C are applicable to the mainline highways on the Interstate System and on the non-Interstate NHS and the bridge condition measures in subpart D are applicable to bridges carrying the NHS which includes on- and off-ramps connected to the NHS (sections 490.307 and 490.403). To ensure that the performance targets required under 23 U.S.C. 150(d) are applicable to the same extent to highways and bridges as the performance measures in sections 490.307 and 490.403, FHWA included the phrase “regardless of ownership,” in section 490.105(d).

To implement the requirements of 23 U.S.C. 119(e)(7), section 490.109(e) provides that FHWA would determine whether or not a State DOT achieved or made significant progress toward achieving the State DOT targets, consistent with the target scope described in section 490.105(d), for the NHS NHPP targets. In the NPRM, FHWA recognized the limit of the direct impact State DOTs and MPOs can have on the performance outcomes within the State and the metropolitan planning area, respectively, and that State DOTs and MPOs need to consider this uncertainty when establishing targets. The FHWA further stated that some Federal and tribal lands contain roads and bridges carrying the NHS, which includes on- and off-ramps connected to the NHS that State DOTs would need to consider (as appropriate) when

establishing targets. Finally, FHWA expressed a need for State DOTs and MPOs to consult with relevant entities (e.g., Federal Land Management agencies, State DOTs, MPOs, local transportation agencies, and tribal governments) as they establish targets to better identify and consider factors outside of their direct control that could impact future condition/performance.

The FHWA received comments from 19 State DOTs (Arkansas, Colorado, Connecticut, Florida, Georgia, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Virginia, and Washington State), AASHTO, AMPO, Atlanta Regional Council (ARC), Center for American Progress, Community Planning Association of Southwestern Idaho (COMPASS), National Association of Regional Councils (NARC), National Center for Pavement Preservation, NYMTC, Association of Texas Metropolitan Planning Organizations (TEMPO), and an anonymous commenter¹⁴ generally indicating that State DOTs and MPOs have no authority or control over maintenance and/or investment decisions on some of the assets on NHS. Therefore, State DOTs and MPOs should not be held responsible for the reporting of data, target establishment, and the condition of these assets (*i.e.*, significant progress determination). The letters from the Connecticut, Virginia, and Washington State DOTs and AASHTO argued that State DOTs may not be able to legally collect data on assets they do not own.

The AASHTO, AMPO, ARC, and the Mississippi and Tennessee State DOTs recommended that each agency (e.g., Federal Government, State DOT, tribal government, local agency, transit agency, and tolling authority) that has ownership of an NHS facility should report on and be held accountable for their portion of the system.

As stated above, the statutory provisions under 23 U.S.C. 150(c)(3) require the establishment of measures for “States to use to assess (I) the condition of pavements on the Interstate System; (II) the condition of pavements on the [NHS] (excluding the Interstate); [and] the condition of bridges on the [NHS]” for the purpose of carrying out the NHPP. Also, 23 U.S.C. 150(d) requires States to establish performance targets that “reflect the established measures.” The MAP-21 also provides a description of the limits (or components) of the Interstate System and National Highway System in 23

¹⁴ FHWA-2013-0053-0135.

U.S.C. 103(c) and 23 U.S.C. 103(b), respectively, and defines the terms “States” and “MPOs” in 23 U.S.C. 101(a)(25) and 23 U.S.C. 134 (b), respectively. This statutory language in MAP-21 prescribes the applicability of the NHPP under 23 U.S.C. 119 and the applicability of performance measures and the scope of performance targets under 23 U.S.C. 150.

Considering this statutory language, MAP-21 requires that the performance management requirements (23 U.S.C. 150) and NHPP (23 U.S.C. 119) apply to the entire NHS and Interstate System and not to a subset of the NHS (*e.g.*, State DOT owned or operated Interstate System, State DOT owned or operated National Highway System), as the commenters would prefer. The MAP-21 does not define the terms “State” or “MPO” for purposes of 23 U.S.C. 150 and 119 as something other than already defined elsewhere in MAP-21. Accordingly, FHWA retains the language in section 490.105 (which requires that State DOTs and MPOs establish targets for the entire NHS and Interstate System within the State or metropolitan planning area, regardless of ownership).

As stated in the NPRM, FHWA recognizes that there is a limit to the direct impact State DOTs and MPOs can have on the performance outcomes within the State and the metropolitan planning area, respectively. The FHWA encourages State DOTs and MPOs to consult with relevant entities (*e.g.*, Federal Land Management Agencies, local transportation agencies, and tribal governments) as State DOTs and MPOs report performance data and establish targets. This will allow for a better assessment of the condition of pavements and bridges on the entire NHS and better identify and consider factors outside of their direct control that could impact future condition/performance.

In section 490.105(d), FHWA added the phrase “of this paragraph” to improve the clarity and consistency of the text. This addition did not change the intent of the original text in the NPRM.

In section 490.105(d)(1), FHWA made an editorial correction and replaced the word “areawide” with “area wide.”

The FHWA added cross reference numbers to section 490.105(d)(1)(i) through (iii) to clarify the specific section that corresponds to each measure. The original intent of the section did not change.

Section 490.105(d)(2) is reserved.

Discussion of Section 490.105(d)(3) NHS Limits

In section 490.105(d)(3), FHWA proposed requiring State DOTs to declare and describe NHS limits in their Baseline Performance Period Report at the beginning of each performance period for the purpose of target establishment, reporting, and progress evaluation and significant progress determination. To ensure consistency of network for target establishment, reporting, and progress evaluation and significant progress determination, the proposed language in section 490.105(d)(3) further specified that any changes in NHS limits during a performance period would not be accounted for until the following performance period. As explained in the NPRM, FHWA proposed this methodology because it recognized that if NHS limits changed after a State DOT establishes its targets, actual measured performance of the transportation network within the changed NHS limits would represent a different set of highways as compared to what was originally used to establish the target. As a result, this difference could impact a State DOT’s ability to make significant progress toward achieving targets.

The FHWA received individual letters from ARC, Cemex USA, Oregon DOT, and Texas DOT and a joint letter from the ACPA and PCA in relation to dealing with changes in NHS limits during a performance period. The letter from Texas DOT stated that the proposed approach in dealing with NHS limit changes may cause “overly burdensome” bookkeeping to keep track of NHS network changes. A similar comment was found in the joint letter from ACPA and PCA and the letter from Cemex USA which stated that the proposed method does not take into consideration new pavements or additional lanes constructed, thereby inadvertently penalizing States for expanding the NHS as a means of upgrading performance. They recommended that the measures should reflect the changes in NHS limits. They also added that since the proposed measures are percentage-based, measures reflecting NHS changes would accurately take into consideration improvements made without “artificially altering” performance indicators.

The Oregon DOT commented that the proposed approach appears to be too “inflexible” and may not reflect how investment decisions are actually made during the performance period due to changing route priorities. They added that the proposed approach “looks

backward in the mirror rather than forward which is needed to incorporate up to date planning and policy.”

Finally, ARC agreed with the proposed approach that a baseline network must be identified and “frozen” for purposes of a reporting cycle, but they suggested that at regular intervals (*i.e.*, 2 years), each State DOT should be permitted to adjust their networks and targets as they feel appropriate in collaboration with FHWA. The ARC commented that permitting the network to change on a regular basis does create a slight “apples to oranges” problem with analyzing long-term progress, but added that changes to the NHS network in reality are likely to be “infrequent and minimal” in impact when compared to the overall network.

Some additional comments related to the NHS limits were received by FHWA. The TEMPO and Texas DOT commented that the criteria used to identify the NHS are still being developed. They added that if this issue is not addressed before reporting and evaluation deadlines are implemented, State DOTs and MPOs could expend significant resources collecting, analyzing, and maintaining data that is not part of the final NHS. They also indicated that some portions of the NHS will not be included in the performance management effort resulting in “missing” data segments. The TEMPO and Texas DOT recommended FHWA should not set deadlines for reporting on and evaluating performance measures until the NHS has been established nationwide and accepted by FHWA. The Seattle DOT made similar comments that before imposing NHS-specific regulatory requirements, FHWA should reassess current NHS designation criteria based on functional classification to consider critical routes based on multiple criteria such as person trip volumes rather than on vehicle miles traveled.

The FHWA evaluated the arguments made by commenters regarding the approach for dealing with potential NHS limits changes during a performance period. The FHWA recognizes that NHS limits will directly impact the performance data collection coverage, measure calculation, the extent of targets, significant progress determination, and determination of minimum levels for condition of pavements and bridges. The FHWA agrees with the comments from ACPA, Cemex USA, PCA, and Texas DOT that the proposed approach would exclude realigned and newly constructed NHS roads/lanes in the measure calculation as a means of improved condition/

performance. In addition to the impacts of NHS expansion, FHWA examined NHS contraction. In case of a NHS contraction, the approach proposed in the NPRM would have required State DOTs to report metrics for the part of NHS no longer designated as NHS for the entire performance period. Moreover, for both expansion and contraction cases, FHWA anticipates that communicating and explaining to the general public the condition/performance of NHS based on previous NHS limit (*i.e.*, baseline) would be particularly difficult. In addition to evaluating the comments, FHWA analyzed historical changes in the NHS network using HPMS data for each State. Based on the historical data, in general, FHWA found that NHS network changes are relatively small except when NHS expansion was required under MAP-21. In such case, FHWA plans to issue guidance to deal with mandated changes in NHS limits for implementing performance management.

After consideration of the comments and the issues associated with the proposed approach dealing with the NHS limit changes, FHWA revised section 490.105(d)(3) in the final rule. The State DOTs are no longer required to declare and describe NHS limits in their Baseline Performance Period Report so the changes in NHS limits during a performance period would be accounted for. Since the National Highway System Data Item in HPMS and the Highway System of the Inventory Route Data Item in NBI are required to be reported to FHWA annually together with condition metric data, NHS limits for pavement condition measures will come from the same dataset submitted to HPMS in the same year as the condition metric data is submitted. The NHS designation for bridge condition measures will come from the same NBI data set as the condition metric data of the same year. Accordingly, FHWA removed section 490.107(b)(1)(ii)(E) because State DOTs no longer have to declare and describe NHS limits in their Baseline Performance Period Report. Also, FHWA amended section 490.109(d)(4). The NHS information for the baseline conditions, for the purpose of the significant progress determination of the achievement of the pavement and bridge condition targets, will come from the data reported in HPMS and NBI in the year in which the Baseline Period Performance Report is due to FHWA. The FHWA believes that the revised approach will eliminate the burden of bookkeeping of the multiple data sets by

State DOTs and MPOs and will improve communicating the performance with the public. The FHWA also believes that it will make the NHS extent consistent with other performance publications of State data (*e.g.*, Highway Statistics¹⁵ and Condition and Performance Report to Congress¹⁶). Since the calculated measure reflects the NHS limit change, States DOTs and MPOs should consider anticipated NHS limit changes when establishing their targets.

Discussion of Sections 490.105(e)(1) and 490.105(f)(1) Implementation Timeline for State DOTs and MPOs

The FHWA proposed the requirements for State DOT and MPO performance targets in sections 490.105(e) and 490.105(f), respectively. Section 490.105(e)(1) specified the schedule for State DOT target establishment as “not later than 1 year of the effective date of this rule and for each performance period.” Also in the NPRM, section 490.105(f)(1) specified a schedule for MPO target establishment as “no later than 180 days after the respective State DOT(s) establishes their targets.” The proposed regulatory language specifying target establishment schedules came directly from the statutory language in MAP-21.¹⁷ Accordingly, FHWA proposed a schedule in section 490.107(b) for State DOT target and progress reporting as the first report (*i.e.*, State Biennial Performance Report) that would be due to FHWA by October 1, 2016 and subsequent report due every 2 years on October 1 thereafter. The October 1, 2016, and subsequent biennial due dates are a statutory requirement.¹⁸ To implement these statutory requirements in a consistent manner, FHWA proposed a definite period of time (*i.e.*, performance period) during which condition/performance would be measured, evaluated, and reported. The FHWA proposed a consistent time period of 4 calendar years that would be used to assess pavement and bridge conditions. The FHWA carefully examined this proposed time period so that it aligns with the timing of the biennial performance reporting requirements under 23 U.S.C. 150(e). This proposed time period is calendar year based so that it is consistent with data reporting requirements currently in

place to report pavement and bridge conditions.

During the development of the NPRM, FHWA anticipated the final rule for the proposal to be effective no later than October 1, 2015. The Oregon DOT commented that the effective date would be difficult to meet and suggested FHWA consider a delayed effective date of January 2017. As stated in the preamble of the NPRM, the October 1, 2015 date would have allowed for at least a 1-year period for State DOTs to establish targets so that they can be reported in the first biennial performance report (*i.e.*, Baseline Performance Period Report) that would be due to FHWA by October 1, 2016. The FHWA also stated in the preamble of the NPRM that it recognizes that if the final rule is effective after October 1, 2015, the due date to report State DOT targets for the first performance period may need to be adjusted, or FHWA would need to issue implementation guidance that would provide State DOTs a 1-year period to establish and report targets.

The FHWA received numerous comments that the 1-year duration between the effective date of this rule and the first reporting of targets (*i.e.*, Baseline Performance Period Report for the first performance period) is difficult for State DOTs and MPOs to meet.

The AASHTO and Connecticut DOT commented that the process to collect/analyze data, understand the trends, and establish targets will require additional time and that the submission of the first Baseline Performance Period Report by October 1, 2016, is “truly unrealistic.” The AASHTO and Mississippi and Connecticut DOTs argued that the opportunity for “cold weather States” to collect data for baseline condition/performance of 2015 is limited because all data has to be collected between the effective date (October 1, 2015) and the end of calendar year 2015 for 2016 condition/performance reporting. The North Dakota DOT and Seattle DOT made similar comments as AASHTO did. The Michigan and Minnesota DOTs expressed their support for the AASHTO comments.

The Texas DOT commented that State DOTs will need more time to transition and measure the metrics required that are not currently collected, and to develop some history to establish the targets, especially for the Interstate since the proposed metric is based on the overall condition.

The Mississippi DOT commented that many State DOTs already have multi-year contracts in place for their data collection. They said that the changes related to the expanded NHS and

¹⁵ Highway Statistics (FHWA): <https://www.fhwa.dot.gov/policyinformation/statistics.cfm>.

¹⁶ Conditions and Performance Report to Congress (FHWA): <https://www.fhwa.dot.gov/policy/2013cpr/>.

¹⁷ 23 U.S.C. 150(d)(1) and 23 U.S.C. 134(h)(2)(C).

¹⁸ 23 U.S.C. 150(e).

additional data requirements would make it impossible for many State DOTs to meet the proposed reporting timelines. Furthermore, they said that if additional data required under this rule is obtained, State DOTs will not have the historical data to analyze trends to effectively establish targets. The AMPO, COMPASS, and TEMPO made similar comments that the timeline in NPRM for identifying baseline condition/performance and reporting targets for the first performance period is “aggressive.” They added that the proposed timeline affords little ability or is insufficient for States to identify reasonably attainable targets.

The Southeast Michigan Council of Governments (SEMCOG) commented that the additional and unfamiliar data requirements (*i.e.*, cracking, faulting, rutting, and roughness data) make it difficult to meet the accelerated timelines for collecting the data. They noted that the NPRM assumes that they will be able to work with the Michigan DOT and finish the reporting within 1 year. They commented that the reporting time will actually be much less than 1 year, especially in the first year. The Missouri DOT stated that including cracking, rutting, and faulting metrics under this rule needs to be delayed until national standards are developed and vetted through a quality control process. They added that these metrics will result in additional costs to collect, analyze, and manage the data.

The New York State DOT cited that FHWA intends to use HPMS as a primary mechanism to report pavement performance data. The New York State DOT recommended that State DOTs be provided adequate time and resources to implement the necessary process and system changes.

The Michigan DOT added that their pavement performance management “took years to develop, test, and refine” and recommended an alternative implementation schedule and process until the national measures mature enough that State DOTs become confident using them as the basis for investment decisions. The NYMTC “strongly objected” to the proposed October 1, 2015, effective date for the data collection and reporting requirements associated with the performance measure rules because they do not have sufficient information available about current pavement conditions using the proposed measures and data collection methods. They also added that, given the constraints on available data and analysis tools, they cannot predict the future conditions.

The AASHTO and Connecticut and Tennessee DOTs suggested providing

State DOTs the opportunity to extend the deadline if they demonstrate that they are working toward and making progress in adopting all requirements. The AASHTO and Connecticut and North Dakota DOTs commented that the coordination for establishing targets will require additional time because it encompasses a wide range of performance areas that can be influenced by local and regional needs. The Michigan State Transportation Commission and Michigan Asset Management Council commented that FHWA must allow State DOTs sufficient time to adequately coordinate with local agencies after the rules are finalized but before implementation begins.

The AASHTO and Connecticut and Oregon DOTs recommended a 24-month phase-in period between the effective date and the first target reporting for the Interstate pavement and bridge condition measures in sections 490.307(a)(1) and (2) and 490.407(c). And, they recommended a 48-month phase-in period between the effective date and the first target reporting for the Non-Interstate NHS pavement condition measures in section 490.307(a)(3) and (4). The Alaska DOT&PF recommended at least a 4-year period to report all new data under this rule since the NHS has also changed with MAP-21. The AASHTO and Connecticut and Oregon DOTs also recommended delaying significant progress determination under section 490.109.

The NYMTC also asked FHWA to consider the impacts of this proposed rule on State DOTs and MPOs that must adjust their planning and programming processes to the new requirements under this rule. The NYMTC requested that FHWA lengthen the amount of time before penalties are imposed so that State DOTs and other agencies could make adjustments while they have the maximum amount of flexibility in the use of available funding.

The AASHTO and Connecticut and New Jersey DOTs commented that the time frame for enacting minimum condition level determination for bridges under section 490.413 is too short. They commented that State DOTs will have no time to assess their current situation and then implement reasonable projects to meet the 10 percent threshold. The AASHTO and Connecticut and Oregon DOTs recommended not determining minimum condition levels under sections 490.315 and 490.411 until 48 months after the effective date.

The FHWA appreciates the comments on the proposed timeline. The FHWA understands that collection of new data items, development of tools,

coordination, planning process adjustments, and integrating with other regulatory requirements to implement this rule will take time and effort for State DOTs. The FHWA recognizes that data required in section 490.309 for the pavement condition measures is new to some State DOTs. Therefore, FHWA amended the proposed data collection timeline for the pavement condition measures to reflect the effective date of this final rule. (See discussion section for section 490.309(a) for data collection timeline for the pavement measures.) Accordingly, FHWA retains phase-in requirements related to the targets for Interstate pavement measures and significant progress determination for those targets, as provided in sections 490.105(e)(1) and 490.109(e)(3), respectively, so that the effective date of this final rule is reflected. The FHWA also retains the transition of non-Interstate pavement measure in section 490.313(e) as proposed.

In addition to the challenges associated with new data items, FHWA recognizes that State DOTs are challenged with NHS expansion, lack of historic data and analytical tools for establishing targets, additional coordination requirements, adjustment to their planning process, and integrating with other regulatory requirements. However, as stated previously, State DOT target establishment “not later than 1 year of the effective date of this rule” in section 490.105(e)(1) is a statutory requirement under 23 U.S.C. 150(d). The date for reporting progress toward targets of October 1, 2016 is also a statutory requirement in 23 U.S.C. 150(e). Therefore, FHWA cannot delay the due date of State DOT target establishment or reporting on performance targets.

Since this rule is being issued and effective after October 1, 2016, FHWA issued guidance¹⁹ on the Initial State Performance Report on August 31, 2016, to provide State DOTs the opportunity to comply with the statutory deadline for the first performance report under 23 U.S.C. 150(e). In this guidance, FHWA recognized that State DOTs would not have established targets for the measures in this rule. The FHWA simplified the reporting requirement by only requiring a description of the planned processes for target establishment and coordination with relevant MPOs and other agencies that will occur in the selection of targets. The FHWA has amended the implementation timeline to reflect the

¹⁹ FHWA Guidance: Initial State Performance Report: <http://www.fhwa.dot.gov/tpm/guidance/160831.cfm>.

effective date of this final rule. (See subsequent discussion in this section for more details on timeline adjustments.)

In response to the comments from AASHTO and Connecticut and New Jersey DOTs above, FHWA disagrees that the time frame for enacting minimum condition level determination for bridges on the NHS is too short and that State DOTs will have no time to assess their current situation and then implement reasonable projects to attempt to meet the 10 percent threshold. The MAP-21 was enacted in October 2012. In September of 2012, FHWA provided initial guidance through its MAP-21 Bridge Q&A Web site²⁰ on how FHWA intended to implement the statutory requirements under the 23 U.S.C. 119(f)(2). Additionally, State DOTs are familiar with the classification of structurally deficient as it had been used for decades to implement the Highway Bridge Program. Because of this familiarity, State DOTs are well aware of their current situation in regards to structurally deficient bridges on the NHS. Based on FHWA guidance provided on the MAP-21 Bridge Q&A Web site, which describes the implementation schedule of the minimum condition level determination, and the familiarity State DOTs have with the classification of structurally deficient, State DOTs have had sufficient time to take actions to meet the 10 percent threshold. Because of its long implementation history and State DOTs' familiarity with the classification of structurally deficient bridges, FHWA believes that implementing the requirement of 23 U.S.C. 119(f)(2) does not depend on the effective date of this rule. Moreover, FHWA has been examining NBI data that State DOTs have been reporting since the enactment of MAP-21 and found sufficient evidence that State DOTs are taking actions to meet the statutory requirement. For example, if the 2013 NBI data was used as the baseline for structurally deficient bridges carrying the NHS, then there were potentially 13 State DOTs that would have been affected by the penalty if the trend of percentage structurally deficient deck area of greater than 10 percent continued for another 2 years. However, based on the 2014 NBI data, the number of State DOTs that would be affected by the penalty dropped to eight. Based on 2015 NBI data, the number dropped even further to six State DOTs. This dramatic change in the potential number of States leads FHWA to

conclude that some State DOTs have taken action in addressing their NHS structurally deficient bridges. Therefore, FHWA believes that a delay in implementing the 23 U.S.C. 119(f)(2) provision is not necessary.

The Louisiana DOT recommended the first data collection cycle, to be used in performance analysis, be pushed back to a later date. The Louisiana DOT cited a large number of conflicts between HPMS, the AASHTO specifications, the Fiscal Management Information System (FMIS) requirements for HPMS, and the proposed rules. They commented that these conflicts will not allow an "apples to apples" data comparison or analysis between the current year and future years, nor among States. However, the Louisiana DOT did not identify how delaying the start of the data collection would mitigate the perceived conflicts or how anything having to do with the FMIS impacts the data reporting for HPMS. The FHWA understands that State DOTs will need some time to adjust contracts and programs to meet the data reporting requirements and the final rule has identified the first reporting dates to be 2019 for Interstate routes and 2021/2022 for non-Interstate NHS routes.

A letter²¹ from the State DOTs of Maine, New Hampshire, and Vermont recommended a bi-directional format to support FMIS, which intends to use HPMS data as its source. In the NPRM, FHWA proposed Interstate pavement condition data to be collected on both directions of the Interstate highway in section 490.309(b)(1)(i). However as a result of further studies,²² FHWA amended section 490.309(b)(1)(i) so that the pavement condition data collection on Interstate is only required in one direction of highway, eliminating the need for examining a bi-directional format to support FMIS and the potential discrepancies with HPMS.

The AMPO and COMPASS stated that the process for amending Metropolitan Planning Agreements is a time consuming and requires considerable opportunity for public input. They recommended a timeline that could lead to more realistic targets. The AASHTO, NYMTC, and Oregon and Washington DOTs urged FHWA to delay the MPO target establishment requirement until the start of the second performance period. They argued that there will be lack of complete (*i.e.*, full extent) performance data for cracking, rutting,

and faulting for the Non-Interstate NHS, where full extent data will only be collected for the second half of the first performance period, as described in sections 490.309(b)(2)(ii) and 490.313(e). They added that until complete data is collected and evaluated, the MPOs might have a difficult time understanding the complexities of this data and establishing targets. They also recommended delay because it will allow additional time for State DOTs and MPOs to further develop their collaborative efforts in response to this rule and the Asset Management Plan rule (23 CFR 515). The NARC commented that additional time for MPOs would be helpful because of the significant collaboration and the data collection requirements in this rule.

The SEMCOG expressed the opinion that a piecemeal approach is being used to develop the performance measures in this rule. This approach makes it difficult to identify the total system performance requirements, the complete data needs, and costs to collect the required data and to program and implement projects to address the performance measures.

The FHWA appreciates these comments and understands that implementing this rule takes time and effort for MPOs as they face similar challenges to State DOTs. In response to comments related to the Metropolitan Planning Agreement, FHWA amended the language in section 490.107(c)(1) to remove the requirement to use the agreement as the means to document how MPOs will report their established targets to their respective State DOTs. The FHWA also amended the language in section 490.105(f)(8) to remove the requirement to document the target adjustment process in the Metropolitan Planning Agreement. (See discussion sections for sections 490.105(f)(8) and 490.107(c)(1) for more details on Metropolitan Planning Agreement for MPO target adjustment and reporting, respectively.) The FHWA re-iterates that the State DOT target establishment schedule of "not later than 1 year of the effective date of this rule" in section 490.105(e)(1) and MPO target establishment schedule of "no later than 180 days after the respective State DOT(s) establishes their targets" in section 490.105(f)(1) are statutory requirements under 23 U.S.C. 150(d) and 23 U.S.C. 134(h)(2)(C), respectively. Therefore, to meet the statutory mandates, FHWA cannot delay the due date of the MPO target establishment. (See discussion on MPO implementation schedule in section 490.105(f)(1).)

²¹ Docket Document FHWA-2013-0053-0096—<http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0053-0096>.

²² "Evaluation of Pavement Conditions on the Interstate System: Preliminary Summary", Rada 2015.

²⁰ Question and Answer #2 at: <http://www.fhwa.dot.gov/map21/qandas/qabridges.cfm>.

As discussed above and in the NPRM, FHWA described its plans in the event that the final rule would not be effective until after October 1, 2015. The FHWA stated in the NPRM that, if it becomes clear that the final rule will not be effective until after October 1, 2015, FHWA would consider adjusting the first performance period in the final rule or would issue implementation guidance that would provide State DOTs a 1-year period to establish and report targets. As this rule is issued and effective after October 1, 2015, providing State DOTs less than 1 year to establish targets prior to the October 1, 2016 report, FHWA has amended the timeline in the final rule. These adjustments are necessary to ensure that State DOTs have at least 1 year between the effective date of this rule and biennial performance reporting of their target while adhering to the statutory reporting due dates²³ under 23 U.S.C. 150(e). Therefore, as stated in the NPRM, FHWA amended the due date for State DOT on reporting their targets for the first performance period from October 1, 2016, to October 1, 2018. To accommodate the amendment of the reporting date for the first performance period, FHWA adjusted the start of first performance period (and start dates for subsequent performance periods) in the final rule so that target reporting could be aligned with corresponding performance periods. Although the due date for State DOT on reporting their targets for the first performance period is October 1, 2018, this amendment does not exempt State DOTs from the October 1, 2016, report required under 23 U.S.C. 150(e). As such, FHWA issued guidance²⁴ on the Initial State Performance Report on August 31, 2016, to provide State DOTs the opportunity

to comply with the statutory deadline for the first performance reporting under 23 U.S.C. 150(e). In this guidance, FHWA recognized that State DOTs would not have established targets for the measures in this rule. The FHWA simplified the reporting requirement by only requiring a description of the planned processes for target establishment and coordination with relevant MPOs and other agencies that will occur in the selection of targets. Since this final rule was not effective by October 1, 2015, FHWA adopted the following in this final rule:

- State DOTs shall establish targets for the first performance period not later than 1 year of the effective date of this rule as specified in section 490.105(e)(1) to meet the statutory requirement in 23 U.S.C. 150(d).
- The MPOs shall establish targets for the first performance period no later than 180 days after the respective State DOTs establish their targets as specified in section 490.105(f)(1) to meet the statutory requirement under 23 U.S.C. 134(h)(2)(C).
- The first performance period shall begin on January 1, 2018, and shall end on December 31, 2021, and subsequent 4-year performance periods shall follow thereafter, as provided in as provided in section 490.107(b) and shown in Figure 1 below.
- The State DOTs will begin collecting Interstate pavement condition data (IRI, rutting (asphalt pavements), faulting (jointed concrete pavements), and Cracking Percent) in accordance with section 490.309(b)(1) in calendar year 2018.
- The State DOTs will begin collecting non-Interstate NHS pavement condition data (IRI, rutting (asphalt pavements), faulting (jointed concrete pavements), and Cracking Percent) in accordance with section 490.309(b)(2) in calendar year(s) 2020/2021.
- The State DOTs shall submit their first biennial performance report (*i.e.*,

Baseline Performance Period Report for the first performance period) on October 1, 2018. Subsequent biennial performance reports are due every 2 years after the first biennial performance report, as provided in section 490.107(b).

- The FHWA will make first significant progress determinations after State DOTs report their Mid Performance Period Progress Report for the first performance period on October 1, 2020, and biennially thereafter.
- The FHWA will not make a determination of significant progress toward the achievement of 2-year targets for Interstate System pavement condition measures in calendar year 2020, as discussed in section 490.109(e)(3)(i).
- To meet the statutory requirement under 23 U.S.C. 119(f)(2), FHWA will make the first minimum bridge condition level determination in calendar year 2016 (by October 1, 2016) and in calendar year 2017 (by October 1, 2017) by considering structurally deficient as a classification given to a bridge which has significant load carrying elements in Poor or worse condition, or the adequacy of the waterway opening provided by the bridge is determined to be insufficient to the point of causing overtopping with intolerable traffic interruptions. Beginning with calendar year 2018 and each calendar year thereafter, FHWA will make the minimum bridge condition level determination by considering structurally deficient as a classification given to a bridge which has any component in Poor or worse condition, as defined in section 490.405 and described in section 490.411(b).
- The FHWA will make the first minimum Interstate pavement condition level determination by October 1, 2019, and each year thereafter, as provided in section 490.317.

²³ Report no later than October 1, 2016 and biennially thereafter.

²⁴ FHWA Guidance: Initial State Performance Report: <http://www.fhwa.dot.gov/tpm/guidance/160831.cfm>.

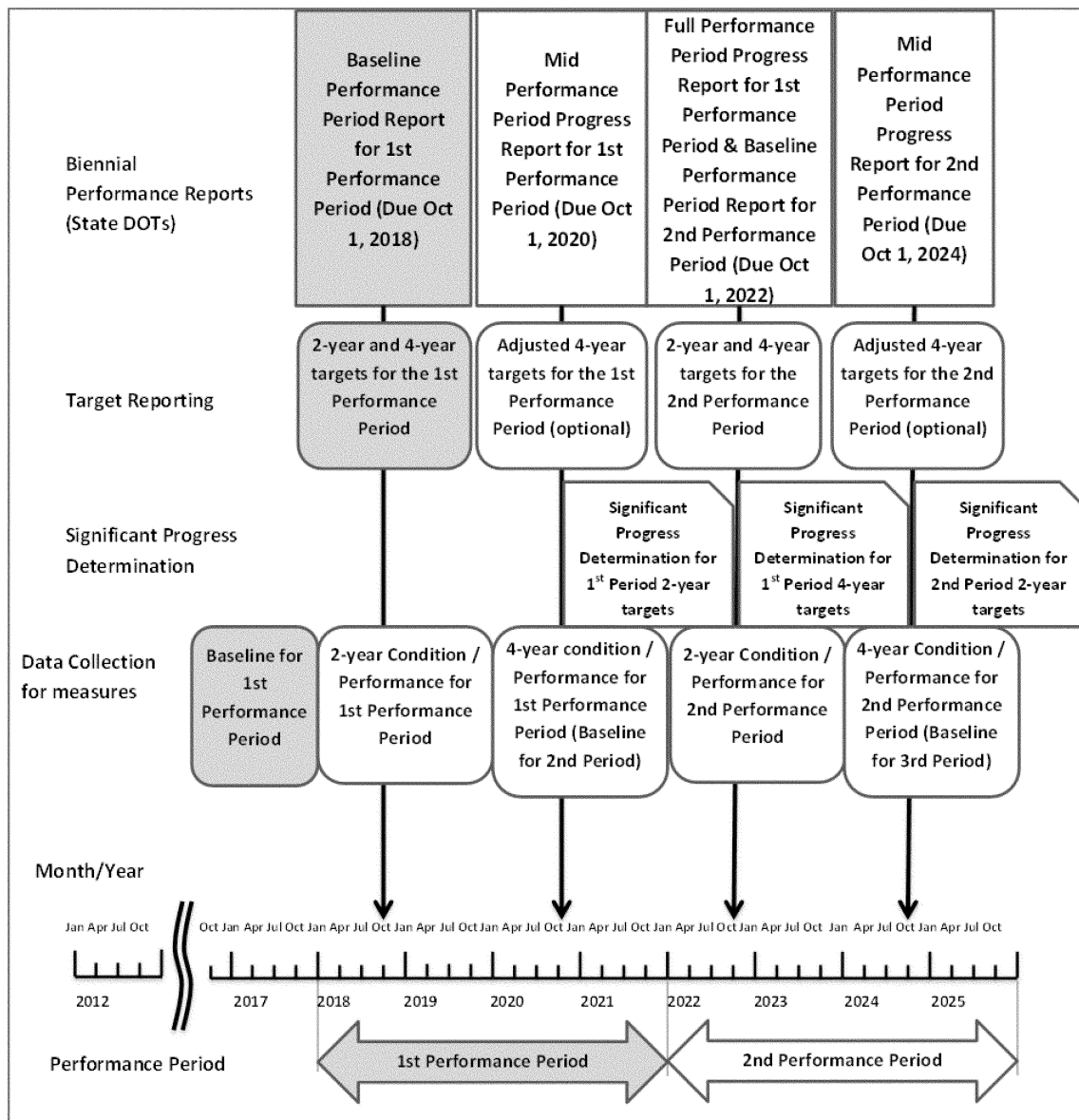


Figure 1 – Biennial Performance Reports – The Baseline Performance Period Report

The FHWA retains the language in section 490.105(e)(1), as proposed in the NPRM, because the due date for State DOT target establishment of “not later than 1 year of the effective date of this rule” in this paragraph is a statutory requirement under 23 U.S.C. 150(d).

Discussion of Sections 490.105(e)(2) and 490.105(f)(2) Target Coordination

Sections 490.105(e)(2) and 490.105(f)(2) specify State DOT and MPO coordination requirements for the establishment of targets, as provided in 23 U.S.C. 135(d)(2)(B)(i)(II) and 23 U.S.C. 134(h)(2)(B)(i)(II). In the NPRM, FHWA sought comment on alternative approaches that could be considered to

effectively implement the coordination requirements under MAP-21.

The Mid-America Regional Council supported the language that encourages State DOT and MPO coordination “to the extent practicable” in target establishment. They also encouraged FHWA to offer guidance and share best practices of coordination among neighboring States and MPOs. The New York State Association of Metropolitan Planning Organizations (NYSAMPO) supported the language in section 490.105(e)(2). They also noted that a “significant portion” of the NHS in New York is owned by local governments and public authorities. They pointed out that the rule is silent on coordination

with other owners and noted that they would support language requiring such coordination. The Orange County Transportation Authority made a similar comment and urged FHWA to include language to support MPO coordination with county transportation commissions and local DOT districts to establish targets and funding priorities, and to allow targets to be established at the sub-regional level.

The Mid-America Regional Council also commented that if State DOTs choose to establish additional targets, under section 490.105(e)(3), for urbanized areas, the rule should encourage coordination with the corresponding MPOs.

The Florida DOT shared their coordination efforts in their letter. The Florida DOT held performance measure workshops in 2014 and 2015 for the representatives of various State DOT Offices, Federal Transit Administration, MPOs, and FHWA. They stated that the workshops resulted “in a rich dialogue with numerous ideas and opinions conveyed through discussion and in writing.” The Florida DOT also indicated in their letter that a Performance Measurement Collaboration Task Force has been formed to coordinate performance measurement activities with FHWA, FTA, Florida’s 27 MPOs, and the Florida Metropolitan Planning Organization Advisory Council. According to Florida DOT, the task force will continue to be used to exchange information during the rulemaking process and implementation. The Florida DOT also indicated that they plan to examine opportunities for data sharing, coordinated target establishment, and combined reporting where practical and efficient. They added that they will look for better ways to communicate the importance of good transportation performance to their State’s economy and their quality of life. The FHWA appreciates the Florida DOT sharing their coordination efforts.

The Illinois DOT commented that the portions of NHS which are not under the jurisdiction of the State DOT will require coordination between Illinois DOT and MPOs on the selection of targets to ensure consistency, to the maximum extent practicable.

The AASHTO and the Connecticut and Oregon DOTs commented that performance measurement and management of NHS pavements and bridges are not the only part of the planning effort State DOTs must undertake in order to deliver a successful program to the public. They emphasized that other tasks and the level of effort and coordination with local agencies, the public, and other stakeholders is “substantial.” They urged FHWA to recognize that the entire process to collect/analyze data, understand the trends, and establish targets needs to be made across a wide range of performance areas that can be influenced by local and regional needs. Finally, they commented that “coordination takes time.”

The AASHTO and the Oregon and Washington DOTs disagreed with the phrase “to ensure consistency, to the maximum extent practicable” in sections 490.105(e)(2) and 490.105(f)(2). They recommended that the regulatory text change to “to facilitate or encourage consistency.” They argued that this

modification would reduce the chances of unreasonable expectations on State DOTs during the implementation.

An anonymous commenter²⁵ stated that coordination between key stakeholders (such as MPOs) and State DOTs needs to be more active. The commenter argued that requiring consultation with MPOs is not enough, and collaboration in goal development is important. Another anonymous commenter²⁶ noted the importance of performance and funding for the entire statewide-non-Interstate NHS and commented that a State DOT should not be allowed to give preference to funding projects on highways within their jurisdiction merely because they are within their jurisdiction.

The North Carolina DOT commented that most of the NHS in North Carolina is owned and operated by North Carolina DOT. They inquired whether or not coordination is “relevant” for North Carolina DOT.

The Northeast Ohio Areawide Coordinating Agency commented that, unless there is a financial rationale or specific policy to coordinate targets, coordination is unlikely, particularly as State laws varies regarding the responsibility of asset management.

The Southern California Association of Governments (SCAG) recommended clear provisions be provided that outline the exact coordination process between State DOTs and MPOs toward the establishment of performance targets. A private citizen, Joyce Dillard, commented that the development of consistent targets across a State can only be achieved when the targets take into account State required plans already in existence, such as the General Plan and its Circulation Element.

Finally, the NARC commented that the success of the national performance management program will rely in part on the extent to which State DOTs and their MPOs are able to work together, establish common ground, and find complementary purpose. They made reference to the discussion of section 490.105(e)(2) in the NPRM which states “FHWA recognizes the need for State DOTs and MPOs to have a shared vision on expectations for future condition/performance in order for there to be a jointly owned target establishment process.” The NARC stated that “in some cases, this shared vision is a difficult—if not impossible—standard.” The NARC encouraged FHWA to foster a “shared vision,” and recommended that FHWA “take a deeper look” into case studies, peer exchanges, and other

input from State DOTs and MPOs in coordination for the establishment of targets. Finally, NARC commented that this is an opportunity to explore existing relationships between State DOTs and MPOs, and create stronger ties between them.

The FHWA appreciates the comments received regarding coordination. The FHWA plans to provide technical assistance to the State DOTs and MPOs through a number of means, including the issuance of guidance, conducting peer reviews and workshops, sharing best practices, and conducting training on topics such as target setting, implementation of performance-based planning and programming, interagency coordination, data collection, and performance progress reporting. The language in sections 490.105(e)(2) and 490.105(f)(2) mirror the statutory language in 23 U.S.C. 135(d)(2)(B)(i)(II) and 23 U.S.C. 134(h)(2)(B)(i)(II) and the regulatory language in 23 CFR 450.206(c)(2) and 23 CFR 450.306(d)(2)(iii) of the final Planning Rule. The FHWA believes the phrase “selection of targets” in 23 U.S.C. 135(d)(2)(B)(i)(II) and 23 U.S.C. 134(h)(2)(B)(i)(II) applies to adjustment of targets. The FHWA expects State DOT and MPO coordination requirements to be carried out for both establishment and adjustment of State DOT and MPO targets in sections 490.105(e)(2) and 490.105(f)(2). The final Planning Rule considers performance target selection as part of statewide and metropolitan transportation planning processes. Therefore, as part of the target selection process, State DOTs are required to consider the concerns of relevant Federal Land Management agencies and Indian tribal governments, and cooperate with affected local elected and appointed officials with responsibilities for transportation (or applicable regional transportation planning organization(s) identified in 23 CFR 450.208(a)), when selecting performance targets. (See 23 CFR 450.206, 23 CFR 450.208, and 23 CFR 450.306 of the final Planning Rule for more details on planning and coordination processes.) The FHWA also encourages State DOTs to coordinate with relevant MPOs and other stakeholders identified in 23 CFR 450.208(a) when establishing additional targets, described in section 490.105(e)(2).

The FHWA amended language in sections 490.105(f)(8) and 490.107(c)(1) to remove the requirement to document the target adjustment process and reporting of targets in the Metropolitan Planning Agreement. The FHWA replaced it with a requirement to

²⁵ Comment #: FHWA–2013–0053–0140.

²⁶ Docket Document FHWA–2013–0053–0135.

document the target adjustment process in a manner that is mutually agreed upon by State DOTs and MPOs. (See discussion sections for sections 490.105(f)(8) and 490.107(c)(1).) The FHWA recognizes that the performance management of NHS pavements and bridges are not the only part of the planning effort State DOTs and MPOs are required to undertake. The FHWA also recognizes that the level of effort and coordination with local agencies, the public, and other stakeholders is substantial and takes time. As discussed in section 490.105(d), the target scope (or the extent of target) for a State DOT consists of the entire NHS within the State, and the target scope for an MPO is the entire NHS within the metropolitan planning area. For this reason, State DOTs and MPOs are required to establish targets for the entire system within their respective areas, regardless of who owns the system. The section also requires close coordination between State DOTs and MPOs in selection of State DOT and MPO targets.

In response to the comments from North Carolina DOT and Northeast Ohio Areawide Coordinating Agency, coordination in the target selection process is required under 23 U.S.C. 135(d)(2)(B)(i)(II) and 23 U.S.C. 134(h)(2)(B)(i)(II), as stated above. Therefore, coordination is not an option, but it is a requirement under statute. Moreover, coordination for target selection is not bound by ownership of assets or asset management responsibilities, but must be consistent with coordination requirements in the statewide and metropolitan transportation planning processes.

In response to SCAG's comments, FHWA believes that the exact coordination process for target selection of an area should be determined by the relevant State DOTs and MPOs in that area. To help establish this process, FHWA plans to provide best practices, Webinar opportunities, and other resources on target selection coordination processes so that the coordination process is effectively implemented.

As stated earlier, the phrase "to ensure consistency, to the maximum extent practicable" in sections 490.105(e)(2) and 490.105(f)(2) is statutory language in 23 U.S.C. 135(d)(2)(B)(i)(II) and 23 U.S.C. 134(h)(2)(B)(i)(II). The FHWA retains the language in sections 490.105(e)(2) and 490.105(f)(2), as proposed in the NPRM.

Discussion of Section 490.105(e)(3) Additional Target

The FHWA proposed to allow State DOTs to establish additional targets for any of the proposed measures in subparts C and D, beyond the required statewide target. The State DOT may establish additional targets for any number and combination of urbanized areas and a target for the non-urbanized area for any or all of the proposed measures. This is intended to give State DOTs flexibility when establishing targets, and to aid State DOTs in accounting for differences in urbanized areas and the non-urbanized area. For example, a State DOT could choose to establish additional targets for a single urbanized area, a number of urbanized areas, or all urbanized areas separately or collectively. For State DOTs that want to establish a non-urbanized target, it would be a single target that applies to the non-urbanized area statewide. In the NPRM, FHWA sought comments on optional additional targets for urbanized and non-urbanized areas. The FHWA also sought comments on any other flexibility it could provide related to the voluntary establishment of additional targets.

The AASHTO and the Connecticut and New York DOTs supported the proposed approach for optional additional targets for urbanized and non-urbanized areas beyond the required statewide target. The AASHTO stated that State DOTs will voluntarily establish additional targets for various geographical boundaries on an ad hoc basis, working with their MPOs and local agencies. The AASHTO added that no other flexibilities need to be provided except that the establishment of additional targets should be at the sole discretion of State DOTs and not encumbered by Federal reporting or other requirements. The Connecticut and New York DOTs echoed AASHTO's comment.

The Georgia DOT commented that the proposed approach provides adequate flexibility in setting targets that will allow differentiation between urban and rural areas. The New Jersey DOT recommended allowing additional targets based on jurisdictional limits of each of the various stewards of the NHS and bridge ownership boundaries. The Oregon DOT recommended allowing States to establish targets of importance to them to provide flexibility in additional targets. The Tennessee DOT stated that they do not believe that it is necessary to provide for separate targets for urbanized and non-urbanized areas at this time.

The Texas DOT commented that optional targets for Texas may be needed for operational needs, but not for collective reporting. They added that many factors could come into play in optional targets, such as climate zones, subgrade, massive industry expansion (e.g., energy sector). The Texas DOT incorporates these factors into district level target setting as it relates to pavement asset condition. They noted that these district level targets accumulate to one State target.

The Missouri State DOT commented that the additional targets should only be considered "if the MPOs desire to have a different target than the State DOT." The Mid-America Regional Council and NARC commented that when a State DOT chooses to establish urbanized and non-urbanized area targets, State DOTs should be encouraged or required to coordinate those targets with relevant MPOs and rural transportation planning organizations. The TEMPO recommended usage of the terms "rural," "urban," and "urbanized" areas, and recommended urbanized area targets for the NHS. The NYMTC, PSRC, and Joyce Dillard recommended that additional flexibility should be provided for State DOTs to establish targets for metropolitan planning areas or urbanized areas. Joyce Dillard also suggested that MPO areas should be viewed in sub-areas for Transportation Management. The NYMTC added that one benefit of using metropolitan planning areas is that the boundaries are likely to change less frequently than urbanized area boundaries, allowing for a longer period of time during which measures would be evaluated on a consistent basis.

Questions were asked by several agencies regarding the additional targets. The Florida DOT asked the reason for the requirements in section 490.105(d)(3) for declaring and describing urbanized area boundaries within the State boundary in the Baseline Performance Period Report (required by section 490.107(b)(1)) for the additional targets. The Colorado DOT questioned the advantages of setting additional targets when these targets are not subject to significant progress determinations under section 490.109(e). Similarly, the NEPPP questioned the incentive of establishing additional targets.

The FHWA appreciates the comments on the voluntary establishment of additional targets and on other flexibilities it could provide. The FHWA strongly encourages State DOTs to monitor condition/performance by different geographic areas (e.g.,

jurisdiction, population, functional class, planning, terrain, and climate) to better understand the location dependency of condition/performance. The FHWA encourages State DOTs to establish targets beyond the required statewide targets where they feel necessary. The FHWA agrees with the comments from AASHTO and the Connecticut and New York State DOTs that State DOT established targets beyond the required statewide targets are at the sole discretion of State DOTs. This agreement was evident in the NPRM and in this final rule because the language does not require State DOTs to establish these targets. However, if a State DOT decides to establish urban or non-urbanized area targets beyond the required statewide targets, FHWA expects that State DOT to meet the coordination and reporting requirements under sections 490.105(e)(2) and 490.107(b). Although urban or non-urbanized area targets are not subject to significant determination under section 490.109, FHWA feels that the coordination and reporting requirements are necessary because once those targets are reported to FHWA (and become available to the public), the transparency and accountability of those targets will be expected by the public. For these reasons, FHWA retains the language in sections 490.105(e)(3)(i), (e)(3)(ii), and (e)(3)(iv) so that State DOTs have the maximum flexibility in monitoring condition/performance by different geographic areas and establishing targets beyond the required statewide targets, while preserving State DOT discretion to establish those targets. However, FHWA revised the language in section 490.105(e)(3)(iii) by striking the phrase “available to FHWA” in the paragraph because the urbanized area data reporting requirement is already covered in section 490.103(b).

Discussion of Section 490.105(e)(4) Performance Period Length and Schedule Alignment

The FHWA proposed a definitive performance period while recognizing that planning cycles and time-horizons for long-term performance expectations differ among State DOTs and MPOs. The FHWA understands that, although differences exist, it is necessary to provide for consistency in performance periods and proposed a 4-year performance period considering: (1) Providing for a link between the interim short-term targets (*i.e.*, 2-year and 4-year time horizons) to individual State DOT's long-term performance expectations as part of a performance-based planning and programming process; (2) ensuring the time horizon is long enough to allow

for condition/performance change to occur through the delivery of programmed projects; (3) aligning the schedule of reporting on targets and the evaluation of progress toward achieving the targets with the biennial performance reporting requirements under 23 U.S.C. 150(e); and (4) reporting targets using a consistent performance period as part of the evaluation of State DOT effectiveness in the performance-based planning process provided to the Congress, as required by 23 U.S.C. 135(h). Therefore, 2-year targets represent the anticipated or intended condition/performance level at the midpoint of each performance period, and 4-year targets represent the anticipated or intended condition/performance level at the end of each performance period. As stated in the NPRM, it is important to emphasize that established targets (2-year targets and 4-year targets) should be considered as interim conditions/performance levels that lead toward the accomplishment of longer term performance expectations in a State DOT's long-range statewide transportation plan²⁷ and NHS asset management plans.²⁸

Two main issues on the proposed 4-year performance period were raised by the commenters: (1) The 4-year performance period duration is too short for noticeable changes in the condition of bridges and pavements and for demonstrating the impact of the investments²⁹ and (2) the timeline of the performance periods does not align with planning cycle of State DOTs and MPOs.³⁰

The ASCE commented that the proposed regimen of performance period and progress reporting “is in accordance with the intent of MAP-21 and will help document the strides that States are making to improve asset conditions.” They also recommended

that FHWA pay particularly close attention to the investment strategies section of progress reviews to help ensure that States are prioritizing investment decisions in a way that will help them reach their intended targets in accordance with national goals. Nicholas Cazares³¹ commented that the proposed approach of performance period is “reasonable.” The Center for American Progress commented that a 4-year performance period is of adequate length to allow States to “make or fail to make progress.”

However, AASHTO and the California, Connecticut, and Texas DOTs commented that the condition of bridges and pavements does not change a great deal in relatively short time periods (*i.e.*, 2-year and 4-year). Additionally, the AASHTO and the Texas DOT provided an example of “a bridge built with a design life of 75 years does not normally show a great amount of change from one inspection cycle to the next (every 2 years).”

The AASHTO, Metropolitan Transportation Commission, Nashville Area MPO, Orange County Transportation Authority, Oversight Committee for the California Local Streets and Road Needs Assessment, Rural Counties Task Force, SCAG, and TEMPO and the State DOTs of California, Colorado, Connecticut, Iowa, New Jersey, and Texas commented that “planning, programming, project delivery, data collection, data reporting of projects” typically takes much longer than 4 years, so the impact of infrastructure investment programs on condition/performance would be difficult to demonstrate with short-term targets (2-year and 4-year targets). The AASHTO and Connecticut and New York DOTs recommended providing State DOTs and MPOs the flexibility to voluntarily establish long-term targets (10 years or more) outside of the regulatory framework and recommended report progress on a 4- or 5-year interval. The Metropolitan Transportation Commission, Nashville Area MPO, Orange County Transportation Authority, the Oversight Committee for the California Local Streets and Roads Needs Assessment, and the Rural Counties Task Force recommended target establishment cycles between 5 and 10 years. The SCAG and TEMPO recommended that performance periods should be at least 10 years. The California and Texas DOTs recommended a 10-year performance period with a 5-year mid performance period progress report. The New York DOT also suggested a 5-year

²⁷ 23 U.S.C. 135(f).

²⁸ 23 U.S.C. 119(e).

²⁹ AASHTO; Transportation for America; the Southeast Pavement Preservation Partnership; the State DOTs of California, Connecticut, Idaho, Iowa, Minnesota, Montana, New Jersey, New York State, North Dakota, South Dakota, Texas, and Wyoming; Rural Counties Task Force; the Organ County Transportation Authority; the Oversight Committee for California local Streets and Road Needs Assessment; TEMPO; the Metropolitan Transportation Commission, the Southern California Association of Governments; Nashville Area MPO.

³⁰ State DOTs of Connecticut, New York, and Texas, the National Association of Regional Councils, the New York State Association of Metropolitan Planning Organizations, the New York Metropolitan Transportation Council, the Association of Metropolitan Planning Organizations, Atlanta Regional Commission, the Association of Texas Metropolitan Planning Organizations, and the Community Planning Association of Southwestern Idaho.

³¹ Docket Letter FHWA-2013-0053-0078.

reporting cycle. The North Carolina DOT suggested 6- to 8-year goals for the bridges. The State DOTs of Idaho, Montana, New York, North Dakota, South Dakota, and Wyoming recommended a longer reporting cycle. Transportation for America recommended the reporting period be 8 or 10 years.

The letters from AMPO, COMPASS, Iowa DOT, Nashville Area MPO, SEMCOG, TEMPO, and Transportation for America suggested that the performance period should coincide with State DOT and MPO Long Range Plan (LRP) cycles. Transportation for America stated that not aligning the performance period with the LRP cycle “creates a disincentive for these important entities to engage in the performance measure targeting and investment process or place an undue burden for these entities to conduct planning and target setting outside the planning process.” The AMPO and COMPASS added that the misalignment of performance periods may cause confusion when discussing baseline conditions and targets within the LRP.

The Iowa DOT indicated that due to their 5-year planning and program development cycle, much of the investment planned for the time period of 2016 through 2020 will already be set by the time these rules go into effect. They added that they have limited ability to make changes, and it may take some time for them to redirect investment, if the national measures indicate different investment prioritization. Similarly, North Carolina DOT indicated that the 2 and 4 year periods will result in their State setting targets based on work that is already planned rather than targets that represent desired long-term system improvement.

The TEMPO did not support the 4-year frequency proposal and argued that MAP-21 does not specify target dates, ranges, or frequencies. They added that State DOTs and MPOs should be allowed to fulfill the continuing, cooperative, and comprehensive process as it relates to the establishment of feasible performance targets and their use in planning activities and documents. They also made a comment that State DOTs and MPOs should establish appropriate targets and meet the statutorily required biennial progress report for each target. Lastly, they rejected any specific target year or target setting frequency proposed by other entities under this and all other related rulemakings.

Finally, the Minnesota DOT indicated that the proposed framework requiring 4-year performance periods with both 2-

year targets and 4-year targets may be overly complex.

The FHWA is aware that pavement and bridges deteriorate slowly and agrees with the comments from AASHTO and the State DOTs of California, Connecticut, and Texas. However, it is important to recognize the difference between condition changes for individual pavement sections or individual bridges over time versus condition changes of system network or system deck areas over time. To confirm this difference, FHWA examined both pavement and bridge condition trends using the proposed condition measures and found noticeable changes over 2-year and 4-year time periods.³² This is also evident in the letter submitted by Oregon DOT³³ for their bridge condition trends using the proposed bridge measures. This analysis provided sufficient evidence for FHWA to believe that the magnitude of percentage of system changes in Good and Poor condition for bridges is noticeable.

As stated in the NPRM, established targets (2-year target and 4-year target) would need to be considered as interim conditions/performance levels that lead toward the accomplishment of longer term performance expectations in State DOT long-range statewide transportation plans³⁴ and NHS asset management plans.³⁵ In order to avoid confusion, FHWA used the term “longer-term performance expectations” in the NPRM to distinguish between longer term targets and the interim anticipated condition/performance (*i.e.*, 2-year and 4-year targets) toward those longer-term performance expectations. The FHWA recognizes the importance of considering a longer time horizon for planning and programming projects that considers and evaluates temporal tradeoffs between feasible improvements for more efficient and effective investment decisions. The FHWA strongly recommends that State DOTs and MPOs consider longer time horizons, which look beyond 4 years (*i.e.*, multiple performance periods), for planning and programming of projects so identification and selection of those projects is guided by the longer term performance expectations. As indicated above, the purpose of the performance period is simply to measure and evaluate condition/performance, which

should not be assumed to be a “planning, programming, project delivery, data collection, data reporting” cycle of individual improvement projects or a program of projects. Thus, the performance period and LRP cycles look at different periods of time and do not have to be aligned to be effective. For these reasons, FHWA believes that the performance period does not need to be aligned with the current LRP cycles of State DOTs and MPOs. Therefore, FHWA retains the intent of the proposed language in sections 490.105(e)(4) and (e)(5) in the final rule. In sections 490.105(e)(4)(iii) and (e)(4)(iv), FHWA added the phrase “for the measures in paragraphs (c)(1) through (c)(3) of this section” to codify the specific measures being discussed. This addition does not change the intent of the paragraph.

Discussion of Section 490.105(e)(5) State DOT Reporting

Because there were no substantive comments on section 490.105(e)(5), FHWA made no changes.

Discussion of Section 490.105(e)(6) Target Adjustment

The FHWA proposed that State DOTs may adjust their established 4-year targets when they submit their Mid Performance Period Progress Report (described in section 490.107(b)(2)). This language recognizes that State DOTs would need to consider many factors in establishing targets that could impact progress, such as uncertainties in funding, changing priorities, and external factors outside the control of State DOTs. This target adjustment allowance is limited to the Mid Performance Period Progress Report, and is not allowed at any other time during the performance period. In the NPRM, FHWA expressed that this frequency of adjustment allows a State DOT to address changes they could not have foreseen in the initial establishment of 4-year targets while still maintaining a sufficient level of control in the administrative procedure necessary to carry out program requirements in an equitable manner. The MPOs impacted by a State DOT's adjustment of targets have the option to adjust their target by either: (1) Agreeing to plan and program projects so that they contribute toward the adjusted State DOT target for that performance measure or (2) committing to a new quantifiable target for that performance measure for its metropolitan planning area when a State DOT adjusts their target, as described in section 490.105(f)(7). The Metropolitan Transportation Commission expressed

³² FHWA (2015) analysis results have been included in the Docket with the filename “NHS Bridge Condition Changes 2015 09 29.”

³³ NPRM Comment FHWA-2013-0053-0161: <https://www.regulations.gov/document?D=FHWA-2013-0053-0161>.

³⁴ 23 U.S.C. 135(f).

³⁵ 23 U.S.C. 119(e).

their support for the proposed approach and stated that the “flexibility of revising targets in mid-stream will improve the ability of State DOTs and MPOs to more accurately predict future performance achievement.” The Illinois DOT expressed their desire for FHWA to retain the language in section 490.105(e)(6). However, the Center for American Progress and Transportation for America opposed the proposed language by stating that the proposed rule provides State DOTs with too much flexibility when establishing performance management targets and recommended that the rule should not allow State DOTs to adjust targets. Transportation for America stated that section 490.105(e)(6) is “directly against the intent of Congress for the nation’s performance management program to increase accountability and transparency of the Federal-aid highway program and improve project decision making through performance-based planning and programming.” They added that section 490.105(e)(6) “provides State DOTs blanket approval to amend their self-established targets after just 2 years without any criteria” and amending self-established targets is “unnecessary and contradictory to congressional intent.”

The AASHTO and the State DOTs of Connecticut, Missouri, Oklahoma, and Oregon recommended that State DOTs should be allowed to adjust targets annually. The South Dakota DOT stated that MAP-21 clearly provides that individual State DOTs establish their own targets. However, they believe that

the proposed rule suggests that FHWA can restrict State DOTs’ authority to establish targets, notably as to when targets can be revised. They added that FHWA “must fully respect a State’s authority to set and revise targets.”

The FHWA disagrees with the comment made by Transportation for America that its approach is “unnecessary and contradictory to congressional intent” and may reduce accountability and transparency of the Federal-aid highway program. As stated previously, the language in section 490.105(e)(6) is a result of FHWA’s recognition that State DOTs have to consider many factors in establishing targets that could impact progress such as uncertainties in funding, changing priorities, and external factors outside the control of State DOTs.

Although the flexibility of adjusting target is granted, FHWA does not believe this approach reduces the accountability associated with targets and transparency in adjusting targets. First, as stated previously, the target adjustment allowance is limited to the Mid Performance Period Progress Report and not allowed at any other time during the performance period.

Second, the 4-year target adjustment through the Mid Performance Period Progress Report will provide a more consistent method for significant progress determinations under section 490.109. The FHWA felt it is necessary to provide State DOTs the same opportunity to make significant progress for 4-year targets as for the 2-year targets. As shown in Figure 2 below,

both 2-year and 4-year targets for the first performance period are reported to FHWA by October 1, 2018. Those 2-year targets will be subjected to a significant progress determination under section 490.109 after the Mid Performance Period Progress Report is submitted on October 1, 2020. Therefore, for the 2-year targets, the duration between target reporting and significant progress determinations is about 2 years. However, for 4-year targets, the duration between target reporting and significant progress determination is about 4 years because the targets are reported on October 1, 2018, and the significant progress determination will be made after the Full Performance Period Progress Report is submitted on October 1, 2022. Allowing the adjustment of the 4-year target in the Mid Performance Period Progress Report provides the opportunity to make the duration between target reporting and significant progress determination about 2 years, which is consistent with 2-year targets.

Third, this rule includes section 490.107(b)(2)(ii)(E) which requires State DOTs to include in their Mid Performance Period Progress Report a discussion on the basis for the adjustment and how the adjusted target supports expectations documented in longer range plans (*e.g.*, the State asset management plan and the long-range statewide transportation plan).

Finally, a State DOT’s discussion on targets and adjustment will be available on a public Web site to ensure transparency and accountability in the process.

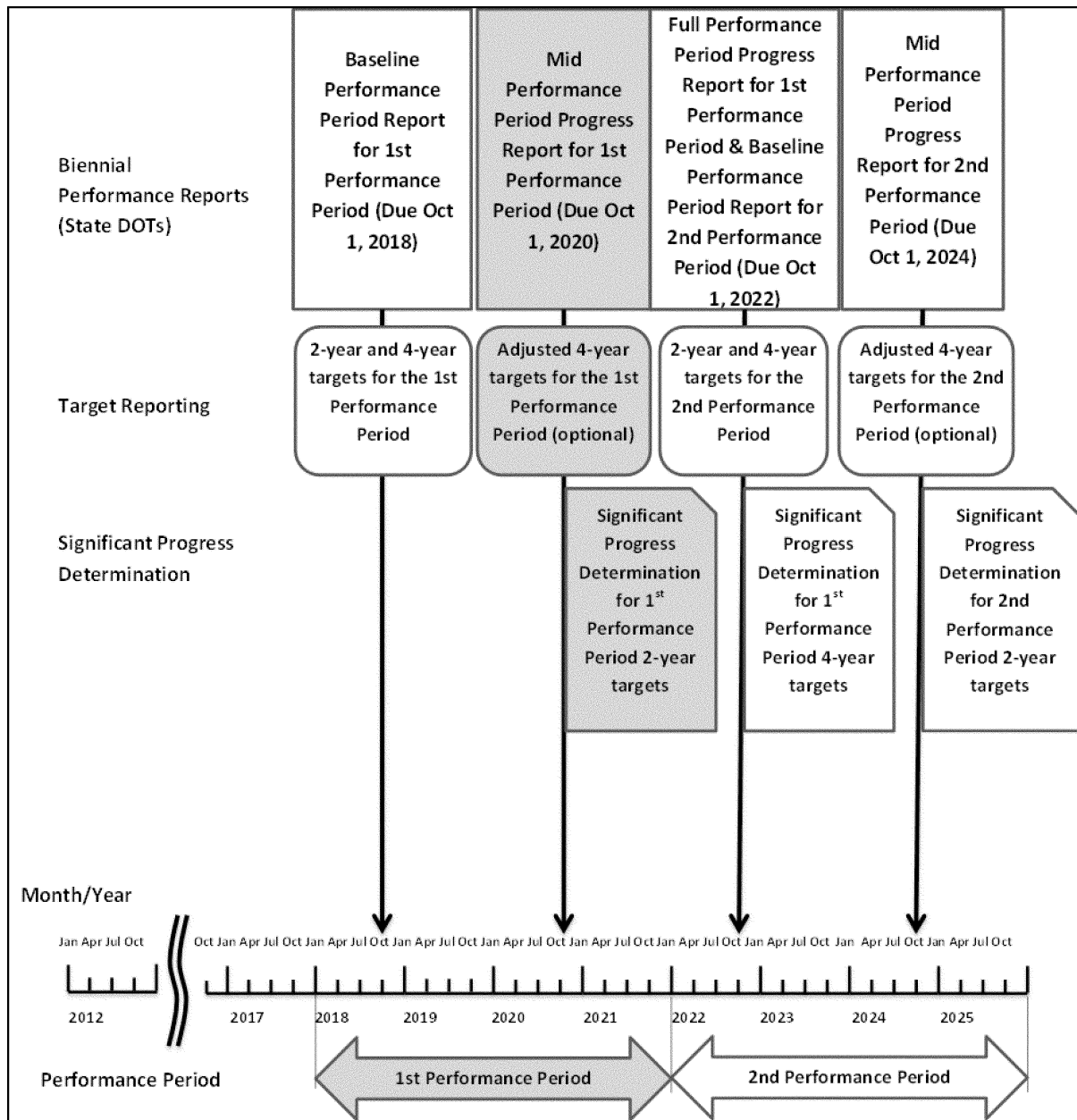


Figure 2 – State DOT Target Adjustment in Mid Performance Period Progress Report

The MAP-21 gives FHWA the discretion to establish requirements for targets such that any targets a State DOT establishes will achieve the overall requirements of the program. The FHWA believes State DOTs have the authority and flexibility to establish targets for the performance measures. However, contrary to South Dakota DOT's comment, FHWA does not believe MAP-21 provides State DOTs the authority to adjust or revise targets at their discretion. Instead, FHWA believes that the statute provides FHWA the authority to establish requirements for targets. The FHWA feels that some

requirements must be established so that accountability and transparency are instilled in the performance management process. The FHWA also believes that these requirements for targets are consistent with six³⁶ of the

³⁶ Six of the Nine principles used in the development of proposed regulations for target establishment criteria: www.regulations.gov, Docket FHWA-2013-0053:

- Ensure for Consistency—provide a sufficient level of consistency, nationally, in the establishment of measures, the process to set targets and report expectations, and the approach to assess progress so that transportation performance can be presented in a credible manner at a national level.

- Increase Accountability and Transparency—consider an approach that will provide the public and decision makers a better understanding of Federal transportation investment needs and return on investments.
- Consider Risk—recognize that risks in the target establishment process are inherent, and that performance can be impacted by many factors outside the control of the entity required to establish the targets.
- Understand that Priorities Differ—recognize that State DOTs and MPOs must establish targets across a wide range of performance areas, and that they will need to make performance trade-offs to establish priorities, which can be influenced by local and regional needs.
- Recognize Fiscal Constraints—provide for an approach that encourages the optimal investment of Federal funds to maximize performance but

nine principles listed in the NPRM preamble that were considered in the development of the proposed regulation.

The biennial reporting cycle, as shown in Figure 2 above, has the appearance of only allowing State DOTs to incorporate uncertainties 2 years in advance. However, as shown in Figure 2 above, the actual duration (*i.e.*, from Mid Performance Period Progress Report due date, October 1, to the end of the performance period) State DOTs have to incorporate uncertainties is shorter than 2 years. For example, as shown in Figure 2, the 4-year target established in 2018 (the first State Biennial Performance Report) may be adjusted in 2020 (the second State Biennial Performance Report due on October 1, 2020). Note that the 4-year target for the first performance period is the anticipated condition/performance level at the end of each performance period (December 31, 2021). As discussed in section 490.105(e)(4), 4-year targets would reflect the programmed improvement projects anticipated to be delivered, and their condition/performance to be measured, by the end of that performance period. Therefore, FHWA believes that target adjustment, in October 2020 for the anticipated condition/performance as of December 2021, provides State DOTs a sufficient level of control in the administrative procedure necessary to carry out these program requirements in a reasonable manner. Note that duration from October 2020 to December 2021 is 15 months, not 2 years.

Annual target adjustment, as suggested by AASHTO and others, would be adjusting the 4-year target (the anticipated condition/performance as of December 2021) during calendar year 2021. The FHWA believes the transparency of target and the target establishment process will be compromised if targets are allowed to be adjusted close to the end of the assessment period. Therefore, FHWA retains the language in section 490.105(e)(6) that allows State DOTs to only adjust their established 4-year targets when they submit their Mid Performance Period Progress Report.

In the NPRM, FHWA proposed that, if an MPO had originally agreed to accept the State DOT's targets and the State DOT adjusts them, the MPO would need to revisit its targets. Several MPOs and

MPO associations, including NARC and TEMPO, argued that the final rule should explicitly state that when a State DOT chooses to adjust targets, an MPO is not required to also adjust its own established targets. The commenters suggested that a State DOT should be required to coordinate with the MPO if the State DOT adjusts its targets, just as State DOTs are required to do when establishing initial targets. The TEMPO recommended that any target adjustments proposed by a State DOT that directly impact an MPO's planning area should be made jointly with the MPO. The FHWA agrees with these comments to implement the target selection coordination requirements under 23 U.S.C. 135(d)(2)(B)(i)(II). Therefore, FHWA added language in section 490.105(e)(6) that if a State DOT decides to adjust their 4-year targets then it must coordinate with relevant MPOs.

Discussion of Section 490.105(e)(7) Phase-in Requirements for Interstate Pavement Measure

In the NPRM, FHWA recognized that some State DOTs may not be able to meet all data requirements in section 490.309(b)(1) prior to the start of the first proposed performance period for the Interstate System pavement condition measure. As a result, FHWA proposed the following for the measures in section 490.307(a)(1) and (a)(2) in the NPRM:

- State DOTs establish their 4-year targets and report these targets in their Baseline Performance Period Report, required under section 490.107(b)(1);
- State DOTs are not required to report 2-year targets and baseline condition/performance in their Baseline Performance Period Report; and
- State DOTs update the baseline condition/performance in their Baseline Performance Period Report, with the 2-year condition/performance in their Mid Performance Period Progress Report, described in section 490.107(b)(2)(ii)(A). Also, State DOTs may adjust their 4-year targets, as appropriate.

The State DOTs of Maine, New Hampshire, and Vermont commented that the phase-in process for the Interstate pavement condition proposed in the NPRM only relieves State DOTs from reporting baseline condition and 2-year targets, but ignores all other new requirements. They commented that establishing both 2 and 4-year targets will require the same baseline data. They questioned whether relieving only the 2-year target was an oversight in the NPRM, and if FHWA should also delay the establishment of 4-year targets. They

requested additional clarification and guidance on how to establish 4-year targets in the absence of baseline condition data. The New Jersey DOT made a similar comment stating that it is impractical to establish and report 4-year targets in the absence of baseline condition information and requested clarification of the requirement to report 4-year targets when a baseline condition/performance reporting is not required. Texas DOT stated that establishing the targets will be challenging since some State DOTs may not have historical information for some of the metrics in this rule and requested guidance on how these measures could be phased in along with new metrics.

During the development of the NPRM, FHWA considered numerous ways for State DOTs to meet the target and progress reporting requirements under the 23 U.S.C. 150(d)(1) and 150(e), which require State DOTs to establish the first set of performance targets one year after the effective date of the final rule and to report those targets not later than October 1, 2016.³⁷ The FHWA felt at the time of the development of the NPRM that some State DOTs may not be able to meet the new data reporting requirements for Interstate pavement condition, as provided in section 490.309(b)(1), until after the start of the first proposed performance period. The FHWA had to consider how State DOTs could meet the statutory requirements. The FHWA also realized that those State DOTs would encounter difficulties in establishing 4-year targets without sufficient data or the baseline condition/performance for Interstate pavement condition measure for the first performance period. Therefore, FHWA allowed State DOTs to estimate their initial 4-year target. This would be done with the understanding that State DOTs would not have baseline condition when the target was first established and State DOTs would be provided an opportunity to adjust their estimated 4-year target through Mid Performance Period Progress Report 2 years later. Their actual 2-year condition in the Mid Performance Period Progress Report would become the baseline condition for the first performance period.

The FHWA has considered the comments and examined State DOTs' ability to implement the data requirements in section 490.309(b)(1) for the Interstate pavement measures with respect to the updated implementation timeline in Figure 2 above. As provided in section 490.309(a), the first data collection cycle

recognize that, when operating with scarce resources, performance cannot always be improved.

- Provide for Flexibility—recognize that the MAP-21 requirements are the first steps that will transform the Federal-aid highway program to a performance-based program and that State DOTs, MPOs, and other stakeholders will be learning a great deal as implementation occurs.

³⁷ "4 years after the date of enactment of the MAP-21" stipulated in 23 U.S.C. 150(e).

(1-year cycle) will be in calendar year 2018. Therefore, assuming this final rule is effective in calendar year 2016, some State DOTs will not have the baseline conditions for Interstate pavement measures at the time of target reporting in Baseline Performance Period Report in calendar year 2018. The FHWA understands that it will be difficult to estimate targets without the baseline condition data for some State DOTs. However, State DOT target establishment “not later than 1 year of the effective date of this rule” in section 490.105(e)(1) is a statutory requirement under 23 U.S.C. 150(d). Therefore, to meet the statutory mandate, FHWA cannot delay the due date of State DOT target establishment. Therefore, as stated above, FHWA has allowed State DOTs to estimate their initial 4-year target. This would be done with the understanding that State DOTs would not have baseline condition when the target is first established and State DOTs would be provided an opportunity to adjust their estimated 4-year target through Mid Performance Period Progress Report 2 years later. Their actual 2-year condition in the Mid Performance Period Progress Report would become the baseline condition for the first performance period. Therefore, FHWA retains the phase-in requirements for Interstate pavement measure in section 490.105(e)(7) as proposed in the NPRM.

Discussion of Section 490.105(f) MPO Targets

Section 490.105(f) describes MPO requirements for the establishment of targets for all measures identified in section 490.105(c). The MPOs are required to implement the 23 U.S.C. 134(h)(2)(B) target establishment provisions in a manner that provides for a level of consistency necessary to evaluate and report progress at both the national and MPO level.

Discussion of Section 490.105(f)(1) MPO Target Schedule

To meet the statutory requirements in 23 U.S.C. 134(h)(2)(C), section 490.105(f)(1) requires each MPO to establish 4-year targets no later than 180 days after the relevant State DOT establishes its targets.

As discussed in the combined discussion for sections 490.105(e)(1) and 490.105(f)(1), FHWA recognizes that the level of effort and required coordination for selecting performance targets is substantial and takes time. However, to meet the statutory requirements in 23 U.S.C. 134(h)(2)(C), FHWA retains the language in section 490.105(f)(1).

In the NPRM, FHWA attempted to develop these target establishment requirements so that they could be met by all MPOs. Recognizing that MPOs vary in size, capability, resource availability, and ability to establish performance targets, FHWA proposed that they only be required to establish 4-year targets and have target establishment options, as provided in section 490.105(f)(4) of the NPRM (section 490.105(f)(3) of the final rule). The FHWA proposed MPO target establishment options: (1) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT targets or (2) committing to quantifiable targets for their metropolitan planning area.

The NARC expressed their appreciation for FHWA’s recognition of the burden an MPO faces in establishing targets and not requiring them to establish 2-year targets. However, Transportation for America stated that this rule lacks consistency as State DOTs are required to establish both a 2-year and 4-year targets while MPOs are only required to establish 4-year targets. The FHWA considered these comments and determined that because MPOs vary in capability, resources, and their ability to establish performance targets it is important that the measures be structured in a way that allows all MPOs to meet the requirements in this rule. The FHWA retains the proposed language in NPRM section 490.105(f)(1)(i), in the final rule.

Section 490.105(f)(1)(ii) is reserved.

The FHWA retains the language of section 490.105(f)(2), as proposed in the NPRM. (See discussion for section 490.105(e)(2).)

The FHWA deleted the language in section 490.105(f)(3) of the NPRM because this paragraph is redundant with what is already in section 490.105(f)(1). Subsequent paragraphs in section 490.105(f) were renumbered in the final rule.

Discussion of Section 490.105(f)(3) and (4) MPO Target Establishment Option and MPOs Serving a Multistate Metropolitan Planning Area

In the NPRM, FHWA proposed MPO target establishment options that would provide for a level of consistency necessary to evaluate and report progress at an MPO level, while providing for a degree of flexibility to support metropolitan planning needs. The FHWA also attempted to develop these target establishment requirements so that they could be met by all MPOs, recognizing that MPOs vary in capability, resource availability, and ability to establish performance targets.

Therefore, FHWA proposed in section 490.105(f)(4) that MPOs would establish targets specific to the metropolitan planning area by either: (1) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT targets, or (2) committing to quantifiable targets for their metropolitan planning area. The proposed language gave MPOs two options to establish targets. The MPOs could establish their own quantifiable targets. Alternatively, recognizing that the resource level and capability of some MPOs to reliably predict performance outcomes varies across the country, FHWA proposed an approach that would allow MPOs that did not want to establish their own quantifiable target to establish targets by supporting State DOT targets for performance. The FHWA also stated in the NPRM that regardless of which option MPOs choose to establish targets, MPOs may need to work with relevant State DOTs to coordinate, plan, and program projects for their planning area.

The NARC expressed their appreciation for the flexibility provided in section 490.105(f)(4) of the NPRM (section 490.105(f)(3) in the final rule), which gives an MPO target establishment options. Moreover, they supported flexibility that emphasizes local transportation priorities in establishing targets and allows MPOs to establish targets that represent a decline in pavement or bridge conditions, if dictated by local priorities. The Connecticut DOT, Mid America Regional Council, and NYSAMPO expressed their support for the proposed MPO target establishment options. However, the Center for American Progress opposed the options, stating that MPOs should be required to establish quantitative performance targets.

The Northeast Ohio Areawide Coordinating Agency stated that if State funds are distributed with a focus on improving capacity, MPOs should have the freedom to establish regional targets that are realistic to the level of funding an MPO receives for maintenance separate from the State DOT goals. The Iowa DOT suggested FHWA should consider a waiver process by which the performance monitoring requirements for MPOs in those States where State DOTs hold sole programming authority over the State’s NHPP funding allocation. This would effectively eliminate the MPOs’ ability to impact the NHPP. The Connecticut DOT commented that many of the smaller MPOs do not currently have the resources to collect and analyze this data so this is likely to put additional

burdens on State DOTs. They advocated that any MPO electing to establish their own targets should be required to collect and analyze whatever data is needed to support their plan, if that data is not already available from State DOT or other entities. Because FHWA believes that MPOs vary in size, capability, resources, and ability to establish performance targets, FHWA disagrees with the Center for American Progress's comment to require that MPOs only be allowed to establish quantifiable targets. The FHWA believes that performance management practices will continuously improve as State DOTs and MPOs implement the requirements under this rule. The FHWA anticipates that more MPOs will be able to establish their own quantitative targets in the future as the performance management practices mature.

In response to the comments from Northeast Ohio Areawide Coordinating Agency and Iowa DOT, FHWA emphasizes that regardless of who controls funds or programming authority, coordination in target selection is required under 23 U.S.C. 135(d)(2)(B)(i)(II) and 23 U.S.C. 134(h)(2)(B)(i)(II). (See the discussion section for sections 490.105(e)(2) and 490.105(f)(2) for more details on target selection coordination requirements.)

In response to Connecticut DOT's comment, FHWA notes that the pavement condition measures in subpart C are applicable to the mainline highways on the Interstate System and on the non-Interstate NHS. The bridge condition measures in subpart D are applicable to bridges carrying the NHS, which includes on- and off-ramps connected to the NHS. This is consistent with the statutory provisions in 23 U.S.C. 150(c)(3). Therefore, the applicable network for State DOTs and MPOs within that State are not mutually exclusive. The data collection and analysis must be done by State DOTs and MPOs in a coordinated manner, as required in 23 CFR 450.208.

The FHWA considered the comments on MPO target establishment options and retains in the final rule the proposed options with minor revision in section 490.105(f)(4) of the NPRM (section 490.105(f)(3)). The revision is to clarify that an MPO can exercise different target establishment options for each measure in subparts C and D, and that they do not have to select the same option for all measures in subparts C and D. The FHWA amended section 490.105(f)(4) so that MPOs shall establish a target by either: (1) Agreeing to plan and program projects so that they contribute toward the

accomplishment of the relevant State DOT target for that performance measure, or (2) committing to a quantifiable target for that performance measure for their metropolitan planning area.

The New Jersey DOT commented that multi-state MPOs should have the discretion to establish different targets for each State. In response to the comment, FHWA added section 490.105(f)(4) to address situations where metropolitan planning areas extend across multiple States. As discussed in section 490.105(f)(3), MPOs have an option for establishing a target by either: (1) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT targets, or (2) committing to quantifiable targets for their metropolitan planning area. The added language in section 490.105(f)(4)(i) provides MPOs the option to choose different target establishment options, as specified in section 490.105(f)(3), for the portion of the metropolitan area within each State. For example, if a metropolitan planning area of an MPO is located within two States (*e.g.*, "State A" and "State B"), that MPO could establish their target for a measure by: (1) Agreeing to plan and program projects so that they contribute toward the accomplishment of the State A target for the portion of metropolitan planning area within State A; and (2) committing to quantifiable target for the portion of their metropolitan planning area within State B. The language in section 490.105(f)(4)(ii) clarifies that if an MPO chooses the option to "agree to plan and program projects to contribute toward State targets" for the entire metropolitan planning area, then they must plan and program projects in support of the individual State DOT targets as applicable to the portion of the metropolitan area within each State.

Although MPOs could exercise their target establishment options provided in section 490.105(f)(3) and (4), FHWA emphasizes that all MPOs are required to coordinate with relevant State DOTs in MPO target establishment regardless of which options MPOs choose in target establishment.

Sections 490.105(f)(5) and 490.105(f)(6) are reserved.

Discussion of Section 490.105(f)(7) MPO Response to State DOT Target Adjustment

The FHWA proposed MPO response options to State DOT target adjustment, described in section 490.105(e)(6), through the State DOT's Mid Performance Period Progress Report. This MPO response option was only for

those MPOs who established their targets by agreeing to plan a program of projects so that they contribute to the adjusted State DOT target for a performance measure, as provided in section 490.105(f)(4)(i) of the NPRM (section 490.105(f)(3)(i) of the final rule). Those MPOs responding to State DOT target adjustment have the following options: (1) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT targets, or (2) committing to quantifiable targets for their metropolitan planning area.

The NARC made a comment that the rule should explicitly state that when a State DOT chooses to adjust its targets, an MPO is not required to also adjust its own established targets. The FHWA believes that the language in this rule does not require MPOs to adjust their own quantifiable target when State DOTs adjust their targets. The FHWA feels that it is not necessary to explicitly state this in the final rule. The FHWA retains the proposed MPO response options with minor revisions in section 490.105(f)(7). The revision is to clarify that MPOs can exercise different target establishment options for each measure in subparts C and D, and that they do not have to select the same option for all measures in subparts C and D. The FHWA amended section 490.105(f)(7) to read that MPOs shall respond to State DOT target adjustment by either: (1) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT target for that performance measure, or (2) committing to a quantifiable target for that performance measure for their metropolitan planning area. Although MPOs could exercise their target selection options provided in section 490.105(f)(7), FHWA emphasizes all MPOs are required to coordinate with relevant State DOTs in target selection, as required in section 490.105(f)(3), regardless of which option MPOs choose in target selection.

Discussion of Section 490.105(f)(8) MPO Target Adjustment

The Texas DOT commented that "if the proposed rules are adopted as drafted, Texas State DOT will need to work with TEMPO and their MPOs and transit providers to amend all existing Metropolitan Planning Agreements to include language regarding performance planning, measures, targets, etc." They added that this is going to become "even more important in light of the new OMB Super Circular and the potential need to make changes to the Metropolitan Planning Agreements based on new regulations in 2 CFR 200." The Texas

DOT commented that “this requirement is a significant task, and State DOTs and MPOs should be given the greatest degree of latitude and flexibility in making these revisions on a schedule of their own choosing without penalty.”

The NYMTC commented that this rule requires State DOTs and MPOs to document procedures for reporting, target setting, target adjustment, and related coordination in metropolitan planning agreements. The NYMTC commented that they object to the use of metropolitan planning agreements for this purpose. In lieu of the metropolitan planning agreements, they recommended maximum flexibility for State DOTs and MPOs in establishing the coordination that is appropriate to each State and region. They argued that MPOs and State DOTs should not have to revisit the metropolitan planning agreements each time they make an adjustment to targets or related data collection and performance reporting procedures.

The comment from Texas DOT on metropolitan planning agreement requirements is beyond the scope of this rule. (See 23 CFR 450.314 for details on metropolitan planning agreement requirements.)

Addressing NYMTC's comments, FHWA amended the language in section 490.105(f)(8) to remove the requirement to document the target adjustment process in the metropolitan planning agreement. The manner in which targets will be adjusted is to be mutually agreed upon by State DOTs and MPOs. This change is consistent with numerous comments received on this rule and the Planning Rule. As noted in the discussion of section 490.107(c)(1) on MPO reporting, amending the metropolitan planning agreement as part of the performance management process is onerous and does not provide the flexibility needed. This change is also intended to emphasize the need for State DOTs and MPOs to coordinate when adjusting targets, just as they are to do when establishing targets. (See discussion section for section 490.107(c)(1) for more information.)

No substantive comments were received for section 490.105(f)(9). The FHWA retains the language in section 490.105(f)(9) as proposed.

Discussion of Section 490.107 Reporting on Performance Targets

Section 490.107 deals with the biennial performance reporting schedule and requirements. The Montana DOT commented that, with multiple rulemakings underway and more planned in the future, FHWA should coordinate the reporting

deadlines for all of the rules that fall under this title. This will reduce the burden on States and allow reasonable process development timeframes.

As outlined in section 490.107, FHWA notes that reporting timeframes will be coordinated to the maximum extent practicable.

The New York DOT submitted a comment expressing their support for the provision that requires that only State DOTs report to FHWA on performance targets and progress in achieving established targets.

Discussion of Section 490.107(a)(1)–(2) General Reporting on Performance Targets

The North Carolina DOT commented that the use of three different reports and the associated requirements is unduly complex. They suggest that since the data is being submitted to HPMS and NBIS, FHWA should extract and use the information to meet the reporting requirements.

The FHWA clarifies that performance metric data is completely different from performance target, condition/performance, progress evaluation, etc. The FHWA felt it is necessary to differentiate the two in this rule because metric data refers to IRI, Cracking Percent, rutting, and faulting values for pavement sections reported to HPMS and NBI Data Items 58-Deck, 59-Superstructure, 60-Substructure, and 62-Culverts). These reported metric data are not performance measures and they do not represent performance targets. Section 490.107 in this rule deals with reporting targets, condition/performance, progress evaluation, etc. and they are also required under 23 U.S.C. 150(e). For this reason, FHWA retains section 490.107(a)(1) and 490.107(a)(2) as proposed in the NPRM.

Discussion of Section 490.107(a)(3) Electronic Reporting Template

The FHWA retains the language in section 490.107(a)(3) that states an electronic template, provided by FHWA, will be used for State DOT reporting. Comments from the AASHTO, Connecticut DOT, Iowa DOT, Missouri DOT, New York DOT, Oklahoma DOT, Oregon DOT, PSRC, Texas DOT, and Washington DOT expressed their support for an electronic template. They wanted State DOTs to be included in the development of the product and given time to review and comment on the requirements to ensure it is not an undue burden to report the data.

The FHWA will invite the public to attend demonstrations of the reporting tool and plans to solicit comments on the reporting tool during this

demonstration. The FHWA will consider comments received on the electronic reporting template.

The New York State DOT commented that FHWA should minimize additional requirements by allowing States and MPOs to work within existing processes, to the extent possible, without imposing onerous reporting requirements or requiring significant adjustment to existing legal documentation. The FHWA notes that development of an electronic reporting template is intended to aid in streamlining the reporting process.

Discussion of Section 490.107(b)(1)(i) Baseline Performance Period Report Schedule

The FHWA received comments on the proposal to require submission of the first Baseline Performance Period Report on October 1, 2016, in section 490.107(b)(1)(i). Comments from Washington DOT and Alaska DOT&PF noted that the proposed 2016 due date would not allow the time required by MAP-21 to establish targets. The Seattle DOT noted this as well, but asked that all deadlines be removed and State DOTs be allowed to conduct an extensive comment and revision process without a specific deadline.

The statute established target establishment and reporting deadlines for State DOTs and MPOs. The FHWA cannot change statutory deadlines. Accordingly, because this rule is being issued and effective after October 1, 2016, FHWA issued guidance on the State DOT report due on October 2016 to advise State DOTs how to comply with the statutory deadline for the first performance reporting under 23 U.S.C. 150(e). Please see discussion section for sections 490.105(e)(1) & (f)(1) for more on the FHWA issued guidance. Considering the comments received on this section, and the requirements in sections 490.105(e)(1) and 490.105(f)(1) (requiring establishment of State DOT targets within 1 year of the effective date of each final rule and MPO targets to be established within 180 days of State targets), FHWA amended the implementation timeline in section 490.107(b)(1)(i). The FHWA amended the due date of the first Baseline Performance Period report from October 1, 2016, to October 1, 2018.

With the revision to section 490.107(b)(1)(i), the first Baseline Performance Period Report is now due October 1, 2018, which is a delay of 2 years. Due to this change, the related performance period discussed in section 490.105(e)(4)(i) will also be delayed 2 years and begin on January 1, 2018. State DOTs and MPOs will still be

required to establish targets by the date specified in sections 490.105(e)(1) and 490.105(f)(1). A timeline for Biennial Performance Reports is shown in Figure 1 in section 490.105(e)(1).

Discussion of Section 490.107(b)(1)(ii)(A) and (C) Baseline Performance Period Report Content

The North Dakota DOT commented that the reporting requirements in section 490.107 were too detailed and that the use of the phrase “to the maximum extent practicable” opens the door to an unconstrained demand on State DOTs with possibilities of abuse. They added that documents such as the long-range statewide transportation plan are already required to document the measures, targets, and financial plans.

The FHWA disagrees with the comment from the North Dakota DOT. The FHWA has identified the minimum reporting requirements in section 490.107 needed to establish a performance management program that meets the intent and requirements of MAP-21, and allows for the discussion of performance management at a national level. The FHWA believes a set of minimum reporting requirements are necessary to provide a sufficient level of consistency in the report and the approach to assess progress, so that transportation performance can be presented in a credible manner at a national level. The FHWA also believes that the requirements in section 490.107 provide the public and decisionmakers a better understanding of Federal transportation investment needs and return on investments, thereby increasing accountability and transparency in the performance management process. The FHWA used the phrase “to the maximum extent practicable” in section 490.107(b)(1)(ii)(A) and (C) where State DOTs are required to include discussions for the basis for each established target and their relationship with other performance expectations (in longer range plans, such as the State asset management plan or the long-range statewide transportation plan). The FHWA believes these descriptions are necessary for State DOT justifications to the public and decisionmakers on how their targets are derived. The FHWA reiterates that the statutory language in MAP-21 provides that State DOTs have the ability to establish their own targets but does not provide FHWA the authority to approve or reject State DOT established targets. The FHWA believes more detailed and defensible explanations will benefit the public, decisionmakers, and State DOTs. The FHWA retains the language in

section 490.107(b)(1)(ii)(A) and (C) in the final rule.

Discussion of Section 490.107(b)(1)(ii)(C) and 490.107(b)(2)(ii)(C) Relationship With Other Performance Expectations in Baseline Performance Report and Investment Strategy Discussion in the Mid-Period Performance Report

Sections 490.107(b)(1)(ii)(C) (Relationship with other performance expectations in Baseline Performance Report) and 490.107(b)(2)(ii)(C) (Investment strategy discussion in the Mid-Period Performance Report) outline the requirements to discuss the link between the performance management targets, other plans, and the effectiveness of the investment strategies documented in the State asset management plan. The AASHTO, Alaska DOT&PF, and Connecticut DOT commented that these requirements should be removed as they are “duplicative and excessive reporting requirements,” and open the “door to an unconstrained demand on State DOTs for information and discussion.” They also commented that the existing documents, such as the long-range Statewide transportation plan and STIP, have requirements to document measures, targets, financial plans, and how the projects support program goals. The North Carolina DOT commented that the mid-period discussion of the State asset management plan could be excessive. The North Carolina DOT asked if this discussion is to be a one-time occurrence or occur in each mid-period report.

As discussed above for section 490.107(b)(1)(ii)(A) and (C), FHWA believes minimum reporting requirements are necessary to provide a sufficient level of consistency, in the expectations and approach, to assess progress so that transportation performance can be presented in a credible manner at a national level. The FHWA also believes that the requirements in section 490.107 provide the public and decisionmakers a better understanding of Federal transportation investment needs and return on investments, thereby increasing accountability and transparency in the performance management process. The FHWA does not agree that the items to be reported in the biennial performance reports are duplicative from the State asset management plan, long-range statewide transportation plan, STIP, or others. Although plans and reports support performance management implementation and the performance targets in section 490.105, the biennial performance reports under this rule are

updates of performance information every 2 years, but the long-range statewide transportation plan and STIP are required as part of planning process. Moreover, FHWA believes that it will be very difficult for the public and decisionmakers to obtain performance information by searching through various plans (e.g., State asset management plan, long-range statewide transportation plan, STIP, and others). The FHWA believes that the minimum reporting requirements under section 490.107 will facilitate public access to performance information in a consistent cycle for all State DOTs, thereby increasing accountability and transparency and helping to facilitate the presentation of transportation performance at a national level. Therefore, FHWA retains the language in sections 490.107(b)(1)(ii)(C) and 490.107(b)(2)(ii)(C), as proposed in the NPRM. The reporting requirements are focused on the impacts of performance management. Including this information within the reports from all State DOTs and on the same timeline will aid in the creation of a national performance story.

Discussion of Section 490.107(b)(1)(ii)(D) Urbanized Area Boundaries and Population Data for Targets

The FHWA proposed in section 490.313(b)(1) that thresholds for IRI rating determination (Good, Fair, or Poor) would be different among the pavement sections located within and outside of the urbanized areas with a population greater than 1 million. In the case of urbanized area boundary changes during a performance period, FHWA proposed that State DOTs declare and describe the urbanized area in their Baseline Performance Period Report at the beginning of each performance period so that the IRI rating determinations could be done consistently throughout the performance period. The FHWA revised section 490.107(b)(1)(ii)(D) to remove the term “IRI rating determination” because the thresholds for IRI rating determination are the same regardless of the location of pavement segments. (See sections 490.103(b) and 490.313(b)(1) for further discussion.)

For section 490.107(b)(1)(ii)(D), the Florida DOT requested clarification on the use of the term “applicable urbanized areas” in regards to the NPRM language that states: “. . . State DOTs shall document the boundary extent for all applicable urbanized areas and the latest Decennial Census population data, based on information in HPMS.”

Should a State DOT choose to establish additional urbanized targets, as outlined in section 490.105(e)(3), urbanized boundary information would need to be submitted. The term “applicable urbanized areas” in section 490.107(b)(1)(ii)(D) applies to the urbanized areas for which State DOTs establish optional targets under section 490.107(e)(3). As stated above, the thresholds for IRI rating determinations in section 490.107(b)(1)(ii)(D) are no longer based on the location of pavement sections. Therefore, the urbanized areas with a population greater than 1 million will no longer apply in this paragraph. In the final rule, the term “applicable urbanized areas” in section 490.107(b)(1)(ii)(D) applies only to the urbanized areas for which State DOTs establish optional targets under section 490.105(e)(3).

Discussion of Section 490.107(b)(1)(ii)(E) Deleted Section

The FHWA deleted section 490.107(b)(1)(ii)(E) so State DOTs will not be required to declare or describe NHS limits for the entire performance period. The NHS limits for pavement condition measures will come from the same year's dataset as the pavement condition metric data in HPMS. The NHS designations for bridge condition measures will come from the same year's dataset as the bridge condition metric data in NBI. (See discussion section for section 490.105(d)(3) for more detail.)

Discussion of Section 490.107(b)(2)(i) Schedule

In section 490.107(b)(2)(i), FHWA has delayed the Mid Performance Period Progress Report due date by 2 years from 2018 to 2020. This was done to be consistent with the delayed start to the performance period and Baseline Performance Report, as discussed in section 490.107(b)(1)(i).

Discussion of Section 490.107(b)(2)(ii)(C) and (E) Investment Strategy Discussion and Target Adjustment Discussion

The NEPPP noted that the investment strategy discussion in section 490.107(b)(2)(ii)(C) specifically identifies the State asset management plan for the NHS, while the other reports do not specify the NHS. The NEPPP requested clarification on the Interstate versus NHS in each of the three reports.

In response to the comments, FHWA inserts the phrase “for NHS” after “State asset management plan” in sections 490.107(b)(1)(ii)(C) and 490.107(b)(2)(ii)(E) to clearly indicate that the State asset management plan

under required under 23 U.S.C. 119(e) is applicable to NHS. This revision is consistent with the term “State asset management plan for NHS” in sections 490.107(b)(2)(ii)(C) and 490.107(b)(3)(ii)(C). The measures in subparts C and D are applicable to the NHS. The measures in subpart C assess the condition of pavements on the NHS (which includes the Interstate System and NHS exclusive of the Interstate System). The measures in subpart D assess the condition of bridges carrying the NHS, which includes on- and off-ramps connected to the NHS.

Discussion of Section 490.107(b)(2)(ii)(H) NHPP Target Achievement Discussion

The FHWA amended the language by replacing the phrase “improve . . . condition” with “achieve targets,” when State DOTs describe the actions they will take required under section 490.109(f). The FHWA received a comment, discussed in section 490.109(f)(1) through (3), that the phrase “improve condition” could be perceived as a “worst-first” management practice. As discussed in sections 490.109(f)(1) through (f)(3), this revision was made to be consistent with the statutory language in 23 U.S.C. 119(e)(7).

Discussion of Section 490.107(b)(3)(i) Schedule

The FHWA delayed the report on the full performance period by 2 years, from 2020 to 2022. This was done to be consistent with the delayed start to the performance period and Baseline Performance Report, as discussed in section 490.107(b)(1)(i).

Discussion of Section 490.107(b)(3)(ii)(B) 4-year Progress in Achieving Performance Targets

The FHWA changed the phrase “. . . each established 4-year target in paragraph (b)(1)(ii)(A) or (E) of this section, . . .” to “. . . each 4-year target established in paragraph (b)(1)(ii)(A) or in paragraph (b)(2)(ii)(E) of this section.” This is an editorial change to correct the section reference in the regulatory text.

The AMPO and New Jersey DOT requested clarification on the difference between the reporting requirements in sections 490.107(b)(3)(ii)(B) and 490.107(b)(3)(ii)(E). The differences between the two are that paragraph (B) applies to all targets, including any additional (urbanized and non-urbanized area) targets in section 490.105(e)(3), but paragraph (E) applies only to the statewide NHPP targets subject to significant progress determination outlined in section

490.109. Additionally, paragraph (B) is a qualitative assessment or explanation of any reasons for differences in the actual and target values. Paragraph (E) is a summary of accomplishments (e.g., how implemented investment strategies impacted the actual condition/ performance) of State DOTs in achievement of 4-year targets for the NHPP measures. The FHWA retains sections 490.107(b)(3)(ii)(B) and 490.107(b)(3)(ii)(E) in the final rule.

Discussion of Section 490.107(b)(3)(ii)(G) NHPP Target Achievement Discussion

As discussed in section 490.107(b)(2)(ii)(H), FHWA amended section 490.107(b)(3)(ii)(G) by replacing the phrase “improve . . . condition” with “achieve targets” when State DOTs describe the actions they will take as required under section 490.109(f). (See discussion section for sections 490.107(b)(2)(ii)(H) and 490.109(f)(1) through (3).)

Discussion of Section 490.107(c)(1) MPOs Shall Report Established Targets to State DOT

The FHWA amended the language in section 490.107(c)(1) to remove the requirement to use the metropolitan planning agreement to document how MPOs shall report their established targets to their respective State DOTs. The final rule requires MPOs to report their established targets to State DOTs in a manner that is documented and mutually agreed upon by both parties.

The Mid-America Regional Council expressed support for the language in the NPRM that required the method for reporting targets be documented in the metropolitan planning agreement. However, AMPO, ARC, COMPASS, NARC, NYSDOT, NYMTC, NYSAMPO, and TEMPO objected to the proposed documentation requirement as it would require the metropolitan planning agreement to be updated. The Transportation for America's commented that “States should form an agreed to process with all MPOs within the State.”

23 CFR 450.314(h) of the final Planning Rule provides State DOTs and MPOs options for mutually identifying the agency roles and responsibilities for performance-based planning and programming in metropolitan areas in writing, either through the metropolitan planning agreements or by some other mutually determined means. To address the received comments above and to ensure consistency between this final rule and the final Planning Rule, FHWA has removed references to the

metropolitan planning agreement from this Rule.

The Connecticut DOT and NYMTC commented that States and MPOs should have maximum flexibility and discretion in target setting. As stated in discussion for section 490.105(a), MAP-21 does not provide FHWA the authority to approve or reject State DOT or MPO established targets. The FHWA reiterates that this rule does not hinder the ability of State DOTs and MPOs to establish targets that have performance holding steady or declining.

The Memphis Urban Area MPO requested clarification on the frequency and method of reporting data to State DOTs. The FHWA did not specify a required MPO reporting process in this rule. Please refer to the 23 CFR 450.324 for the requirements for MPO system performance report in the metropolitan transportation plan.

Discussion of Section 490.107(c)(2) MPO System Performance Report

The FHWA retains the language in section 490.107(c)(2) that requires MPOs to report baseline condition/performance and progress toward the achievement of their targets in the system performance report for the metropolitan transportation plan (MTP), in accordance with part 450 of this chapter and as provided in 23 U.S.C. 134(i)(2)(c). The Mid-America Regional Council expressed their support for this requirement.

The IOWA DOT, NYMTC, and NYSAMPO asked for clarification on the timing of the initial Metropolitan Transportation Plan System Performance Report, given the variability of MTP adoption schedules. The inquiries related to the MTP are outside of the scope of this rule. Those inquiries should refer to the Planning final rule.

The Iowa DOT expressed concerns with submitting the system performance report with the Long Range Transportation Plan (LRTP), which is required every 4–5 years (depending on air quality in the MPO). The Iowa DOT asked how that will line up with the 2-year reporting periods outlined in the NPRM. The Iowa DOT also commented that the NPRM sets specific dates for implementing the performance measure reporting, which may or may not align with LRTP update cycles for individual MPO agencies. The NYSAMPO commented that it is important to coordinate all of the reporting and target setting timelines for each of the performance measure rules so that State DOTs and MPOs are not burdened with numerous reporting schedules that are out of synch with one another.

Transportation for America echoed these concerns, and suggested that FHWA “ensure the performance period being proposed syncs up with the plan update cycles for State DOTs and MPOs.” The AMPO and COMPASS advised FHWA to have MPOs align their performance periods to their LRTP cycle. The TEMPO stated that each MPO should set its own individual target setting and biennial reporting timelines. The AMPO requested clarification on whether MPOs would be required to report on the same timelines as State DOTs.

It is true that the performance period and individual MPO planning cycles may not coincide, but there is no requirement that they do. At the time of MTP adoption (LRTP or MTP), the MPO would include what information it had in its system performance report and expand on the information with the next report update. In addition, MPOs can choose to adopt their MTPS before the 4–5 year requirement, and more closely align their planning cycle and the performance period cycle.

The Iowa DOT requested more detail on what will be required to report in their system performance report. The regulatory requirements of the system performance report are provided in 23 CFR part 450.³⁸ The inquiries related to the system performance report are outside of the scope of this rule. Those inquiries should refer to the Planning final rule.

Section 490.109 Assessing Significant Progress Toward Achieving the Performance Targets for the National Highway Performance Program

Discussion of 490.109(a) General

The FHWA retains the language in section 490.109(a) which makes State DOTs accountable for making progress for all pavements and bridges on the NHS regardless of ownership. The FHWA made minor clerical edits to clarify the cross-references. The AASHTO recommended that non-State DOT assets (e.g., assets owned by the Federal government, tribal governments, local agencies, and others) be excluded from the significant progress determination under section 490.109. The AASHTO and State DOTs of Connecticut, Maine, New Hampshire, Vermont, and Washington argued that State DOTs may not be legally able to collect data on non-State DOT assets and may have no authority to control how funding on those assets is spent or assets are maintained. As discussed in

section 490.105(d), FHWA is aware of a limit to the direct impact that State DOTs can have on performance outcomes for the non-State controlled assets within the State. However, as the recipients and stewards of the NHPP funds for the NHS in respective State DOTs, FHWA expects that State DOTs would consider the uncertainty and associated performance outcome of the non-State owned assets. The FHWA expects State DOTs to coordinate with the appropriate owners of the non-State controlled NHS assets in the establishment of State DOT targets.

Both the Alaska DOT&PF and the Oregon DOT suggested alternatives to the term significant progress and its definition. The Alaska DOT&PF commented that the term be redefined to mean “meet or exceed the ½ target” or the term should be removed from the rule entirely. The Oregon DOT suggested that the term significant progress be revised to “adequate” progress. However, FHWA retains the term “significant progress” in the final rule because the term is referenced in the statute (23 U.S.C. 119(e)(7)).

Discussion of 490.109(b) Frequency

Section 490.109(b) specifies the frequency for FHWA to determine whether a State DOT has or has not made significant progress toward the achievement of NHPP targets to be every 2 years (i.e., at the midpoint and the end of each performance period) which aligns with State DOT Biennial Performance Reports in 490.107. In the NPRM, FHWA stated that it expects that during a performance period, State DOTs would routinely monitor leading indicators (e.g., program delivery status) to assess if they are on track to make significant progress toward achievement of their NHPP targets. If a State DOT anticipates that it may not make significant progress, it is encouraged to work with FHWA and seek technical assistance during the performance period to identify the actions that can be taken to improve progress.

In the NPRM, FHWA sought comment on whether it should require State DOTs to more frequently (e.g., annually) evaluate and report the progress they have made. The Tennessee DOT supported the 2-year cycle of significant progress determinations and added that “annual reporting would be unlikely to show significant differences in results than biennial reporting.” The Missouri DOT commented that State DOTs will have the ability to report data annually. The data should be updated in HPMS and NBI systems, but State DOTs should not be asked to submit a progress report on an annual basis. The AASHTO and

³⁸ Statewide and Nonmetropolitan Transportation Planning: Metropolitan Transportation Planning (FR Vol. 81, No. 103).

Connecticut State DOT opposed more frequent reporting and determinations.

The FHWA clarifies that FHWA did not seek comments on the frequency of FHWA significant progress determination (*i.e.*, every 2 years). Instead, FHWA requested comments on whether or not State DOTs should evaluate their condition/performance and report the progress they have made more frequently than every 2 years. Through more frequent condition/performance evaluation, State DOTs would more frequently monitor their condition/performance and have the opportunity to proactively take necessary actions make significant progress toward achievement of the NHPP targets. The FHWA appreciates the comments, but retains the biennial frequency of progress reporting in § 490.107. The FHWA strongly encourages State DOTs to routinely monitor their condition/performance so they can proactively take actions necessary to make significant progress toward achievement of the NHPP targets.

Discussion of § 490.109(c) Schedule

The FHWA retains the language in section 490.109(c) which says FHWA will determine significant progress toward the achievement of a State DOT's NHPP targets after the State DOT submits the Mid Performance Period Progress Report for progress toward the achievement of 2-year targets, and again after the Full Performance Period Progress Report for progress toward the achievement of 4-year targets.

The Missouri and Tennessee DOTs expressed support for the proposed timeline, noting that the necessary data is submitted annually and therefore FHWA is able to complete their assessment with the frequency they deem necessary.

The Oregon DOT requested clarification on who at FHWA will perform the assessment of significant progress.

The AASHTO and the Oregon and Connecticut DOTs recommend that FHWA inform State DOTs of their achievement of making significant progress by December 31 of the calendar year in which the assessment was made. They also recommended that the rule provide that if a State DOT does not receive that information by the deadline, then it is conclusively deemed to have made significant progress in that time period. North Carolina DOT also commented that notification should be as soon as possible.

The FHWA is committed to a timely notification of significant progress determination results to State DOTs so

they can take prompt actions, as described in section 490.109(f). The FHWA is also committed to a timely publication of determination results on the public Web site to meet the demands of the public and Congress. The FHWA clarifies that prior to its determination, State DOTs are required to report actual condition/performance in their Mid Performance Period Progress Report and Full Performance Period Progress Report, as provided in sections 490.107(b)(2)(ii)(A) and 490.107(b)(3)(ii)(A). The FHWA also clarifies that the reported actual condition/performance in sections 490.107(b)(2)(ii)(A) and 490.107(b)(3)(ii)(A) are not a qualitative assessment of performance, but they are quantitative values (*i.e.*, calculated measures). The qualitative assessment of performance is required under sections 490.107(b)(2)(ii)(B) and 490.107(b)(3)(ii)(B). With quality HPMS and NBI data from State DOTs, FHWA believes that State DOT reported condition/performance will be no different from FHWA calculated condition/performance in significant progress determination in section 490.109.

State DOTs are also required to discuss the progress they have made toward the achievement of all targets established for the NHPP measures, as described in sections 490.107(b)(2)(ii)(F) and 490.107(b)(3)(ii)(E), in the Mid Performance Period and Full Performance Period Progress Reports. The FHWA believes that through these requirements, State DOTs will be well aware of whether they will make significant progress prior to FHWA determination notification. Therefore, FHWA retains the language in section 490.109(c), as proposed in the NPRM. The FHWA plans to issue guidance clarifying when the determination notification to State DOTs will be made after publication of the final rule.

The North Carolina DOT requested clarification on whether States that failed to achieve significant progress would be able to adjust their targets. Failure to achieve significant progress does not trigger the opportunity or requirement to adjust targets. The State DOTs have the opportunity to establish or adjust targets every 2 years, as provided in sections 490.105(e)(4)(i) and (e)(4)(ii) and 490.105(e)(6), respectively. The process used by FHWA to determine significant progress is transparent. As discussed in section 490.105(e)(6), FHWA believes if targets are allowed to be adjusted more frequently, then the transparency of target and target establishment process will be compromised. The FHWA

strongly encourages State DOTs to track their significant progress on their own, and adjust targets in their Mid Performance Period Progress Report as they deem necessary.

Discussion of 490.109(d)(1) Through (d)(3) Source of Data/Information

In sections 490.109(d)(1) through (d)(3), FHWA proposed data extraction dates for the significant progress determination for NHPP measures. The proposed data extraction dates were:

- June 15 of the year in which the significant progress determination is made for the Interstate System pavement condition measures;
- August 15 of the year in which the significant progress determination is made for the non-Interstate NHS pavement condition measures; and
- June 15 of the year in which the significant progress determination is made for the NHS bridge condition measures.

The Oregon DOT requested a wording change from “prior year” to “most recent data collected” in sections 490.109(d)(1) and (d)(2). The commenter noted that the term “prior year” indicates that data has to be collected in the 2nd and 4th years for the non-Interstate NHS sections. They asked what if a State wants to collect this data in years 1 and 3 of the performance period. The commenter stated that the wording should be changed to allow States to use the most recent data collected as this gives the States flexibility in selecting data collection cycles to match other processes, such as STIP development, within the State.

The FHWA clarifies that the data collection frequency requirement for non-Interstate NHS pavement data is every 2 years, as described in section 490.309(b)(2). So, in this rule, there is no requirement for State DOTs to collect their pavement condition data for the entire non-Interstate NHS within a particular year. The FHWA also clarifies that biennial data collection frequency for non-Interstate NHS requires annual data reporting to HPMS making the most recent data collected replacing the data from previous data collection cycle. So, if a State DOT chooses to collect pavement data for the entire non-Interstate NHS in the first year of a performance period and collect data again for the entire non-Interstate NHS in the third year of that performance period, that State DOT will meet the requirements in section 490.309(b)(2). The FHWA believes that this approach will not hinder State DOTs from selecting their data collection cycles to match other processes. Please note that annual pavement data collection

frequency is required for the Interstate System, as described in section 490.309(b)(1). Because of the provided explanation, FHWA believes the term “prior year” is more appropriate in sections 490.109(d)(1) and (d)(2) because the term refers to the “most recent data collected and reported” in HPMS. Therefore, FHWA retains the language in sections 490.109(d)(1) and (d)(2), as proposed in the NPRM.

The FHWA did not receive any substantive comments regarding these data extraction dates but received substantive comments on the proposed data reporting dates for both pavement and bridge condition measures. Please refer to sections 490.311(c)(4) and (c)(5) and 490.411(d) for discussion of those comments. As discussed in sections 490.311(c)(4) and (c)(5) and 490.411(d), FHWA adopts the language in sections 490.109(d)(1) through (d)(3) in the final rule.

Discussion of 490.109(d)(4) Baseline Condition Data

The FHWA revised section 490.109(d)(4) so that the NHS limits for significant progress determination for pavement condition measures will come from the same year’s dataset as the pavement condition metric data in HPMS. The NHS designations for the significant progress determination for the bridge condition measures will come from the same year’s dataset as the bridge condition metric data in NBI. Similarly, the NHS information for the baseline conditions for significant progress determination of the targets for the pavement and bridge condition measures will come from the data contained in HPMS and NBI of the year in which the Baseline Period Performance Report is due to FHWA. (See discussion sections for 490.105(d)(3), and 490.107(b)(1)(ii)(E) for more detail.)

In addition, sections 490.313(b)(1) and (b)(2) are revised so that IRI condition ratings of Good, Fair, and Poor will no longer depend on whether a pavement section is within an urbanized area with a population greater than 1 million. Therefore, urbanized area data for significant progress determinations of pavement condition targets is no longer necessary. (See discussion sections for 490.313(b)(1) for more detail.)

Discussion of 490.109(e)(1) General Discussion of Significant Progress Determination for Individual NHPP Targets

The FHWA revised the language in section 490.109(e)(1) to correct a typographical error and replaced the

word “and” with “through.” The final rule reads “. . . established by the State DOT for the NHPP measures described in 490.109(c)(1) through (c)(3).” This error was noted by AASHTO and the Connecticut and Virginia DOTs.

The AASHTO and Connecticut DOT commented that significant progress should only be determined based on the required targets in section 490.105(d)(1), not any additional targets State DOTs have voluntarily chosen to establish in section 490.105(e)(3). The language in section 490.109(e)(1) of the NPRM and final Rule is consistent with this. Section 490.109(e)(1) specifically says that FHWA will not assess the progress achieved for any additional targets a State DOT may establish under section 490.105(e)(3). No change to the final rule is required.

Discussion of 490.109(e)(2) Significant Progress Toward Individual NHPP Targets

The FHWA retains the language in section 490.109(e)(2), which states that for each NHPP target, progress toward the achievement of the target would be considered significant when either of the following occur: (1) The actual condition/performance level is equal to or better than State DOT Baseline Performance Period Report; or (2) actual condition/performance is equal to or better than the established target. To make the comparisons in a consistent manner, the language in sections 490.313(f) and 490.409(c) includes the precision level (*i.e.*, decimal places) for the measures, which is to be calculated to the one tenth of a percent (0.1 percent). The Colorado DOT expressed their support for the 0.1 percent achievement threshold.

In the first performance measures NPRM, which addresses safety, FHWA proposed in section 490.211 of the NPRM a statistical evaluation approach for determining significant progress. Comments received on the Safety NPRM indicated that it was too complicated and seemed arbitrary. In the Final Rule for safety performance measures, FHWA changed its approach from statistical evaluation to improvement over baseline. Therefore, in this final rule, FHWA is retaining the determination methodology proposed.

The following summarizes the comments on the proposed methodology for determining significant progress. In regard to the proposed significant progress methodology, the comments from AASHTO said that “the approach must be retained in the final rule.” They also added that the approach would “give State DOTs flexibility to establish aggressive targets

if desired but will not result in States being punished if they do not meet those targets.” Missouri DOT also supports the approach as “straightforward and easy to determine.” Oregon DOT voiced their support by indicating that it is “reasonable and accommodates both increasing and decreasing pavement conditions.” Minnesota DOT expressed their support, stating that it would allow States to establish declining targets, but still achieve significant progress.

While many State DOTs did not specifically mention their support, they indicated their general support for the AASHTO’s letter in support of the proposed approach. These State DOTs included Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Maryland, Michigan, Missouri, Montana, New Jersey, North Dakota, Pennsylvania, South Dakota, and Wyoming. The support of the proposed approach was also expressed by the Metropolitan Transportation Commission and the Mid-America Regional Council.

However, some commenters expressed disagreement with FHWA’s proposed method for determining significant progress. Washington DOT and the PSRC commented that “significant change” should be based on a statistical evaluation of the data submitted by the State DOT and suggested use of the standard deviation of the data to determine the level of significance. The FHWA considered some statistical methods for significant progress determination approach during the time of preparing the NPRM. However, this option was determined to be unfeasible because the magnitude of “statistically significant change” in condition/performance would have to be an arbitrarily selected significance level. Without an established target value, determining the magnitude of “statistically significant change” was not possible. In addition, in the final rule for safety performance measures, FHWA changed its approach from statistical evaluation to improvement over baseline after receiving comments that the statistical methods were “too complex and difficult.”

The AASHTO and the Connecticut and Iowa DOTs stated that the use of 0.1 percent was arbitrary. In the discussion of section 490.109 of the NPRM, FHWA found that any improvement better than the baseline condition/performance, which represents a 0.1 percent improvement, would be viewed as significant progress. Although the AASHTO supported the proposed approach for determining significant progress, they argued that 0.1 percent improvement above the baseline “seems

arbitrary with no basis.” The Connecticut, Iowa, and Washington DOTs made similar comments as well. Oregon DOT cited that 0.1 percent of Oregon’s Interstate System equates to 1.5 miles for Oregon and argued that the 0.1 percent tolerance is too “tight.” They suggested 0.5 or 1 percent tolerance.

Illinois DOT requested clarification on how “significant progress” is defined, asking whether it is any improvement made toward the target, a measure of a partial percentage point, or something else.

As stated above, the proposed approach for determining significant progress is based on comparison between: (1) Target and the actual condition/performance and (2) baseline condition/performance and the actual condition/performance. To make the comparisons in a consistent manner, the language in sections 490.313(f) and 490.409(c) included precision level (*i.e.*, decimal places) of the measures, which is to be calculated to the one tenth of a percent. By specifying precision levels for the measures, FHWA believes the comparisons in significant progress determinations would be done in a consistent manner. The FHWA understands decimal places of measures could be translated to a tolerance level in making significant progress, as Oregon DOT’s example indicated. However, FHWA believes a larger tolerance level with less precision level could work against State DOTs. For example, with a 1 percent tolerance (*i.e.*, measures round to the nearest to 1 whole percent), if a State DOT actually made 0.1 percent improvement above the baseline condition/performance, it would not be considered significant progress because the 0.1 percent would be rounded down and the condition/performance level would be considered as equal to the baseline condition/performance. Therefore, FHWA retains the proposed language.

The Center for American Progress and Transportation for America stated that 2-year target establishment and significant progress determinations should be required for MPOs. They argued that accountability requirements should be the same for State DOTs and MPOs. In 23 U.S.C. 119(e)(7), biennial significant progress determinations under section 490.109 only apply to State DOT NHPP targets. There is nothing in the statute that requires a similar assessment with similar consequences for MPOs. Therefore, FHWA does not have the statutory authority to make significant progress determination on MPO targets.

The TEMPO recommended expanding section 490.109(e)(2) to allow FHWA Division Administrators to determine significant progress. As stated in section 490.109(a), FHWA will assess each State DOT target for the NHPP measure to determine the significant progress made toward its achievement with the method prescribed in section 490.109. The FHWA believes the method outlined in section 490.109 provides a fair and consistent process to determine compliance across State DOTs. Although FHWA Division Offices will notify State DOTs with the results of the significant progress determination, FHWA clarifies that no one individual in FHWA will make the significant progress determination at his or her discretion. Following the publication of the final rule, FHWA will publish guidance on the timing of significant progress determinations and notifications. Therefore, FHWA retains the language in section 490.109(e)(2), as proposed in the NPRM.

Discussion of 490.109(e)(3) Phase-In of New Requirements for Interstate System Pavement Condition Measures

The FHWA proposed a phase-in of new requirements for Interstate pavement condition measures. Only at the midpoint of the first performance period and only for the targets for Interstate System pavement condition measures in section 490.307(a)(1) and (a)(2), FHWA would not make a determination of significant progress toward the achievement of 2-year targets for these measures. The FHWA received comments related to the phase-in of Interstate System pavement condition measures in section 490.105(e)(7), but no direct comments on the phase-in proposed in section 490.109(e)(3).

Since these measures are being phased-in, FHWA will not determine significant progress until after the measures are established and the State DOTs have had time to complete a biennial reporting cycle. As discussed in section 490.105(e)(7), FHWA retains the language in section 490.105(e)(7)(ii) that for the first performance period only, State DOTs are not required to report their 2-year targets and baseline condition/performance for the Interstate pavement condition measures in their Baseline Performance Period Report. Accordingly, FHWA will classify the assessment of progress toward the achievement of targets for the Interstate pavement condition measures as “progress not determined” at the 2-year significant progress determination. The FHWA retains the language in section 490.109(e)(3) as proposed in the NPRM.

(See discussion for section 490.105(e)(7) for more details.)

Discussion of § 490.109(e)(4)

Insufficient Data and/or Information

The FHWA proposed that if a State DOT does not provide sufficient data or information necessary for FHWA to make significant progress determination for each bridge or pavement condition target, FHWA would determine that the State DOT has not made significant progress toward the achievement of the applicable individual targets.

The State DOTs of Connecticut, Oklahoma, and Oregon requested that the phrase “does not provide sufficient data and/or information” be clarified.

In response to these comments, FHWA revised section 490.109(e)(4). The revised text in section 490.109(e)(4)(i) specifies that all measures must meet the reporting requirements in section 490.107. If a State DOT does not submit a required report, targets, or other information as specified in section 490.107, then FHWA will determine that the State DOT has not made significant progress toward the achievement of NHPP target.

Section 490.109(e)(4)(ii) specifies if FHWA determines that a total mainline lane-miles of missing, invalid, or unresolved sections for Interstate System is 5 percent or more, as described in section 490.313(b)(4)(i), then FHWA will determine that the State DOT has not made significant progress toward the achievement of targets for the Interstate System pavement condition measures in section 490.105(c)(1).

Section 490.109(e)(4)(iii) specifies if FHWA determines that a total mainline lane-miles of missing, invalid, or unresolved sections for non-Interstate NHS is 5 percent or more, as described in section 490.313(b)(4)(i), then FHWA will determine that the State DOT has not made significant progress toward the achievement of targets for the non-Interstate NHS pavement condition measures in section 490.105(c)(2). (See discussion for section 490.313(b)(4) for further discussion and information on the revisions to this section.)

Section 490.109(e)(4)(iv) specifies that for the NHS bridge condition measures in section 490.105(c)(3), if a State DOT’s reported data is not cleared in the NBI as of June 15, then FHWA will determine that the State DOT has not made significant progress toward the achievement of targets for the bridge condition measures in section 490.105(c)(3).

As stated above in section 490.109(e)(2), the approach for determining significant progress is

based on comparison between: (1) Target and the actual condition/performance and (2) baseline condition/performance and the actual condition/performance. Section 490.109(e)(4)(v) provides an approach for determining significant progress when reported data for baseline condition/performance is determined “insufficient” in the year in which the Baseline Performance Period Report is due to FHWA. If the data for baseline condition/performance is determined insufficient, the comparison between the baseline condition/performance and the actual condition/performance cannot be made. In this situation, FHWA will make the significant progress determination for that measure by comparing the target to the actual condition/performance. The FHWA will determine that a State DOT has not made significant progress toward the achievement of a target if data for the baseline condition/performance was determined insufficient previously, and the actual condition/performance level is not equal to or better than the established target.

Discussion of § 490.109(e)(5)(i) Extenuating Circumstances

The FHWA amended the language for section 490.109(e)(5)(i) related to the list of extenuating circumstances that may prevent a State DOT from making significant progress. In the final rule, FHWA added language to clarify that extenuating circumstances include the sudden discontinuation of Federally furnished data due to a lack of Federal funding. This text was added to clarify that the lack of funding is not a stand-alone reason, but it is tied to the data access associated with target establishment and evaluation.

The list of extenuating circumstances details issues that could be considered outside of State DOTs ability to make significant progress toward achieving targets. If a State DOT encounters these extenuating circumstances, State DOTs would document the explanation in their performance progress report. If the explanation is accepted by FHWA, then the associated NHPP targets would be excluded from FHWA significant progress determinations. Comments from a private citizen³⁹ supported FHWA’s proposal.

The AASHTO comment letter suggested adding the following additional extenuating circumstances: (1) Lack of Federal funding through a long-term surface transportation program; (2) Cost inflation beyond

assumed levels; and (3) another cause reported by the State not covered under the previous circumstances. The Connecticut DOT made identical comments. The California DOT commented that the situations considered extenuating circumstances are too narrow. They suggested broader circumstances to include fiscal limitations and project delivery constraints. The Illinois DOT recommended that the rule account for the uncertain funding impacts by explicitly recognizing how this might inhibit the achievement of targets for significant progress requirements and determinations in section 490.109. The Colorado and Washington DOTs sought clarification on whether a lack of funding would be considered an extenuating circumstance that would result in a finding of “progress not determined” by FHWA. The Minnesota and North Carolina DOTs commented that budget uncertainties could result in a lack of funding and should be an extenuating circumstance. The Colorado DOT requested clarification on whether a sudden, unforeseen reduction in Federal funding would be considered an extenuating circumstance. The Oregon DOT commented that the discussion of proposed extenuating circumstances covers a range of possible circumstances, but it is also limited to those specifically listed in the rule. The Oregon DOT suggested including some language to allow States to describe circumstances not on the list. They added that there could be situations not yet thought of that should be open for consideration. The Tennessee DOT proposed that the significant progress determinations account for decreases in anticipated Federal funding, inflation above expected rates, or other unforeseeable reasons. The Washington DOT commented that FHWA should consider extenuating circumstances documented by a State DOT in the assessment of progress toward the achievement of NHPP targets in the relevant State Biennial Performance Report.

The majority of the above comments wanted to add financial uncertainty to the list of extenuating circumstances. As noted in the NPRM, FHWA understands that there are many external factors that could impact the condition/performance and the State DOT’s ability to make significant progress, including financial uncertainty. However, FHWA believes that the frequency of target establishment, and the ability to adjust 4-year targets at the mid-point of a performance period creates a relatively short forecast window that should allow

State DOTs to consider the impacts of funding shortfalls and uncertainty (*e.g.*, lack of funding for investment, cost escalation, and others) in initial targets and any subsequent adjustments. As discussed in section 490.105(e)(6), the State Biennial Performance Report has the appearance that State DOTs must consider uncertainties 2 years in advance. In truth, the duration that State DOTs have to consider uncertainties is shorter than 2 years. For example, the 2-year target established in 2018 is not actually submitted until October 2018 when the first State Biennial Performance Report is due. Therefore, while it reflects a 2-year period (2018 and 2019), it is in place for less than 2 years (*i.e.*, October 2018 to December 2019). (See discussion section for section 490.105(e)(6) for additional details of the timing of reports and the impact on targets.) The FHWA does not intend to use the significant progress determination process to be punitive or to lead State DOTs to simply establish easy targets. The FHWA believes one purpose of establishing targets and assessing progress is to encourage State DOTs and MPOs to establish data-supported targets that consider anticipated resources and potential uncertainties. Establishing targets and assessing progress also encourage State DOTs to provide data-supported explanations of condition/performance changes. If a State DOT did not make significant progress because of the absence of a long-term surface transportation program, unanticipated cost escalation, and other reasons, FHWA expects that State DOT would provide data-supported explanations for not achieving significant progress.

The FHWA strongly believes transportation performance management is not just about making significant progress. It is also about effectively communicating to Congress and the public how the absence of a long-term surface transportation program, unanticipated cost escalation, and other circumstances are impacting the condition/performance of the transportation infrastructure. Moreover, FHWA believes the determination process must be meaningful and bring accountability to the program as MAP-21 and FAST Act intended. Therefore, FHWA believes that adding more circumstances to exclude State DOTs from the determination will decrease the level of accountability. For these reasons, FHWA is keeping the list of extenuating circumstances short. The FHWA modified the language in section 490.109(e)(5) only to include the

³⁹ Nicholas Cazares, Docket Letter FHWA–2013–0053–0078.

discontinuation of Federally furnished data due to a lack of Federal funding.

In section 490.109(e)(5)(ii), FHWA proposed to accept a State DOT's explanation if it pertains to the extenuating circumstances listed in section 490.109(e)(5)(i). The FHWA would classify the progress toward achieving the relevant NHPP targets as "progress not determined," and those targets will be excluded from the determination. The FHWA did not receive any substantive comments regarding this paragraph. Therefore, FHWA retains the language in section 490.109(e)(5)(ii) in the final rule.

Discussion of § 490.109(f) Performance Achievement Requirements

The AASHTO, Oregon DOT, and a private citizen⁴⁰ support basing performance achievement on two consecutive FHWA determinations. This provides State DOTs some opportunity to improve their performance before being assessed the penalty. The ASCE took the opposite view and argued that if a State DOT did not make significant progress after two consecutive reviews, intervention by the DOT should be immediate. They argued that the proposed timeline for penalties did not represent the type of speedy accountability that the public expects and that it will benefit our transportation system. Section 119(e)(7) of Title 23 of the U.S.C. required States to describe the actions they will take to achieve targets after they fail to achieve significant progress on two consecutive determinations. Subsequently, FAST Act removed the phrase "two consecutive" in 23 U.S.C. 119(e)(7) and added that the description of actions will be included in the biennial performance report under 23 U.S.C. 150(e). Pursuant to 23 U.S.C. 119(e)(7), FHWA amended section 490.109(f) so that State DOTs are required to describe the actions they will take to achieve targets after they fail to achieve significant progress for each FHWA biennial determination. The FHWA believes this required change in section 490.109(f) will ensure the accountability ASCE urged in their comment.

The Southeast Pavement Preservation Partnership commented that the short time horizon given to recognize improvement in the pavement network may force States into a "worst-first" mentality for the preservation of pavements. The FHWA agrees that indiscriminately attempting to improve condition could lead to a "worst-first" mentality. The FHWA also realizes that

the proposed language in section 490.109(f) is inconsistent with the principle of "Recognize Fiscal Constraints"⁴¹ in the NPRM preamble. In addition, FHWA emphasizes that, as discussed in section 490.105, State DOTs and MPOs have the authority to establish their targets at their discretion. The MAP-21 does not provide FHWA the authority to approve or reject State DOT or MPO established targets.

Therefore, FHWA amended section 490.109(f)(1) through (f)(3) by replacing the phrase "improve . . . condition" with "achieve targets" to be consistent with the nine principles and 23 U.S.C. 119(e)(7). Similarly, in section 490.109(f)(6), FHWA replaces the phrase "improve progress" with "achieve targets" to be consistent with the statutory language in 23 U.S.C. 119(e)(7).

Discussion of Section 490.111 Incorporation by Reference

The FHWA proposed to incorporate by reference several items. First, FHWA proposed to incorporate the HPMS Field Manual to codify the data requirements for measures, as discussed throughout part 490, and to be consistent with the HPMS reporting requirements. Second, FHWA also proposed to incorporate by reference the Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges (NBI Coding Guide), which contains all of the NBI items listed in subpart D. Finally, FHWA proposed to incorporate by reference five permanent AASHTO Standards (M328-14, R36-13, R43-13, R48-10, R57-14) and three provisional AASHTO Standards (PP68-14, PP69-10, PP70-10) to codify the methods and devices used to collect data for the metrics (*i.e.*, IRI, Cracking Percent, rutting, and faulting). The FHWA proposed specific versions of each item in the NPRM with an understanding that future changes to the HPMS Field Manual, NBI Coding Guide, and AASHTO Standards will be subject to **Federal Register** notices. Because of the incorporation by reference, FHWA had posted the Proposed HPMS Field Manual 2015 for 2nd Performance Measure NPRM,⁴² the 10 proposed

AASHTO Standards, and the NBI Coding Guide on the docket.

The Mid-America Regional Council expressed general support for the incorporation by reference of the proposed documents, stating "the use of widely accepted standards and calculation methods will facilitate the establishment of targets and monitoring of progress toward their achievement." The FHWA agrees and appreciates the comment.

The Alabama DOT recommended that FHWA consider adding AASHTO R56-10 (Standard Practice for Certification of Inertial Profiling Systems) in the final rule. The FHWA appreciates the need for certification of the Inertial Profiling Systems used in the HPMS data collection and included a requirement for equipment certification as part of the Data Quality Management Program in section 490.319(c). It is expected that State DOTs would specify AASHTO R56 or an equivalent standard as their method for equipment certification in the State Data Quality Management Program.

The AASHTO, Alaska DOT&PF, and Connecticut DOT recommended modifying the wording of the proposed rule "so that any proposed changes to items (b)(1) or (b)(2) would be subject to public notice and comment by State DOTs and other affected parties".⁴³ The FHWA agrees that any updated versions of the HPMS Field Manual and the AASHTO Standards will not be incorporated by reference without public notice and comment.

The AASHTO and the State DOTs of Connecticut, Florida, Mississippi, North Dakota, Iowa, and Oregon commented that AASHTO standards are developed in a voluntary manner and are used by State DOTs in a voluntary manner. Commenters noted that incorporating these standards into a Federal rulemaking is not their intended use and could cause unintended consequences. The FHWA recognizes the voluntary process used to develop AASHTO Standards and appreciates the efforts of State DOTs in creating them. However, the five permanent AASHTO Standards incorporated by reference in section 490.111 of this final rule contain well-known protocols for data collection, equipment requirements, and data compilation. These protocols are useful in determining pavement performance. Since these standards have been balloted and approved by a

www.regulations.gov/#/documentDetail;D=FHWA-2013-0053-0050.

⁴³ State DOTs of Alaska, Connecticut, Idaho, Montana, North Dakota, Oklahoma, Oregon, South Dakota, and Wyoming.

⁴⁰ Nicholas Cazares Docket Letter FHWA-2013-0053-0078.

⁴¹ Nine principles used in the development of proposed regulations for national performance management measures under 23 U.S.C. 150(c), www.regulations.gov, Docket FHWA-2013-0053 "Recognize Fiscal Constraints"—provide for an approach that encourages the optimal investment of Federal funds to maximize performance but recognize that, when operating with scarce resources, performance cannot always be improved.

⁴² Proposed HPMS Field Manual 2015 for 2nd Performance Measure NPRM: Docket Document FHWA-2013-0053-0050: <http://www.regulations.gov/#/documentDetail;D=FHWA-2013-0053-0050>.

majority of State DOTs, it is preferable that State DOTs use the appropriate parts of these standards to guide quality data collection, even though additional calculations may be needed to meet the reporting requirements for the HPMS Field Manual.

The AASHTO and the State DOTs of Connecticut, Iowa, Minnesota, Missouri, and North Dakota recommended that FHWA “develop a mechanism . . . to ensure that the most recent version of AASHTO standards is used or not used as appropriate.” Similarly, Oregon DOT recommended that FHWA provide States with some flexibility in which versions of AASHTO Standards they use. The Oregon DOT recommended that instead of directly referencing specific standards the final rule, FHWA should provide separate guidance for this information.

The FHWA appreciates the desire for flexibility in application of standards and the latest versions. However, Federal law requires a formal comment and review process for any modification of a document incorporated by reference in a rulemaking. The FHWA may undertake this process in the future, but there is no mechanism to automatically ensure that the latest versions of AASHTO Standards be used. The final rule retains the language in section 490.111(b).

The TEMPO, Oregon DOT, and Texas DOT expressed concern over FHWA’s proposal to use provisional AASHTO Standards that will be refined following completion of an ongoing study on cracking and rutting measurements. When provisional standards become full standards, changes may occur in the reported data, causing inconsistencies from previously reported data. The FHWA agrees with the commenters, and removed references to provisional AASHTO standards PP67, PP68, PP69, and PP70 to ensure consistency in reporting. Specific guidance on data collection and reporting for the topics covered by these provisional standards has been added to the HPMS Field Manual, which is posted on the docket. (See discussion section for section 490.309 for more details.)

In addition, the Center for Auto Safety, PSRC, and *Public Resource.org* expressed concern over the availability of the documents incorporated by reference. The PSRC commented that “section 490.111 lists AASHTO Standard Specifications that States must follow when collecting and calculating pavement distress; however, these specifications are not freely available. Please consider providing access to the AASHTO standards for pavement data collection as a component of MAP–21

implementation.” In a joint letter, the Center of Auto Safety and *PublicResource.org* expressed concern that the AASHTO standards incorporated by reference were not freely available to the public.

While FHWA acknowledges that the proposed AASHTO Standards are available for purchase on the AASHTO Web site, they were posted on the docket for review by the public. Furthermore, AASHTO provides copies of all Standards to State DOTs without charge. Therefore, FHWA retains the language as proposed.

The Louisiana DOT commented that the final rule should specify that those documents incorporated by reference are “revised to all English units of measure to be consistent and to eliminate the numerous metric to English conversion rounding issue.” The HPMS Field Manual that is incorporated in the final rule indicates that English units are the preferred method for measurement. However, there is no prohibition on using metric devices for measurement and converting measurements to the English standards. State DOTs electing to convert metric measurement are guided to follow the accepted U.S. standard process⁴⁴ for conversions.

Regarding the proposed HPMS Field Manual, Wisconsin DOT asked when the proposed file that reflects these changes would be available if the HPMS Field Manual would continue to be re-released every year. In response to those questions, the final rule incorporates the revisions to the HPMS Field Manual, which is available on the docket with the final rule. The incorporation by reference requires that future updates to the HPMS Field Manual be made through a formal public comment and review process.

The PSRC asked which standards should be used to collect IRI data. The PSRC also asked for clarification on the following: (1) Whether bituminous road would include those with a chip seal wearing surface; (2) whether the AASHTO method required for distress evaluation is also appropriate for chip sealed surfaces; and (3) whether the percent cracking distress only refers to fatigue and/or alligator cracking.

In response, the HPMS Field Manual has been revised to clarify the standards to be used to collect and report all pavement measurements to the HPMS.

The AASHTO commented that in section 490.309(a), the word “include” should be changed to “are.” The use of “include” suggests that there could be

additional pavement metrics or requirements that are not discussed in this section or elsewhere in the NPRM. The FHWA appreciates the comment and has amended the language in section 490.309(a) to clarify the extent of the metrics and data elements State DOTs are required to report.

B. Subpart C National Performance Management Measures for Assessing Pavement Condition

Discussion of Section 490.301 Purpose

To implement the statutory provisions under 23 U.S.C. 150(c)(3)(A)(ii)(I) and (II), FHWA proposed a statement of purpose which required the establishment of performance measures for State DOTs to use to assess the condition of pavements on the Interstate System and the NHS excluding the Interstate System. No comments specific to this section were received, although Washington DOT concurred with the concept that MAP–21 provided more flexibility in the use of Federal funds.

Discussion of Section 490.303 Applicability

This section described the applicability of this rule to highways on the NHS for purposes of implementing the NHPP. Comments from 19 State DOTs (Arkansas, Colorado, Connecticut, Florida, Georgia, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, and Washington State), and AASHTO expressed concerns about the requirements to report pavement conditions on routes not owned or operated by States. The commenters also inquired as to whether required reporting included ramps and similar connectors.

In the NPRM, FHWA indicated that the pavement measure would apply to all mainline highways on the NHS. The 19 State DOTs identified above, the AASHTO, AMPO, ARC, Center for American Progress, COMPASS, NARC, National Center for Pavement Preservation, NYMTC, and one anonymous commenter generally agreed that State DOTs and MPOs have no authority or control over maintenance and/or investment decisions on some of the assets on NHS. Therefore, commenters said State DOTs and MPOs should not be held responsible for the reporting of data. The commenters suggested that the responsibility for data collection, reporting, and programming rests with the entities that own the highway system. Similar comments were raised, as discussed in section 490.105(d), regarding highway

⁴⁴ Process is defined in Publication SP 1038–2006 from the National Institute of Standards.

ownership as it pertains to the accountable entity to establish and achieve targets. The statutory language in MAP-21 requires that the performance management requirements under 23 U.S.C. 150 and NHPP under 23 U.S.C. 119 apply to the entire NHS and Interstate System, not to a subset of the NHS (e.g., "State DOT owned or operated Interstate System," "State DOT owned or operated National Highway System," and others) as the commenters would prefer. The MAP-21 does not define the terms "State" and "MPOs" for purposes of 23 U.S.C. 150 and 119 as something other than what is already defined elsewhere in MAP-21. Accordingly, FHWA retains the language in section 490.303 for purposes of the performance management requirements in 23 U.S.C. 150 and 119(e)(7), which require performance measures for the entire NHS and Interstate System within the State. The FHWA evaluated the extent of the enhanced NHS that is not owned or maintained by State DOTs. In that analysis,⁴⁵ FHWA found that a majority of State DOTs own at least 90 percent of the Interstate (40 States) and non-Interstate NHS (28 States) within the State boundary. The FHWA expects State DOTs to coordinate with other entities that own and maintain portions of the NHS in support of these new performance requirements.

The New York DOT and Seattle DOT provided comments to express concern with the focus on the NHS. They commented that this system only comprises a portion of the roadways they need to maintain and improve. The FHWA appreciates these comments and recognizes the challenges that transportation and planning organizations are faced with in managing the transportation system under tight budgetary constraints. However, 23 U.S.C. 150 requires the measure to apply to both the Interstate System and the non-Interstate NHS and precludes FHWA from establishing measures outside those areas described in 23 U.S.C. 150(c). Therefore, FHWA cannot change the applicability of the measures beyond the limits defined in this section of title 23 U.S.C. (See discussion on target scope for the measures in the discussion section for section 490.105(d)(1).)

The National Highway System routes for pavement conditions are specifically defined as mainline highways excluding ramps and connectors. The comments received on the proposed requirement to limit the applicability to the mainline highways of the NHS for the pavement

measure were supportive of this requirement.

Discussion of Section 490.305 Definitions

The NPRM proposed a number of definitions related to pavement performance to clarify specific meaning in Subpart C. Where additional clarification is needed, the HPMS Field Manual is to be used for interpretation. The Ada County Highway District (ACHD) commented that both the definition and means of computing Cracking Percent are unclear. They requested that the final rule either describe how the metric should be computed or reference the HPMS Field Manual, whose definition is clearer. The Iowa DOT expressed concern over the definition of PCC pavements. They noted that the definition does not appear to cover all possible types of cracks and is overly simplistic. As a result, a very small crack could cause an entire pavement slab to be assigned a "failing" grade. They suggested that the definition use "percent slabs cracked" for PCC overlay projects. The FHWA agrees with this concern and has made changes to the thresholds for PCC pavements described below and in revisions to the HPMS Field Manual. The Portland Cement Association commented that composite pavement should be added to the rule as a fourth pavement type. They remarked that composite pavements consist of an asphalt overlay of existing concrete pavement (either jointed or Continuously Reinforced Concrete Pavement). They argued that composite pavement behaves differently than asphalt pavements and will respond differently to preservation, repair, rehabilitation, and replacement requirements. As such, defining composite pavement as a separate pavement type will provide a more consistent assessment of roughness and distress. While there is merit to this suggestion, not all State DOTs have a complete inventory indicating the limits of composite pavement on their networks. The FHWA has concerns about the cost of requiring this level of detail and does not find it justified at this time. Therefore, the comment was not accepted.

An anonymous commenter requested that FHWA add additional details to the pavement cracking definition, noting that the definition in HPMS is too vague. The FHWA does not think the definition used here is too vague; however, the details about measurement and reporting have been revised in the sections that follow to improve clarity.

The Oregon DOT expressed concern with the definition for Cracking Percent, spalling, and visible defects in the proposed rule. In addition, the commenter stated that the proposed unintentional break cracking definition is not included in AASHTO standards or the HMPS Field Manual. The definitions in the final rule are identical to those used in the HPMS Field Manual and are intended to cover the typical conditions that are typically measured on highway pavements. The NPRM defined a term called Pavement Surface Rating that might be used with manual evaluation of pavement surfaces. The Alabama DOT stated that PSR should refer to "Present Serviceability Rating", rather than "Pavement Surface Rating." The FHWA acknowledges the error in the term used and has revised the language the definition to read "Present Serviceability Rating" (PSR) as "an observation based system used to rate pavements." The prohibition on its use was deleted from the definition because the use of PSR is permitted in the final rule for reporting conditions on certain pavement sections as discussed in sections 490.309 and 490.311.

In a joint submission, the State DOTs of Vermont, Maine, and New Hampshire commented that the definition for cracking in the proposed rule was unclear and stated that more work is necessary to identify data collection requirements and interpretation of the cracking performance metric. In addition, the commenters expressed concern with the proposed data collection methodology for rutting. The commenters said the 5-point system can underestimate rutting measurements and the differences between the 5-point system and the automated transverse data profile can lead to inconsistent data presentation at the national level. The FHWA agrees that there is some ambiguity in the description of the methods used for collecting and reporting cracking and rutting and has made changes in the sections that follow. The definitions used in the NPRM are adequate and have been retained in the final rule. The Louisiana DOT expressed concern with several definitions in the proposed rule and urged FHWA to develop standardized definitions. In addition, the commenter remarked that the proposed rule did not include a definition for transverse crack. The issues raised by Louisiana are covered in the specific sections of the final rule and discussed in the sections describing the measurement and reporting of each distress.

In the final rule, FHWA adds a definition for a "Pavement Section" as a nominally 0.1 mile-long reported

⁴⁵ Docket Document.

segment that defines the limits of pavement condition metrics required by FHWA. The added definition is to clearly differentiate between reported condition metric sections and dynamically segmented condition metric sections for calculating measures and determining missing, invalid, and unresolved data. Please see discussion in section 490.309 for more details.

The FHWA proposed a definition for the term “sampling” as “a means for measuring pavement conditions on a short section of pavement as a statistical representation for the entire section.” The FHWA also proposed in the NPRM that sampling is not to be used to measure or rate Interstate and non-Interstate NHS pavement conditions. As discussed in section 490.309, FHWA retains the language stating that no sampling of condition metric and inventory data items is allowed for required pavement condition data and their inventory data items for performance measures or condition rating. To ensure consistency, FHWA revised the definition of sampling by adding “Sampling is not to be used to measure or rate NHS pavement conditions.” This reflects the requirements in sections 490.309 and 490.313(e).

Discussion of Section 490.307 National Performance Management Measures for Assessing Pavement Condition

This section proposed four performance measures required by 23 U.S.C. 150(c)(3)(A)(ii)(I) and (II) for measuring pavement conditions, two for the Interstate System, and two for the NHS excluding the Interstate System. Twenty comments were received from highway agencies, planning organizations, local governments, and industry. In summary, the issues raised included: (1) Not including traffic in the measures; (2) the use of the terms “Good,” “Fair,” and “Poor;” (3) inconsistency in how those terms are determined for pavements and bridges; and (4) finalizing the enhanced NHS.

In the NPRM, FHWA asked for comments on whether other factors such as facility location, functional class, level of use, or environment should be considered in the design of the pavement performance measure. The Louisiana DOT disagreed with the language in the proposed rule. The commenter argued that traffic is an important measure of pavement condition because of the impact that truck traffic has on the long-term structural viability of pavements and bridges. The AMPO, NYMTC, and Washington DOT provided comments

that suggested the pavement measures be weighted by the level of traffic on the roadway. The FHWA agrees that traffic impacts pavement conditions. However, FHWA believes incorporating traffic volume in the pavement condition measures could unintentionally force the State DOTs and MPOs put more emphasis on high-trafficked highway sections. The FHWA believes incorporating traffic in the investment decisionmaking should be dictated by local priorities. So, FHWA does not incorporate traffic in the pavement condition measures in the final rule. A private citizen, William Grenke, commented that there should be separate ratings for pavement performance and pavement maintenance level of service. While there is merit to this suggestion, the statute limits pavement performance in this rule to pavement conditions.

The AASHTO, Maryland SHA, and Minnesota DOT suggested expanding the terms “Good,” “Fair,” and “Poor” to describe the level of repair needed to address each respective condition level. The Connecticut DOT opposed making this change. The Memphis MPO expressed support for the transition to a numerical based scoring system to assess the quality of NHS roads and bridges as well as Interstate pavement. The commenter argued that using numerical scoring eliminates the ambiguity associated with qualitative scores (e.g., Good, Fair, or Poor).

In selecting the terms and calculation methodologies in the final rule, FHWA intended to identify pavement conditions where “Good” suggests no major investment is needed and “Poor” suggests conditions where major investment for pavement reconstruction is needed. “Fair” pavement conditions suggest that minor expenditures for maintenance and repairs are expected. The MAP-21 delegates the selection of actions to States. It would be inappropriate for FHWA to prescribe any actions needed to address a respective condition level. The FHWA agrees with comments from Connecticut DOT that no change should be made to these terms and definitions as they are terms commonly understood by the public.

The AASHTO, NEPPP, and NYMTC commented that the focus on Good and Poor conditions will not promote management practices to preserve existing conditions. The focus on Good and Poor pavements conditions for measuring performance is not intended to prescribe State DOT management practices. The statute makes preservation activities eligible for NHPP funding and State DOTs may find that

preservation programs are cost effective ways to achieve performance targets. However, FHWA has no authority to require them to use preservation programs.

The South Carolina DOT commented that the rating system of Good, Fair, and Poor as a national standard presents a conflict. By setting new metrics for measuring system performance nationally, it challenges State DOTs to tell a new story about the condition of their assets. If State DOTs have traditionally used those terms in their own metrics to communicate the condition of our asset to the public, stakeholders, and legislators, it could give the appearance that State DOTs are “manipulating the information.” The South Carolina DOT also commented that they have no issue with complying with the rule, but recommended that FHWA grant State DOTs the discretion in their reporting to remain consistent in what and how they have been communicating the condition of their assets. The AASHTO, NYSAMPO, and the State DOTs of California, Connecticut, Michigan, and Oklahoma suggested that the Fair condition level be defined and added to the list of four required measures. The Washington DOT commented that they did not see the need for a Fair category, and were in agreement with FHWA’s use of Good and Poor.

The FHWA believes the net increase or decrease of percent Fair network condition does not easily indicate improvement or declining condition. For example, if there was an increase in percent Fair, it could be the result of declined condition of pavement sections that were previously rated as Good condition or improved condition of pavement sections that were previously rated as Poor condition. Therefore, the net increase (or decrease) in percent Fair may not adequately portray condition improvement (or decline) for the highway network. The FHWA believes that focusing on Good and Poor conditions will better indicate improvement or decline of network condition and also will better inform the public about pavement conditions and what they should expect from investments in highway pavements. Finally, the requirement to establish targets for each of the final four measures does not prohibit a State DOT or MPO from focusing on maximizing Fair conditions. For these reasons, FHWA retains the four measures in the final rule.

A few commenters commented that the approaches to determining Good, Fair, and Poor conditions should be consistent for pavements and bridges.

The FHWA proposed approaches that determine pavement condition levels based on the predominance of metric condition levels and bridge condition levels based on the lowest metric condition level. In the NPRM, FHWA discussed how each of these approaches supported current practice and the findings of pilot studies⁴⁶ conducted prior to the rulemaking effort. Although the methods for determining pavement and bridge condition levels are different, the results of the two methods discussed in the studies provide sound assessments of the condition level of pavements and bridges. Consistency or using a single methodology to determine pavement and bridge condition level is desirable from a process standpoint. However, having assessments that best reflect the condition of pavements and bridges is more desirable. It is also important to note that pavements and bridges are two distinct types of assets with distinct performance characteristics. Therefore, having different methodologies for determining their condition levels should not be unexpected. The FHWA retains the two methodologies for assessing the condition level of pavements and bridges in the final rule.

The TEMPO expressed concerns that the criteria used to identify the NHS are still being developed for implementing performance measures applicable to the NHS. They commented that if this issue is not addressed before reporting and evaluation deadlines are implemented, State DOTs and MPOs could expend significant resources collecting, analyzing, and maintaining data that is not part of the final NHS. They urged FHWA to delay implementation of the new pavement requirements until the limits of the NHS are finalized.

As discussed in combined discussion sections for sections 490.105(e)(1) and 490.105(f)(1), FHWA cannot delay the due date of the State DOT target establishment or the State DOT reporting on performance targets because of the statutory deadlines in MAP-21. The FHWA also recognizes that NHS limits could change during a performance period. Therefore, FHWA revised section 490.105(d)(3) in this final rule so that State DOTs are no longer required to declare and describe NHS limits in their Baseline Performance Period Report. As a result, the changes in NHS limits during a performance period would be accounted for. As discussed in section 490.105(d)(3), the National Highway

System Data Item in HPMS and the Highway System of the Inventory Route Data Item in NBI are required to be reported to FHWA annually together with the condition metric data. The NHS limits for pavement condition measures will come from the same data set submitted to HPMS in the same year as the performance condition metric data is submitted, and NHS designation for bridge condition measures will come from the same NBI data set as the performance condition metric data of the same year. (See more details on implementation timeline discussion in sections 490.105(e)(1) and 490.105(f)(1) and discussion on NHS limits in the discussion for section 490.105(d)(3).)

Discussion of Section 490.309 Data Requirements

The FHWA proposed four condition metrics to be collected and reported to the HPMS to calculate the pavement measures. These metrics included IRI, rutting, faulting, and Cracking Percent. Comments on the inclusion of these four metrics were primarily focused on the consideration of IRI as a required metric. The AASHTO and eight State DOTs⁴⁷ commented that, of the four proposed metrics, IRI is the only one ready to be measured consistently in all States and therefore should be the only measure of pavement condition. Alternatively, they suggested that the additional three metrics be phased in over time. In contrast, the ACPA, Cemex USA, Connecticut DOT, Georgia DOT, Illinois DOT, Louisiana DOT, Ohio DOT, and PCA supported the use of the four metrics. Some commenters⁴⁸ suggested that the four metrics not be equally weighted in the calculation of the pavement measures. The FHWA considered these differing opinions and elected to retain the requirement for the collection and reporting of the four metrics. The FHWA has found through documented research⁴⁹ that nearly all State DOTs currently use more than IRI in their pavement management programs. Publications by recognized pavement experts indicate that pavement conditions cannot be determined using only IRI alone.^{50 51 52 53} However, FHWA

recognizes and appreciates that the methods to collect and report the rutting, faulting, and Cracking Percent metrics may be new to some State DOTs. The Alabama DOT suggested that FHWA replace IRI with Mean Roughness Index (MRI) in order to avoid confusion. The FHWA agrees with Alabama that MRI is the correct measurement and the HPMS Field Manual has been revised to clarify this distinction. The term IRI is still used because it is familiar to most users even though the actual collection and reporting is the MRI value.

The FHWA recognizes that the level of pavement data collection for the four metrics is more intensive than the HPMS requirements in previous years and will require time for State DOTs to adjust contracts and equipment to comply. The final rule delays the requirements for pavement data collection until January 1, 2018, for Interstate highways and until January 1, 2020, for non-Interstate NHS routes. Further, FHWA has delayed the implementation of data collection, reporting, and target establishment requirements so that the first performance period begins in 2018. The phased approach pushes the determination of baseline pavement conditions for the first performance period from 2018 to 2020 (the mid-point of this period). This phased approach to target establishment for the pavement measures is presented in the discussion for section 490.105(e)(7). The FHWA believes that these actions will advance the state of practice to more consistently collect and report rutting, faulting, and cracking while allowing for a phased approach to full implementation.

Several commenters,⁵⁴ primarily representing local governments and

⁵¹ "Pavement Asset Management", Uhlmeier, J., Luhr, D., and Rydholm, T., Washington State Department of Transportation. 2016: <https://www.wsdot.wa.gov/NR/rdonlyres/E93CF754-0452-4FDE-92BA-02A7BC4CB98A/0/WSDOTPavementAssetManagement2816.pdf>.

⁵² "Performance Measures for Pavement Assets under Performance Based Contracts", Alyami, Z., Tighe, S., Gransberg, D., 9th International Conference on Managing Pavement Assets, 2014: <https://vtechworks.lib.vt.edu/bitstream/handle/10919/56400/ICMPA9-000173.PDF?sequence=2&isAllowed=y>.

⁵³ "Performance Measures: Pavement Condition 2015", Kansas DOT 2015: https://kdotapp.ksdot.org/perfmeasures/documents/pavement_fact_sheet.pdf.

⁵⁴ City of Fremont, CA, City of Santa Rosa, CA, City of Vacaville, CA, Colorado DOT, Contra Costa County, CA, County of Marin, CA, Metropolitan Transportation Commission, Oversight Committee for the California Local Streets and Roads Needs Assessment, Puget Sound Regional Council, Rural counties Task Force, California DOT, Cemex USA, City of Vancouver, WA, Connecticut DOT, County of Los Angeles, Oregon DOT, South Dakota DOT,

⁴⁶ Improving FHWA's Ability to Assess Highway Infrastructure Health Pilot Study Report FHWA-HIF-12-049 2012.

⁴⁷ Alaska DOT&PF, Connecticut DOT, Idaho DOT, Montana DOT, North Dakota DOT, South Dakota DOT, Washington State DOT, and Wyoming DOT, Michigan Asset Management Council, Michigan State Transportation Commission.

⁴⁸ Oregon DOT, Association of Metropolitan Planning Organizations, and Illinois DOT.

⁴⁹ NCHRP Study 401 "Quality Management of Pavement Condition Data Collection 2009."

⁵⁰ "Pavement Management Practices in State Highway Agencies": Newton, Connecticut Peer Exchange Results. 2011: <http://www.fhwa.dot.gov/asset/pubs/hif11036/hif11036.pdf>.

planning organizations, objected to the use of IRI as a metric in the calculation of the pavement measure. The ACHD, for example, commented that collecting data on low speed roads is difficult and generally results in poor quality data. As such Ada County suggested dropping IRI as a measure for local roads. Similarly, the city of Santa Rosa commented that while the California DOT is collecting IRI data on California's NHS, it will likely be the responsibility of local agencies to collect IRI data in the future. This change could disrupt established process for PCI collection and will result in increased cost and duplicative data collection efforts. The Alaska DOT&PF commented that asphalt cracking has no standard method of collection, remarking that two methods, windshield and laser, are not comparable. Finally, CEMEX USA and the Portland Cement Association suggested adding Remaining Service Interval as a condition metric. The majority of the commenters represent cities and counties that utilize the Pavement Condition Index (PCI) as their primary method to assess pavement conditions. The commenters noted that the PCI method does not include IRI nor an assessment of ride quality. Several commenters, primarily local agencies in California, commented that applying IRI to local roads could lead to "worst-first" strategies. Additionally, the ACHD commented that using IRI on local roads may mean that cost-effective pavement preservation techniques (e.g., chip seals) will no longer be useful as they can negatively impact IRI. The commenters expressed a number of concerns related to the cost and burden of collecting IRI using a high speed profiler testing device; and the lack of correlation between PCI and IRI. In addition, many of these commenters suggested that local agencies be allowed to use their own methods to classify pavements as being in Good, Fair, or Poor condition. The ACHD suggested that straight-edge based methods could replace IRI or manual methods on local roads. This alternative method would remain accurate and would be much more practical. Furthermore, as discussed later in this section, a number of commenters raised concerns with the

accuracy of collecting IRI in urban environments. Discussions with manufacturers of IRI data collection equipment and the comments from the Road Profiler Users Group confirmed that this is particularly difficult where posted speed limits are less than 40 mph, usually in urban settings. In the final rule, an alternative method known as PSR is permitted to determine the overall condition of pavement sections only on roadways where posted speed limits are less than 40 mph.

In section 490.309(b) of the NPRM, FHWA proposed the data collection requirements for Interstate and non-Interstate NHS pavements necessary to calculate the four pavement condition metrics. A wide range of comments was received on these proposed data collection requirements. This section includes a discussion on the response to the comments and the changes resulted in the final. This discussion is organized into the following categories of issues raised by commenters:

- Reference to AASHTO protocols
- Collecting data in both directions on Interstate pavements
- Collecting data at an annual frequency for Interstate pavements
- Collecting IRI data on lower speed roadways
- Processing data at 0.10 mile intervals
- Requiring full extent data collection on the full NHS for all four metrics
- Using structure type to identify and exclude bridges
- Travel lane required for data collection
- Devices for rutting collection

Reference to AASHTO Protocols

Because the data requirements to calculate pavement performance vary somewhat from current data collection practices, the NPRM specified defined collection protocols for each of the required data elements. The majority of the methods and standards for data collection are outlined in the HPMS Field Manual and reference some of the aspects of certain AASHTO Standards. These documents are incorporated by reference in section 490.111. Several adopted and provisional AASHTO Standards were specified in the NPRM with the intention of providing guidance and background for measuring data needed to determine performance.

The AASHTO and others⁵⁵ submitted comments about the proposed methods for data collection, suggesting that these

standards were never intended for regulatory purposes. The comments noted distinctions between AASHTO Standards and those in the HPMS Field Manual for cracking measurement. The commenters also noted that AASHTO Provisional Standards PP68–14, PP69–10, and PP70–10 were never intended as permanent standards, are subject to change, and inappropriate for use in rulemaking.

The FHWA recognizes that AASHTO Standards were not specifically designed for collecting data that is used for pavement performance evaluations. However, the 10 AASHTO Standards incorporated by reference in section 490.111 contain well-known protocols for data collection, equipment requirements, and data compilation that are useful in determining pavement performance. It is preferable that State DOTs use the appropriate parts of these standards to guide quality data collection even when additional calculations are needed to meet the requirements for the HPMS Field Manual. For example, AASHTO Standard PP68–14 contains excellent methods to collect cracking images in asphalt pavements. Additional calculations can easily be done to make this value meet the HPMS requirement for area of pavement cracked. Guidance on how to make these calculations is included in the HPMS Field Manual. The FHWA agrees with AASHTO that including the provisional standards PP67–14, PP68–14, PP69–14, and PP70–14 as requirements in the rule is inappropriate. The FHWA directs State DOTs to refer to the HPMS Field Manual for data collection methods for automated data collection of pavement cracking and rutting. However, FHWA recognizes the extensive efforts by State DOTs involved in developing these provisional standards. The HPMS Field Manual may continue to reference them as preferred methods for data collection with specific guidance for making calculations from that data to report pavement conditions to HPMS.

Collecting Data in Both Directions on Interstate Pavements

The FHWA proposed in section 490.309(b) for State DOTs to collect data in both directions of travel for the full Interstate for all four condition metrics to accurately capture the directional differences associated with pavement type, age, traffic loading, and roadway geometry. Three State DOTs and one planning organization⁵⁶ expressed

Seattle DOT, Orange County Transportation Authority, City of Portland, OR, City of Sacramento, CA, City of Gilroy, CA, City of Napa, CA, Town of Tiburon, CA, City of Spokane, WA, California Association of Counties, South Jersey Transportation Planning Organization, Portland Cement Association, American concrete Pavement Association, Northwest Pavement Management Association, Fugro Roadware, NCE, Brian Domsic, John Harvey, An anonymous commenter, Stephen Mueller Consultancy, League of California Cities, and LA DOT.

⁵⁵ Colorado DOT, Connecticut DOT, Florida DOT, Georgia DOT, Idaho DOT, Illinois DOT, Minnesota DOT, Montana DOT, North Dakota DOT, Oregon DOT, Rhode Island DOT, South Dakota DOT, Wyoming DOT, Mid-America Regional Council, and Southeastern Pavement Preservation Partnership.

⁵⁶ Georgia DOT, Missouri DOT, Oregon DOT, Atlanta Regional Commission.

concerns with the burden associated with collecting data in both directions. The Maryland State Highway Administration and Missouri DOT suggested a revision to the final rule to limit the requirement for collection in both directions to only those cases where the highway is divided with either a median or a physical barrier. Conversely, two State DOTs⁵⁷ commented that they collect data on their Interstate in both directions, and in some cases, in all lanes. In addition, it was noted by the Oregon DOT that data for the required inventory metrics (Through Lanes, Surface Type, and number of lanes) are collected and reported in one direction only, which may not represent information in the non-inventory direction correctly. In the NPRM, an HPMS review indicated that 52 percent of State DOTs do not report data in both directions on the Interstate. The comments received on this requirement support that finding.

Contrary to the comments opposing data collection on both directions of Interstate System, the joint letter from the Maine, New Hampshire, and Vermont DOTs supported the pavement condition data requirements on “both barrels of dual-carriageways.” The letter stated that the New Hampshire DOT has been measuring pavement condition and other measurements on each carriageway for all of their Interstate System for “several years and it has taken significant effort to combine the data for FHWA purposes.” They noted that requiring data for “both barrels” of divided Interstate System would relieve them from additional post-processing and create a more comprehensive picture of the statewide pavement condition in their State. They also recommended FHWA to consider the dual-carriage data format to support FMIS, which intends to use HPMS data as its source.

In a recent study for FHWA,⁵⁸ pavement conditions were measured in both directions on a significant number of miles of Interstate highways. The findings indicated that the difference in pavement conditions between the two directions was insignificant. This supports the claims made in the comments indicating that data collection in both directions on Interstate highways is not warranted. However, FHWA also recognizes that agencies, like New Hampshire DOT, collect their data in a dual-carriageway data format for a more comprehensive

assessment of the statewide pavement condition and for better integrating with FMIS. Therefore, section 490.309(b)(1) in the final rule was amended to require pavement data reporting for “at least one direction” for the Interstate System, and section 490.309(b)(1)(iii) in the final rule provides State DOTs the option to collect and report pavement condition data separately for each direction of divided highways (carriageway) on the Interstate System. Please note if a State DOT chooses to exercise the option of reporting Interstate pavement data in dual-carriage data format, then that State DOT must report the data for the entire Interstate System within the State (*i.e.*, no partial network dual-carriage option allowed). As stated previously, FHWA provides this option for State DOTs for a more comprehensive assessment of their statewide pavement condition and for better integrating with FMIS. The FHWA expects State DOTs to not convert data format only to meet the minimum Interstate pavement condition level and/or to make significant progress. Considering a substantial amount of effort required to convert data format (*i.e.*, single/inventory direction to dual carriage or vice versa) in accordance with HPMS Field Manual, FHWA does not believe State DOTs will convert the data format just to meet the minimum Interstate pavement condition level and/or to make significant progress. Therefore, FHWA does not specify an allowable frequency of changes in data format in the final rule so that State DOTs have the flexibility of converting their Interstate data format at any time. The FHWA recommends that State DOTs should carefully examine the effects of data format conversion on condition/performance trends and on the ability to meet the minimum Interstate pavement condition level and significant progress toward achieving targets. Also, it is important to note that if a State DOT decides to report Interstate System data in a dual-carriageway data format, then the Interstate pavement metrics in section 490.311 will be determined separately for each direction (*i.e.*, inventory and non-inventory directions) and the Interstate pavement measures in section 490.313 will be computed using the data from both directions of the Interstate highways. Please refer to the HPMS Field Manual in the docket for data requirements associated with dual-carriageway data format for Interstate System.

Collecting Data on an Annual Frequency for Interstate Pavements

The FHWA proposed to maintain the current HPMS requirement to collect

data annually for the IRI metric and an increased frequency of annual (from biennial collection) collection for the Cracking Percent, rutting, and faulting metrics for the Interstate System. A total of 23 comments⁵⁹ addressed the proposed annual data collection requirements. The majority of these commenters expressed concern with the costs and burden associated with annual data collection and questioned the need to capture annual changes in pavement condition. The Oregon DOT noted that an evaluation of their annual collection efforts after 7 years of testing concluded that “it was not necessary or cost effective to collect data annually,” citing that the overall condition does not change dramatically from year to year. The Michigan State Transportation Commission and Michigan Asset Management Council opposed the annual data collection requirement and recommended that FHWA work in cooperation with States to determine the most appropriate frequency and level of detail for data collection. In general, the commenters did not feel it was necessary to capture annual changes in condition.

The Rhode Island, Pennsylvania, and Minnesota DOTs commented that they collect data on their Interstate System on an annual basis. The Rhode Island DOT commented that their data coverage and frequency were the result of a recommendation by the National Center for Pavement Preservation to account for the rapid deterioration that pavements in Rhode Island can exhibit from year to year due to the weather conditions. Fugro Roadware supported the proposed data coverage and data collection frequency. Fugro Roadware emphasized the importance of identifying many of the potential problems early and clearly so that State DOTs and other agencies can ensure that they are optimizing the work performed on the network to limit deterioration and potential need for more advanced and expensive treatments.

The FHWA believes that the minimum Interstate pavement condition requirements in 23 U.S.C. 119(f) require annual assessments of condition. The FHWA recognizes that, for a specific pavement, conditions may not change

⁵⁹ AASHTO, California DOT, Connecticut DOT, Delaware DOT, Hawaii DOT, Idaho DOT, Iowa DOT, Maryland DOT, Michigan DOT, Minnesota DOT, Montana DOT, North Carolina DOT, North Dakota DOT, Oregon DOT, Pennsylvania DOT, Rhode Island DOT, South Dakota DOT, Northeast Pavement Preservation Partnership, Southeastern Pavement, Preservation Partnership, NYSAMPO, SJTPO, Michigan State Transportation Commission (STC) and Michigan's Transportation Asset Management Council (TAMC).

⁵⁷ Tennessee DOT, New Hampshire DOT.

⁵⁸ Evaluation of Pavement Conditions on the Interstate System: Preliminary Summary, Rada 2015.

dramatically each year. However, FHWA believes that changes in conditions of the full-extent Interstate System within a State will be evident from year to year due to construction activities, weather events, and variability in the durability of the highway pavements. State DOTs have been reporting IRI for the Interstate highways to HPMS on an annual basis since 1989. A review of the HPMS data from 2007 to 2011 showed that 29 State DOTs reported at least a 1 percent change in the IRI for their Interstate pavements in Good condition. During the same period, 10 State DOTs reported at least a 10 percent change in annual Good pavement condition levels.

Although the new pavement measure includes multiple condition metrics, FHWA believes this account of historical changes in IRI condition suggest that similar changes should be expected for the new pavement measure. Furthermore, FHWA believes that the 0.1 percent reporting accuracy required of the new pavement measure necessitates at least an annual frequency of testing in order to accurately determine State DOT compliance with the minimum condition requirements in 23 U.S.C. 119(f).

As discussed in the Executive Summary, the FAST Act removed the phrase “two consecutive reports” in 23 U.S.C. 119(f)(1)(A), which relates to triggering the penalty for when the Interstate pavement condition has fallen below the minimum condition level established under this rule. Under the FAST Act the penalty will be based on each FHWA minimum condition level determination instead of two consecutive minimum condition level determinations. The FHWA believes that the changes due to FAST Act further support the importance of the annual data collection for implementing the statutory requirements under 23 U.S.C. 119(f)(1).

For these reasons, FHWA retains the requirement of annual data collection for all four condition metrics for the Interstate pavements in the final rule.

Collecting IRI Data on Lower Speed Highways

The FHWA proposed that IRI data be collected on all NHS roadways. As previously discussed, a number of commenters⁶⁰ noted the challenges with collecting IRI data on roadways in urban settings and lower speed roadways. Although IRI is a well-known

measure for pavement performance, it is less detectable to highway users at low speeds and less useful as a measure of pavement performance. To specifically address this issue, FHWA added an alternative method known as PSR⁶¹ that may be used to determine overall pavement condition for Interstate and non-Interstate NHS sections where the posted speed limit is less than 40 mph (sections 490.309(b)(1)(iv) and 490.309(b)(2)(iii)). The intent of this change is to allow continued use of a method that has been a part of HPMS for many years to provide pavement condition information for locations where IRI data collection is not practical. In addition, section 490.309(b)(2)(iii) provides that State DOTs may use conversions to PSR from other pavement condition assessment methods, such as the U.S. Army Corps of Engineers PCI,⁶² if they demonstrate to FHWA that the conversion produces pavement conditions equivalent to the PSR method.⁶³ (See discussion section for section 490.313(b) for the thresholds to define Good, Fair, and Poor condition levels based on PSR.)

Processing Data at 0.10 Mile Intervals

The FHWA proposed in sections 490.309(b) and 490.311(c) that data be collected and reported at 0.10 mile intervals for the four pavement metrics for the full NHS to provide better uniformity and increased accuracy in condition assessment. The majority of commenters, including 18 State DOTs,⁶⁴ 3 industry associations,⁶⁵ 2 planning organizations,⁶⁶ ACHD and AASHTO opposed or expressed concerns with the proposed requirement. In general, the commenters noted that the uniform 0.1 mile reporting requirement did not align with their current State DOT pavement measuring and reporting practices. The commenters cited the costs to conform to this requirement and urged FHWA to consider an approach that would provide greater flexibility to State DOTs to allow for varying reporting lengths.

⁶¹ Carey and Irick, Highway Research Bulletin (1960).

⁶² ASTM Standard D6433.

⁶³ An example in publication: Al-Omari and Darter, ULUI-ENG-92-2013 (1992).

⁶⁴ Georgia DOT, New York State DOT, North Carolina DOT, North Dakota DOT, Pennsylvania DOT, South Dakota DOT, Wyoming DOT, Idaho DOT, Minnesota DOT, Mississippi DOT, South Carolina DOT, Texas DOT, Colorado DOT, Illinois DOT, Iowa DOT, Alabama DOT, Connecticut DOT, and Montana DOT.

⁶⁵ Road Profiler User's Group, NCE, Agile Asset Inc., and Northeast Pavement Partnership.

⁶⁶ Texas Association of Metropolitan Planning Organizations and Association of Metropolitan Planning Organizations, Michigan State Transportation Commission, Michigan Asset Management Council.

The reporting of the inventory data elements in section 490.311(c) of the NPRM generated some questions. Fugro Roadware recommended that sections shorter than 0.1 mile be considered for other significant changes in the pavement inventory, such as change in pavement surface type and change in route identification (*i.e.*, where reference posts reset at county lines and overlapping highways start and end). The Georgia DOT urged FHWA to define the method for calculating cracking, rutting, and faulting, including differentiation of surface types. The Kentucky Transportation Cabinet requested clarification on how sections should be broken down when there are discontinuities in the route or surface type within a section. Considering these comments, FHWA revised sections 490.309(a) and 490.311(c)(2) to clarify that State DOTs are required to report all relevant⁶⁷ condition metrics for each pavement section. This means that each pavement section and all relevant condition metrics must be spatially coincident (*i.e.*, identical Route ID, Begin Point, and End Point values in HPMS). Recognizing that inventory data items do not perfectly align (or are not spatially coincident) with the pavement sections, FHWA revised section 490.311(c) and added section 490.311(d) in the final rule to clarify that State DOTs are required to report the three inventory data items (Through Lanes, Surface Type, and Structure Type) using the protocols in the HPMS Field Manual. In contrast to the section lengths for the measured pavement metrics, the section length for each of the inventory data items is not restricted to the 0.1 mile length. Instead, it reflects logical start and end points. These inventory data items will be tied to measured pavement conditions reported in the metrics using each State DOT's linear referencing system, as described in chapter 4 of the HPMS Field Manual.

Nine State DOTs⁶⁸ the Northeast Ohio Areawide Coordinating Agency and the Southeast Pavement Preservation Partnership provided comments expressing support for 0.1-mile intervals and noted that they collect and report data at 0.10 mile intervals and did not

⁶⁷ For asphalt pavement sections (Surface_Type is 2,6,7, or 8), relevant condition metrics are IRI, rutting, and Cracking_Percent; for jointed concrete pavement sections (Surface_Type is 3,4,9, or 10), relevant condition metrics are IRI, faulting, and Cracking_Percent; and for Continuously Reinforced Concrete Pavements (CRCP) sections (Surface_Type is 5), relevant condition metrics are IRI and Cracking_Percent.

⁶⁸ Hawaii DOT, Kentucky DOT, Maryland DOT, Oklahoma DOT, Oregon DOT, Missouri DOT, New Jersey DOT, Tennessee DOT and Washington State DOT.

⁶⁰ Ada County Highway District (ACHD), John Harvey, CEMEX USA, City of Vacaville, CA, Portland Cement Association, Metropolitan Transportation Commission, Oregon DOT.

see an undue burden with this proposed requirement. However, many of these State DOTs asked for more clarification on how they should address breaks in the system that would prevent collection at 0.10 mile lengths.

The NPRM contained substantial discussion about the importance of the 0.10 mile length data collection and reporting lengths in providing uniformity and increased accuracy in pavement condition assessment. The RIA prepared for the NPRM considered the increased costs of data collection and processing to comply with the requirements. Some State DOTs currently collect and report pavement condition at 0.10 mile intervals to the HPMS. An evaluation of the network level condition outcomes in these State DOTs using 0.20 mile section lengths indicated a minor difference in the percentage of Good condition pavements but a considerable difference in percentage of Poor condition pavements compared to the 0.10 mile length.

In the final rule, the 0.10 mile uniform pavement section data collection and reporting is retained because it is needed for a consistency in national performance reporting. Current data collection and processing technologies can easily accommodate it, and it is already an accepted practice in several State DOTs. Furthermore, this requirement does not impose restrictions on State DOT management programs. State DOTs can and should operate pavement management programs as they see fit.

Related to the section lengths, the commenters asked for more clarification on how State DOTs should address breaks in the system where collection at 0.10 mile lengths is not practical. These breaks occur due to uneven lengths in highway routes, interruptions to measurements by intersections, change in surface type, bridges, and similar locations where uniform 0.1 mile lengths are not possible. In the NPRM, allowance was made to report conditions for smaller pavement sections if needed, but that none should exceed 0.1 mile in length. It was noted in the comments and confirmed by examination of existing HPMS data that field measurements do not always align exactly with official State route maps. These deviations relate to the accuracy of global positioning devices and other field conditions that can result in sections slightly exceeding 0.1 mile lengths but always within a tolerance of approximately 50 feet. In the final rule, the intent is that State DOTs will report in 0.1 mile sections wherever possible, but are provided an allowance for

lengths up to 0.11 mile (580.8 feet) to accommodate the alignment issue. Therefore, FHWA revised sections 490.309(b)(1)(i)(C), 490.309(b)(2)(i)(C), 490.309(b)(2)(ii)(C) and added sections 490.309(b)(1)(iv)(C) and 490.309(b)(2)(iii)(C). These changes were made so that shorter than 0.10 mile pavement sections are permitted at the beginning of a route, end of a route, bridges, locations where surface type changes, or other locations where a section length of 0.10 mile is not achievable and specified that the maximum length of sections shall not exceed 0.11 mile (580.8 feet). Please note that as discussed in sections 490.309(a) and 490.311(c)(2), State DOTs are required to report spatially coincident (*i.e.*, identical Route_ID, Begin_Point and End_Point values in HPMS) sections for all relevant⁶⁹ condition metrics to HPMS.

As stated above, the sections of condition metrics (*i.e.*, IRI, rutting, faulting, Cracking_Percent, and PSR) are 0.10-mile long sections (shorter than 0.10 mile sections are permitted at the situation specified above) and not exceeding 0.11 mile, and all relevant condition metrics must be spatially coincident for each section. On the other hand, as discussed above, the section lengths of inventory data items (Through Lanes, Surface Type, and Structure Type) shall be in accordance with the protocols in the HPMS Field Manual so those data items do not necessarily spatially align with the condition metrics sections. However, in order to calculate measures (described in section 490.313) and to determine missing, invalid, or unresolved data (described in 490.313(b)(4)(i)), the data items (*i.e.*, inventory data items, and other related data items) which do not spatially align with condition metrics are required. So, for the purpose of calculating measures and determining missing, invalid, or unresolved data, condition metric data will be dynamically segmented with all three inventory data items (Through Lanes, Surface Type, and Structure Type), functional class data item (Data Item F – System in HPMS) and NHS data item (Data Item NHS in HPMS). To provide clarification on how sections should be broken down when there are discontinuities in the route in

⁶⁹For asphalt pavement sections (Surface_Type is 2,6,7, or 8), relevant condition metrics are IRI, rutting, and Cracking_Percent; for jointed concrete pavement sections (Surface_Type is 3,4,9, or 10), relevant condition metrics are IRI, faulting, and Cracking_Percent; and for Continuously Reinforced Concrete Pavements (CRCP) sections (Surface_Type is 5), relevant condition metrics are IRI and Cracking_Percent.

responding to the comment from Kentucky Transportation Cabinet, FHWA differentiates between condition metric sections and dynamically segmented condition metric sections by adding a definition for condition metric sections in section 490.305. The FHWA defines a “Pavement Section” as a nominally 0.1 mile-long reported segment that defines the limits of pavement condition metrics required by FHWA. The revised sections 490.309(b)(1)(i)(C), 490.309(b)(2)(i)(C), 490.309(b)(2)(ii)(C) and added sections 490.309(b)(1)(iv)(C) and 490.309(b)(2)(iii)(C) used the term “pavement section.”

Requiring Full Extent Data Collection on the Full NHS for the Four Condition Metrics

The FHWA proposed that the data for all four condition metrics be collected on the full extent of the Interstate and non-Interstate NHS. This proposal introduced and increased the data collection burden for cracking, rutting, and faulting. Comments provided by AASHTO, ARC, the National Asphalt Pavement Association, and the State DOTs of Connecticut, Florida, Georgia, Kentucky, Minnesota, Mississippi, Missouri, and Oregon noted that the requirement for full extent data coverage is “unnecessary and excessive.” They also commented that the full extent data provides only marginally better insight into the system condition with significant financial consequences for State DOTs. Alabama DOT commented that sampling should be permitted on off-system routes, even if the end goal is to eliminate sampling on-system. The Mississippi DOT commented that the cost associated with the proposed requirement is not just in the data collection, but also includes review, analysis, maintenance, and reporting of the data. These requirements create additional burdens to the personnel resources of State DOTs. The Illinois DOT commented that automated crack mapping is still an emerging technology, and it is possible for there to be some inconsistencies in the way that States collect and report this data. They added that manual distress surveys of the entire NHS system are not a viable option.

The AASHTO and State DOTs of Connecticut, Georgia, Idaho, Minnesota, Montana, North Dakota, South Dakota, and Wyoming recommended allowing State DOTs to report metric data on samples in lieu of full extent. The AASHTO and Connecticut and Minnesota DOTs argued that sampling is a more cost effective approach than measuring the full extent. The Oregon

DOT commented that the full extent requirement is somewhat “understandable” for the Interstate System because there is a minimum pavement condition standard applied nationwide with significant financial consequences. Therefore, full extent measurement “makes sense” to ensure the most accurate data. However, the Oregon DOT recommended a sampling approach for the non-Interstate NHS because the system is not subjected to financial consequences. The Oregon DOT also stated that a sampling approach could also help avoid the inherent data errors associated with full extent IRI data where the data collection vehicle must stop at traffic lights. The Rhode Island DOT commented that State DOTs typically manage and maintain each direction of the Interstate System as separate roadways, but only report one direction to the HPMS. The Pennsylvania DOT commented that they collect data in both directions on divided non-Interstate NHS roads and requested clarification from FHWA on if they will only need to report one direction in the future. In addition, the commenter requested clarification on the frequency with which they need to report the data, since it is collected every year.

As discussed in the NPRM, reporting the full extent measurement for the whole NHS is important to determining pavement performance.⁷⁰ The final rule retains the language in section 490.309(b)(1) that requires State DOTs to collect and report IRI, rutting (asphalt pavements), faulting (jointed concrete pavements), and Cracking Percent annually for the full extent of the mainline highway Interstate System and collect data biennially and report data annually for the full extent of the non-Interstate NHS. As discussed in sections 490.109(d)(1) through (d)(3), State DOTs are required to collect non-Interstate NHS data every two years but State DOTs are required to report data for the entire non-Interstate NHS network to HPMS every year, hence, replacing the reported data from previous data collection cycle with the most recent data collected in HPMS. In response to Pennsylvania DOT’s question on the non-Interstate NHS, FHWA retains the language, as proposed in the NPRM, that only one direction (*i.e.*, inventory direction) data collection and reporting for non-Interstate NHS is required for the pavement metrics and inventory

data (sections 490.309(b)(2)(i)(D), 490.309(b)(2)(ii)(D), 490.309(b)(2)(iii)(D) and 490.309(c)(1)(ii)). Please note that the non-Interstate NHS pavement measures in section 490.313 will be computed using only the data referenced to the inventory direction of the non-Interstate NHS highways in HPMS. If a State DOT chooses to collect pavement data for the non-Interstate NHS on an annual basis, that State DOT will still meet the requirements in section 490.309(b)(2). In this case, the actual 2-year condition/performance (midpoint of a performance period) will be derived from the collected pavement data for the entire non-Interstate NHS in the second year of a performance period, and the actual 4-year condition/performance (end of a performance period) will be derived from the collected pavement data for the entire non-Interstate NHS in the fourth year of a performance period.

In response to comments suggesting use of a sampling approach, a recent statistical study⁷¹ found that, even under controlled conditions, the variability of pavement data was substantial. A sampling program would require sample sizes approaching full data collection to provide a reasonable level of confidence in the results. It is not practical to implement this kind of a sampling program.

Using Structure Type To Identify and Exclude Bridges

In section 490.313(f)(1) of the NPRM, FHWA proposed that bridges would be excluded prior to computing all pavement condition measures by removing the sections where the Structure Type field value is coded as “1” in the HPMS. This was done to meet the statutory requirement (23 U.S.C. 119(f)(1)(A)) that pavement analyses must be done “excluding bridges.”

The AASHTO, Fugro Roadware, and the State DOTs of Alabama, Colorado, Connecticut, Georgia, New Jersey, Oregon, and Texas requested clarification on how the bridge limits would be removed from the 0.10 mile interval continuous pavement performance data, particularly where the bridge limits do not spatially coincide with the 0.10 mile pavement sections. Fugro Roadware recommended that areas with bridge structures simply be invalidated and identified as a bridge. The AASHTO and Connecticut and New York DOTs recommended flexibility for State DOTs to use

segments other than 0.10 mile at the bridges. Oregon DOT commented that they prefer not to include IRI data for the structures, but State DOTs have been required for several years to report IRI metric data for bridges under the current HPMS reporting requirements. Oregon DOT added that this redundant effort to provide pavement condition data on structures that is not being used by FHWA is inefficient. This creates concern because of the current environment where staff and money are scarce. The AASHTO and Illinois and Montana DOTs commented that there is a discrepancy between pavement data reporting requirements in the current HPMS and the proposed measure calculation process for handling pavement data on bridges. The Hawaii DOT commented that pavements on viaduct structures should be excluded from the pavement condition performance measures. The FHWA concurs since viaduct structures meet the definition for bridges and are excluded in the legislation.

The New Hampshire DOT commented that the Federal definition of bridges requires structures to be greater than 20 feet long. However, in New Hampshire there are several shorter bridges that often impact roughness just as larger structures do because many of them contain expansion joints or cause transverse cracking through expansion.

The FHWA has evaluated the comments regarding the methodology for excluding bridges for pavement condition measure calculation. The FHWA clarified several of the issues related to bridges on the NHS in the final rule.

First, in response to the comment from New Hampshire DOT, the term “bridge” used throughout subparts C and D is consistent with the definition proposed in section 490.405 of the NPRM. The FHWA agrees with New Hampshire DOT that structures less than 20 feet long could impact the condition of pavement sections. As discussed in the NPRM, FHWA recognizes that State DOTs may have different definitions for bridge. However, FHWA believes that these discrepancies would cause problems in calculating pavement measure consistently at the national level by excluding additional structures. The FHWA believes that the use of an established definition would continue to provide consistent and standardized data to be analyzed for the evaluation of State DOT and national progress. Therefore, FHWA moved the definition for the term “bridge” in subpart D (section 490.405) to subpart A (section 490.101) to use it in a consistent manner

⁷⁰ FHWA (2012). Improving FHWA’s Ability to Assess Highway Infrastructure Health Pilot Study Report, FHWA-HIF-12-049. <http://www.fhwa.dot.gov/asset/pubs/hif12049/hif12049.pdf>.

⁷¹ Evaluation of Pavement Conditions on the Interstate System: Preliminary Summary, Rada 2015.

throughout the rule. As discussed in section 490.405, FHWA did not receive any substantive comments on the definition. The FHWA made an editorial revision to the definition in section 490.101 by striking the phrase “this section” and replacing it with the phrase “this part” to ensure that the definition in subpart A applies to both subparts C and D in the final rule.

The FHWA also clarifies that excluding bridges means that bridge limits will be determined by the coded values “Route_ID,” “Begin_Point,” and “End_Point” for the Structure Type Data Item in HPMS where the value is coded “1.” Those determined bridge limits will not be used for calculating pavement performance measures.

The FHWA agrees with the comments and recommendations from AASHTO and Connecticut and New York DOTs to provide flexibility for State DOTs to use segments other than 0.10 mile at the bridges. Therefore, FHWA revised sections 490.309(b)(1)(i)(C), 490.309(b)(2)(i)(C), 490.309(b)(2)(ii)(C), and 490.309(b)(ii)(C) and added sections 490.309(b)(1)(iv)(C) and 490.309(b)(2)(iii)(C) so that shorter than 0.10 mile pavement sections are permitted at bridges. The FHWA also provided flexibility for State DOTs in reporting pavement sections by either: (1) Reporting uniform section lengths of 0.10 mile regardless of presence of bridges (Figure 3); or (2) reporting shorter than 0.10 mile pavement

sections adjacent to bridges (Figure 4). The method of excluding the bridges for both options will be the same for both pavement section reporting options. The FHWA notes that if the first option is chosen, the reported IRI, rutting, faulting, and Cracking Percent metric values for a 0.10 mile pavement section will be influenced by the surface condition of the bridge deck. State DOTs should carefully examine the impact of bridge surface condition on the pavement condition measures when choosing the options on reporting pavement sections at (or adjacent to) bridges.

The FHWA cautions State DOTs in changing the way they report pavement sections at (or adjacent to) bridges between the time of target establishment and the time of progress evaluation. Such changes may alter the measures reported, which could then impact how an established target relates to actual measured performance. This difference could impact a State DOT’s ability to make significant progress toward achieving targets. Therefore, FHWA recommends that reporting of pavement section pavement sections at (or adjacent to) bridges is consistent between the HPMS data reporting cycles so that evaluating progress toward achieving target is consistent.

Finally, unlike the NHS limits and urbanized area boundary, FHWA did not propose that constant bridge limits would be used for excluding bridges

throughout performance period. The FHWA did not add language in the final rule specifying constant bridge limits to be used for excluding bridges throughout performance period. However, FHWA expects State DOTs to take necessary actions so that changes (both the number and the limits) in reported Structure Type Data Item in HPMS will be minimal between the data reporting cycles and have minimal impact on changes in pavement condition. In the discussion section for section 490.105(d)(3), ARC commented that changes to the NHS network are likely to be “infrequent and minimal” in impact when compared to the overall network extent. The FHWA expects the majority of changes in reported Structure Type Data Item in HPMS between data reporting cycles will be due to changes in NHS limits. For example, if a State DOT reports Structure Type Data Item in HPMS for only a small fraction of their bridges at the time of target establishment but reports for all bridges in subsequent years, the progress evaluation of targets for pavement condition measures will not be done in a consistent manner. The FHWA encourages State DOTs to take necessary actions to better integrate data between NBI and HPMS prior to establishing performance targets to minimize the impact of changes in HPMS between reporting cycles.

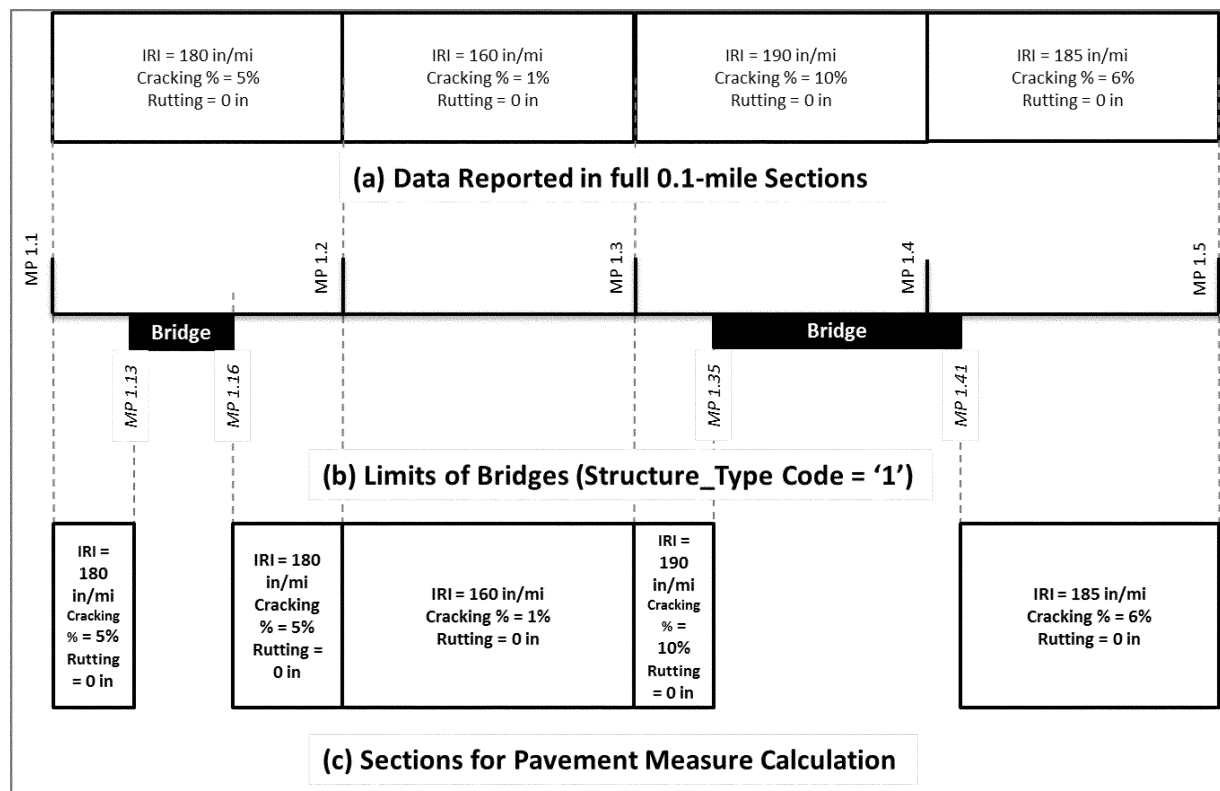


Figure 3 – An example of 0.10 mile pavement section with data measured in full 0.10 mile sections

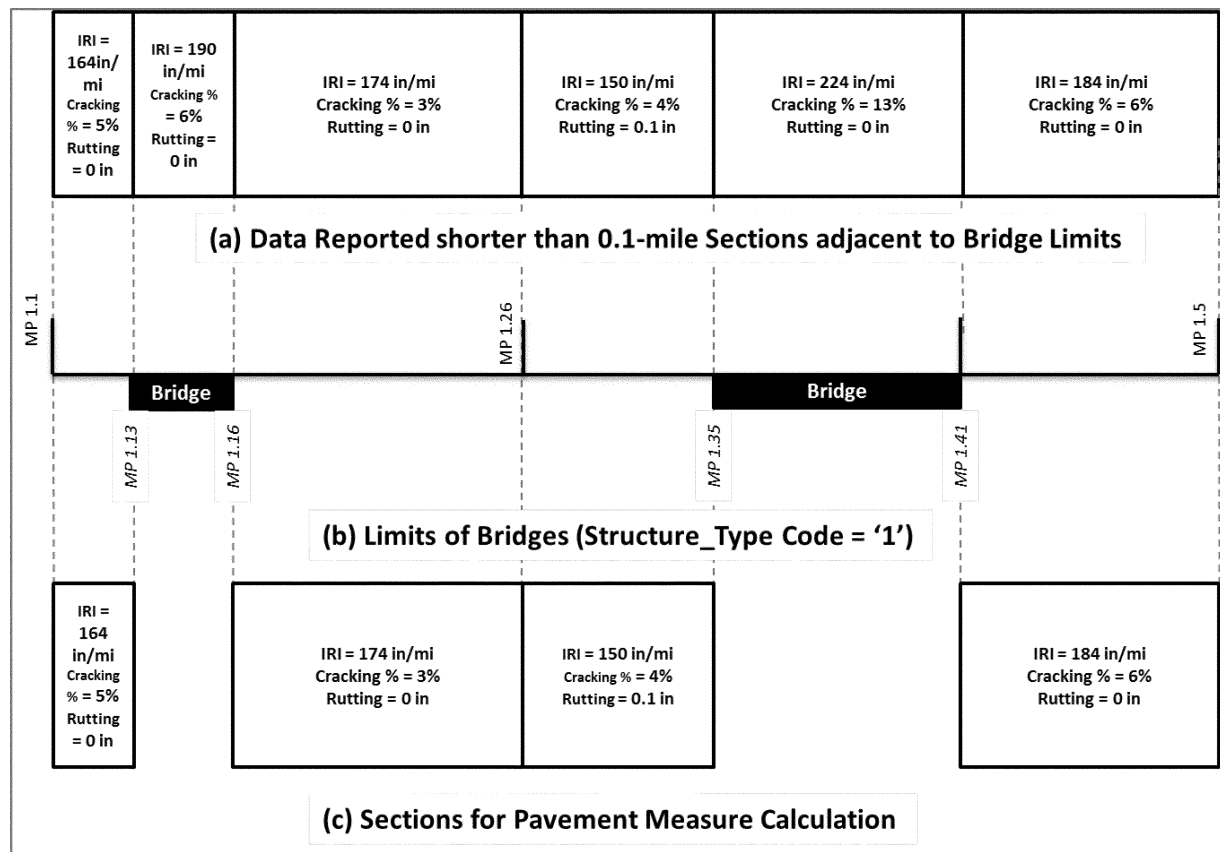


Figure 4 – An example of shorter than 0.10 mile pavement sections adjacent to bridge limits where data is measured separately for each section

Travel Lane Required for Data Collection

In the NPRM, FHWA proposed that data be collected for all four condition metrics in the rightmost travel lane, or one consistent lane if the rightmost travel lane is not accessible. The AMPO stated that a lane-mile requirement could become prohibitively expensive. This commenter suggested a compromise similar to the Interstate requirement where data is collected in each direction for highways divided by a physical median. Similarly, the commenter said data for frontage roads, which serve NHS facilities, should be collected as well and be reported separately. The AASHTO and the Connecticut and Wisconsin DOTs commented that the rightmost lane may not be the most effective for data collection. They agreed that a consistent lane should be used, but preferred that State DOTs make the decision on the lane for data collection. The commenters expressed concerns with using the rightmost lane in mountainous areas. They argued that these lanes are often dedicated to truck travel and not representative of the other lanes on the roadway. They also expressed concern

with the challenges of collecting data in urban settings where the rightmost lane is often more congested than other lanes. The Tennessee DOT commented that they currently test the rightmost lane and supported the proposed requirement.

The FHWA considered these points and acknowledges that pavement conditions measured in dedicated truck lanes and congested lanes may not be representative of the overall condition of pavements in all lanes. The FHWA amended section 490.309(b) to allow other lanes to be used if the rightmost lane carries traffic that is not representative of the remainder of the lanes or is not readily accessible due to closure, excessive congestion, or other events impacting access.

Devices for Rutting Collection

The Florida and Oregon DOTs commented that the proposed process for data collection allows for rutting measurements using either a device that determines rutting from 5 points across the lane, or a device that determines rutting from 1,000 points or more across the lane. They argued that there is a large difference between the two methods. Fugro Roadware commented

that AASHTO R48–10 is not a reliable solution and should be removed as an option for pavement condition reporting. A review of AASHTO Standards R48–10 and PP–70 suggests that differences in precision exist. While the automated transverse profiling devices are the preferred method for measuring rutting, FHWA realizes that the devices are not yet universally adopted by State DOTs and that a significant number of State DOTs use the 5-point devices in their pavement programs. The NPRM provided for use of either device. No changes are made in the final rule.

Discussion of Section 490.311 Calculation of Pavement Metrics

The FHWA proposed the methodology to be used by State DOTs to calculate the IRI, cracking, rutting, and faulting metrics and the requirements to report these metrics and the three inventory data elements to the HPMS. The condition metrics are used, as defined in section 490.313, to classify pavements as being in Good, Fair, or Poor condition. These methods and metrics were derived primarily from

published standards⁷² used in pavement design and adopted by a majority of State DOTs.

A number of commenters suggested additional or alternative metrics to be collected and identified challenges with the use of IRI in some local jurisdictions. The FHWA included discussion on these comments and the changes to the final rule in the previous sections of this rulemaking.

In the NPRM, FHWA proposed a requirement in section 490.311(b)(1) for State DOTs to determine the IRI metric for all NHS sections. As discussed in the previous section, a number of comments raised concerns with the collection of IRI in urban settings and on lower speed roadways. The FHWA used these comments to adjust the requirement of data collection to allow for an alternative method (PSR) to assess pavement condition on roadways where the posted speed limit is less than 40 mph. The PSR is to be determined using the method prescribed in the HPMS Field Manual, which is a visual overall assessment of pavement condition. The new provision also allows for State DOTs to utilize an alternative assessment method to estimate the PSR using a correlation that is approved by FHWA.

In section 490.311(b)(2)(i), FHWA proposed the method to calculate the amount of cracking in each asphalt pavement section. Many commenters noted inconsistencies with the proposed regulations and the HPMS Field Manual, the types of cracks to be included in the metric, and the consideration of cracks that have been sealed. In addition, several commenters noted concerns with the use of provisional AASHTO Standards that have been removed, as discussed previously for section 409.309 (under "Reference to AASHTO Protocols"). Fugro Roadware and the Ada County Highway District recommended the HPMS Field Manual metric of percent area of fatigue cracking for use on asphalt roads. The NCE commented that Cracking Percent may be overly simplistic for use in pavement management. The commenter states that Cracking Percent is a much simpler measure than PCI and adopting it in the rule as opposed to PCI "would be a step backwards." The commenter also remarked that Cracking Percent is not widely used by either local agencies or States. In addition, the commenter expressed concerns with the proposed

thresholds for pavement measures, stating that they are inappropriate for local roads.

Some comments sought clarification on the location of cracks to be included in the metric or how the area of cracked pavement is to be calculated. The language in the HPMS Field Manual has been changed to more clearly state that the location of cracks to be included shall be limited to the wheel paths only. The Louisiana DOT suggested that a wheel path be defined as 3 feet wide to eliminate metric conversion errors. The HPMS Field Manual further clarifies the width and location of each wheel path is in English units. In addition, commenters asked for clarification on the types of cracks to be included in the metric. Suggestions were provided to consider the severity of the crack and to limit the metric to only fatigue related cracking. Stephen Mueller Consultancy suggested that the severity level of cracking (high, medium, or low) be added to the HPMS "Cracking Percent" reporting requirement to be used as one of the pavement condition rating thresholds in the regulation. In addition, the Maine Turnpike Authority commented that severity of cracking will be crucial for making a fair assessment of a road's performance.

The intent of the metric is to only include load associated cracking in the wheel path. The HPMS Field Manual has been revised to clearly state that only fatigue (interconnected cracks) will be included in the metric. The FHWA believes that, for the purpose of the pavement measure being established through this rulemaking, an overall assessment of cracking is adequate to monitor system-wide performance. Consequently, FHWA does not feel that the cracking metric needs to consider the severity of the crack or cracking that is not related to pavement fatigue. The FHWA believes that the majority of fatigue generated cracking is in the wheel paths for asphalt pavements and therefore should be considered in the metric. The HPMS Field Manual has been revised to provide a clarification and guidance in reporting fatigue cracks, regardless of severity, in the metric.

Several commenters asked for clarification on the inclusion of sealed cracks in the cracking metric specifically related to asphalt pavements. The NEPPP noted that sealed cracks are often rated more severe using automated methods. The FP² corporation commented that crack sealing is an effective pavement preservation technique and should not be considered equal to an unsealed crack. The Rhode Island DOT

commented that sealed cracks should be considered in the metric.

In response to these comments, it should be noted that while sealing pavement cracks is an accepted practice for preserving pavements in Good condition, sealing cracks caused by fatigue does not restore structural capacity or alter the need for investment. The cracking performance metric in the final rule is predicated on measurement of fatigue cracking located only in the wheel path, regardless of whether the cracks are sealed. Therefore, no change was made in this final rule.

In section 490.311(b)(2)(ii), FHWA proposed methods to determine the rutting metric for asphalt pavements that permitted the use of either 5-point devices, scanning laser devices, or manual measurements. The Connecticut DOT asked for clarification on the accuracy of rutting measurement and Texas DOT suggested a minimum rut measurement spacing interval be required to determine the rutting average. The Michigan DOT suggested that if the precision level equaled the threshold for Good, then only pavements with zero rutting would be considered Good. The Texas DOT suggested an alternative metric that would represent the extent of rutting, in terms of the percentage of the section exhibiting rutting, to the proposed average value of rutting in a section. The Colorado, Florida, and North Carolina DOTs commented that the two devices identified in the NPRM for measuring rutting do not produce the same results. They recommended that only one device be permitted. The South Carolina DOT commented that it only has a 3-point laser system, and asked that FHWA consider the inability of State DOTs to perform the work in-house as required by the new rulemaking.

In consideration of these comments and inquiries made to the manufacturers of the measuring devices, the final rule clarified section 490.311(b)(2)(ii) and Item 50 of the HPMS Field Manual. The final rule requires the *average* rutting measurement to be computed to the nearest 0.01 inch, and that the measured rut values in each wheel path should be averaged first and then used as the basis for the final rutting metric calculation (average of the average wheel path ruts). The FHWA concurs with the comment by Texas DOT related to the minimum spacing for manual rut measurement at 12 inches and has included clarification in the HPMS Field Manual. However, FHWA does not concur with the suggestion to base the rutting measurement on the extent of rutting in a section instead of the averaged area of

⁷² Mechanistic-Empirical Pavement Design Guide, A Manual of Practice, August 2015, 2nd Edition. American Association of State Highway and Transportation Officials, Washington, DC. Table 7.1

rutting. While there is merit to the suggested method, it conflicts with typical practices used in a majority of State DOTs and would require major reworking of planning and other performance models, such as the Highway Economics Requirements System, currently in use by FHWA. The final rule retains the use of averaged area as the basis for the rutting metric.

In section 490.311(b)(3), FHWA proposed the method to determine the cracking metric for CRCP. Commenters⁷³ requested a more clear description of how cracking, punch-outs, and patching should be measured to determine the percentage of the area for the metric. The Alabama DOT commented that the values for Item 52 are rounded to the nearest 5 percent under the current HPMS Field Manual, meaning that a result of 7.5 percent cracked is rounded to 5 percent and values up to 12.5 percent are rounded to 10 percent cracked. Louisiana DOT made similar comments regarding rounding in the HPMS Field Manual. Item 52 in the HPMS Field Manual was revised to clarify how cracking and other distresses in CRCP are to be measured and reported to the HPMS.

In section 490.311(b)(4)(i), FHWA proposed the method to determine the cracking metric for jointed concrete pavements. There were a number of comments⁷⁴ requesting clarification about the method of calculation, the types of cracks to be included, and the consideration of sealed cracks to the measure. Item 52 of the HPMS Field Manual (attached to the NPRM and posted to the docket) has been revised to clarify how the cracking metric for jointed concrete pavements is to be calculated and reported to the HPMS. There are no changes in the final rule language related to this issue.

In section 490.311(b)(4), FHWA proposed the method to determine the faulting metric for jointed concrete pavements from measured pavement profiles, although there is no prohibition from using manual methods. A number of comments⁷⁵ focused on the method to determine faults from pavement profiles, the determination of average faulting, and the accuracy of reporting. The NPRM proposed the use

of AASHTO Standard R36–13 as the method to identify faults, allowing for both automated and manual detection of faults. Several commenters⁷⁶ expressed concerns with the potential for bias using the automated method. They remarked that the automated method would only average joints that exhibit measurable faulting. They noted that AASHTO Standard R36–13 allows for variability in the method of detecting the location of joints, which causes variation in the reported faulting values.

In response to these concerns, FHWA has revised the section for Data Item 51 in the HPMS Field Manual to clarify how to calculate and report the average faulting to the HPMS.

The Michigan DOT, Alabama DOT, and Louisiana DOTD pointed out a conflict in the threshold proposed to determine Good faulting condition and the accuracy of reporting for the faulting metric. The Louisiana DOT stated that the proposed metrics for faulting appear to be based on pre-2000 historical faulting data, which ignores the significant increase in Truck Traffic and is relatively limited in scope. As Michigan DOT pointed out, if the precision of the reporting of average faulting for a section is 0.05, the process of rounding would eliminate the possibility of a Good classification unless the pavement faulting was zero. For example, if in a section one half of the measurements were 0.02 inch and one half of the measurements were 0.04 inch, the average would be 0.03 inch, which would be rounded up to 0.05 inch. Since the threshold is also 0.05 inch, this section would be classified as Fair per the NPRM, even though all of the measurements were in the Good range. A recheck with the manufacturers of the measuring equipment indicated that the devices would not have a problem providing an average measurement to the 0.01 inch precision. This would eliminate the problem. The basis for the faulting thresholds is the “end of design life” from the AASHTO Mechanistic-Empirical Pavement Design Guide (MEPDG),⁷⁷ not pre-2000 historical faulting data as suggested by Louisiana DOT.

In the final rule, FHWA revised the reporting accuracy of faulting from 0.05 inches to 0.01 inches to address conflicts associated with rounding in the determination of condition levels.

In section 490.311(c)(4) and (5), FHWA proposed due dates of April 15th

and June 15th to report metrics to the HPMS for the Interstate and non-Interstate NHS, respectively. The AASHTO, Alaska DOT&PF, Illinois DOT, Mississippi DOT, New York DOT, Oregon DOT, Rhode Island DOT, and Texas DOT objected to these due dates. They expressed concern with managing two different submission dates and the challenges of meeting the April 15th deadline for Interstates. The commenters felt that the earlier due date was not necessary and that all of the data should be submitted no later than June 15th. The Wisconsin and the Kentucky DOTs commented that they could meet the proposed April 15th deadline. The Washington DOT agreed with reporting metrics for the entire Interstate System by April 15th.

The FHWA included discussion in the NPRM to explain the reasoning for this proposed change. In summary, the accelerated due dates for Interstate pavements and NHS bridges is needed to administer the NHPP condition requirements prescribed in 23 U.S.C. 119(f). These provisions require FHWA to make a determination of compliance in a time frame that would allow for any resulting penalties to be applied by the next fiscal year. The April 15th deadline was proposed to provide sufficient time for the data to be reviewed and for any issues to be addressed before a determination is made. As discussed previously, the determination will be made based on HPMS data extracted on June 15th. State DOTs will have 2 months prior to June 15th to address any unresolved issues with the data submitted to HPMS. The final rule retains the due dates for HPMS submission as proposed.

Discussion of Section 490.313 Calculation of Performance Management Measures

The FHWA proposed the following:

- (1) The methods to calculate the condition levels for each of the four condition metrics;
- (2) the approach to address missing data;
- (3) a transition in the design of the pavement measure for non-Interstate NHS pavements; and
- (4) the method to calculate the section 490.307 pavement performance measures. The proposed approach utilized a method that considered the predominant condition level, represented by the four condition metrics, to determine the overall condition of each pavement section. The overall condition was proposed to be used to determine the percentage of the Interstate and non-Interstate NHS in Good and Poor conditions. In addition, the NPRM provided for a transition for non-Interstate NHS pavements that

⁷³ AMPO, Fugro Roadware, Virginia DOT, Illinois DOT, Louisiana DOTD, New Jersey DOT, Portland Cement Association.

⁷⁴ Colorado DOT, Connecticut DOT, Louisiana DOT, Michigan DOT, Mississippi DOT, New Jersey DOT, New Mexico DOT, New York DOT, Oregon DOT, Rhode Island DOT, Tennessee DOT, Wisconsin DOT, FP² Inc., NAPA, NCE, Portland Cement Association, Southeastern Pavement Preservation Partnership, and three private citizens.

⁷⁵ Michigan DOT, Wisconsin DOT, Iowa DOT, Louisiana DOT, PCA, Roadway Profile Users Group.

⁷⁶ Michigan DOT, Wisconsin DOT, Iowa DOT, Louisiana DOT, Ohio DOT (Tim McDonald), PCA, Roadway Profile Users Group.

⁷⁷ Mechanistic Empirical Design Guide, A Manual of Practice, Second Edition AASHTO 2015.

utilized only the IRI metric for the first performance period in determining the pavement measure. Finally, the NPRM also proposed an approach to consider all sections with missing data to be in Poor condition.

A number of comments were received on the use of the terms “Good,” “Fair,” and “Poor” and the condition metrics that were proposed to determine condition levels and the final pavement measures. The City of Seattle DOT suggested that FHWA define pavement condition in terms of 3 to 4 predominant assessment systems, arguing that it would provide additional flexibility. The FHWA considered these comments in the review of section 490.307. The discussion in section 490.307 of this preamble responds to comments and describes corresponding changes to the final rule.

In section 490.313(b), FHWA proposed thresholds for each of the four condition metrics that would be used to determine Good, Fair, and Poor condition levels. Several comments, primarily from local government agencies,⁷⁸ suggested that the thresholds be set differently for higher and lower volume roadways. The Louisiana DOT proposed that different performance metrics be identified for pavements that have higher traffic volumes. Maryland DOT generally agreed that the proposed criteria are appropriate, but suggested that alternative thresholds may be appropriate if friction is included as a metric, or if consideration is given to the causes of and repairs to structural cracking versus surface (functional) cracking. The Missouri DOT commented that one approach should be used for all roadways. The FHWA agrees with the comment from Missouri DOT and maintains that a standard definition of condition levels be used for all levels of roadway. The intent of MAP-21 is that State DOTs and MPOs establish targets that reflect different expectations for pavement conditions due to higher and lower traffic volumes and/or other reasons. For example, a State DOT may elect to establish the pavement performance condition target for high traffic volume roads to be significantly

smoother and less prone to disruption from maintenance activities than conditions on lower volume roads.

The FP² Corporation and State DOTs of Georgia, Rhode Island and Illinois expressed concerns regarding the weighting of pavement measures. They suggested that rather than weighting equally (except for rutting and faulting, which are combined), FHWA should consider weighting rutting and faulting differently. Fatigue cracking and rutting typically have a higher impact on the overall pavement condition rating and deterioration rate than does IRI or faulting. In addition, the State DOTs of Connecticut and Illinois argued that excluding bridges from the IRI calculation conflicts with the current HPMS Field Manual reporting practices. The State DOTs asked if the HPMS Field Manual will be updated.

The FHWA appreciates the concerns from FP² Corporation and the Georgia, Rhode Island and Illinois DOTs about the issues related to weighting of the pavement metrics. The FHWA recognizes that weighting is a typical practice for pavement management in many jurisdictions. However, the evaluation of pavement performance is more of a snapshot of existing conditions than a predictor of future conditions. Because of this, it is dependent more or less equally on each of the parameters described in the NPRM and maintained in the final rule. With reference to the bridges, it should be noted that the HPMS Field Manual made changes related to excluding bridges as required by 23 U.S.C. 119(f)(1)(A). Revisions to the HPMS Field Manual incorporated in the final rule retain these changes.

In section 490.313(b)(1), FHWA proposed IRI thresholds of less than 95 for Good condition and more than 170 for Poor condition with an exception for urbanized areas over 1 million in population. The IRI equal to 95 threshold reflects the generally accepted point where a road surface is no longer considered smooth; an IRI equal to 170 is the point where a road surface is considered unacceptably rough. A threshold of 220 for Poor was proposed for urbanized areas over 1 million in population, citing that a greater tolerance for increased roughness, lower travel speeds, utilities and construction difficulties existing in these areas. Several commenters⁷⁹ objected to this

provision. They argued that population should not be part of the definition of pavement roughness and that if adopted, it should be extended to all urban areas. The AASHTO and Connecticut DOT also requested clarification on the definition of urban, suggesting that urban areas should include more than the 1 million population threshold proposed in the NPRM. The Orange County Transportation Authority, PSRC, Road Profilers Users Group, Tennessee DOT, and Washington DOT suggested that the threshold for IRI on pavements be based on speed, not population. New Jersey DOT argued that the Interstate IRI should never be greater than 170, regardless of whether or not it is urban. CEMEX USA suggested that a “Poor IRI threshold of greater than 170 in/mile” be used for both rural and urban Interstate applications. Similarly, the Northeast Areawide Coordinating Agency, the Metropolitan Transportation Commission, and the Portland Cement Association agreed that urbanized and non-urbanized areas should have the same thresholds. Florida DOT and Illinois DOT also noted that there is potential confusion over census boundaries, adjusted/approved boundaries, and metropolitan planning areas.

The FHWA agrees that a separate threshold should not be established for urban areas, primarily because of the point raised by Florida DOT on confusion about boundaries for urbanized areas with a population over 1 million. The exception provided for in the NPRM (section 490.313(b)(2)) has been removed from the final rule. The change requires that all pavements will be considered in Poor IRI condition when the IRI is greater than 170.

In section 490.313(b)(2), FHWA proposed cracking thresholds of less than or equal to 5 percent for Good condition and greater than 10 percent for Poor condition. The New Mexico DOT commented that the definition of Cracking Percent is unclear, particularly for flexible pavements. In addition, the commenter stated the proposed threshold is too low. The Louisiana DOT commented that the thresholds for Cracking Percent be reviewed. The commenter stated that the usefulness of Cracking Percent is extremely limited. In addition, the commenter proposed that total length of cracks in a section be used as opposed to Cracking Percent. The AASHTO and Alabama DOT

⁷⁸ City of Fremont, CA, City of Santa Rosa, CA, City of Vacaville, CA, Colorado DOT, Contra Costa County, CA, County of Marin, CA, Metropolitan Transportation Commission, Oversight Committee for the California Local Streets and Roads Needs Assessment, Puget Sound Regional Council, Rural Counties Task Force, California DOT, Cemex USA, City of Vancouver, WA, Connecticut DOT, County of Los Angeles, Oregon DOT, South Dakota DOT, Seattle DOT, Orange County Transportation Authority, City of Portland, OR, City of Sacramento, CA, City of Gilroy, CA, City of Napa, CA, Town of Tiburon, CA, City of Spokane, WA, California Association of Counties, League of California Cities, Ada County Highway District.

⁷⁹ Alaska DOT&PF, AASHTO, CalTrans, Association of Municipal Planning Officials, Connecticut DOT, Idaho DOT, Illinois DOT, Iowa DOT, Louisiana DOT, Mississippi DOT, Missouri DOT, Montana DOT, New Jersey DOT, North Dakota DOT, Oklahoma DOT, South Dakota DOT, Tennessee DOT, Washington State DOT, Wyoming

DOT, Puget Sound Regional Council, Road Profilers Users Group, North East Ohio Areawide Coordinating Agency, CEMEX, USA, Brian Domsic, Ohio DOT, Larry Scofield.

commented that the proposed cracking thresholds for asphalt and jointed concrete pavements were more appropriate for Interstates and intended for project level assessments, citing references in the AASHTO MEPDG for

different design thresholds. The FP² Corporation proposed alternative cracking thresholds of less than 10 percent for Good condition and greater than 20 percent for Poor condition.

In response to the comments, the threshold for Poor due to cracking is

relaxed in section 490.313(b)(2) of the final rule (Table 1). This change aligns with the AASHTO MEPDG⁸⁰ for arterial highways and reflects actual practices States DOTs use for design and management of NHS highways.

TABLE 1—CRACKING PERCENT PAVEMENT CONDITION RATING THRESHOLDS

Surface type	Metric	Metric range (percent)	Rating
Asphalt Pavement	Cracking Percent	<5 5–20 >20	Good. Fair. Poor.
Jointed Concrete Pavement	Cracking Percent	<5 5–15 >15	Good. Fair. Poor.
CRCP	Cracking Percent	<5 5–10 >10	Good. Fair. Poor.

No comments were received on the proposed cracking condition thresholds for CRCP (section 490.313(b)(2)(iii)). Therefore, they have been incorporated as proposed.

In section 490.313(b)(3), FHWA proposed asphalt pavement rutting thresholds of less than 0.20 inch for Good condition and greater than 0.40 inch for Poor condition. Several commenters⁸¹ objected to these standards. They argued that the thresholds were not reasonable in areas where tire studs and snow chains are used and that 0.75 inch was a more acceptable threshold. Connecticut DOT suggested that increments of 0.25 inches be used for the thresholds, as opposed to the proposed 0.10 inch increments. Cemex USA and PCA commented that the rutting threshold of 0.10 should be the threshold for Poor condition as this is the level where hydroplaning would begin to occur. The Ohio DOT commented that the proposed rutting threshold of 0.10 would minimize the risk of hydroplaning. For 0.10 mile segments that have relatively uniform rutting, the threshold is appropriate, however, the threshold is inappropriate for 0.10 mile intervals that contain high stress areas.

The FHWA acknowledges the issues related to the use of tire studs and snow chains; however, as noted by Cemex

USA and PCA, the presence of rutting has a potential safety impact to users of the system regardless of the stress in the pavement. Although hydroplaning is possible at rutting level as low as 0.10 inch, the documented practices for State DOTs⁸² identify rutting above 0.20 inch as cause for concern and above 0.40 inch as needing immediate attention. Moreover, these levels are supported by the design thresholds in the MEPDG,⁸³ which has been widely adopted by State DOTs. The final rule retains the proposed thresholds for asphalt pavement rutting.

In section 490.313(b)(3)(ii), FHWA proposed faulting thresholds for jointed concrete pavement of less than 0.05 inch for Good condition and greater than 0.15 inch for Poor condition. There were a number of comments⁸⁴ about this proposal. Some commenters argued that the thresholds were too stringent, particularly to define Good conditions. Some noted that there appears to be a conflict in the proposed threshold of 0.05 inch for Good condition and in the 0.05 inch accuracy of reporting for faulting (discussed earlier in section 490.311(b)). Others suggested that the 0.05 inch threshold for Good faulting would be difficult to maintain using sound construction, preservation, and maintenance activities. The suggested

thresholds for Good ranged from 0.05 inch to 0.25 inch.

In the NPRM, FHWA proposed a minimum requirement for reporting faulting in the HPMS to a precision level of 0.05 inch, reflecting measuring capabilities from legacy equipment no longer in use. Current devices are accurate to 0.002 inches⁸⁵ for individual measures and routinely deliver average values to a precision level of 0.01 inch. The HPMS permits State DOTs to report values more precisely than 0.10 inch and several report values to 0.01 inch or even 0.001 inch precision levels.

The FHWA revised section 490.313(b)(3)(ii) to provide a 0.01 inch precision level for reporting average faulting, reflecting the existing state of the practice. The FHWA also revised section 490.313(b)(3)(ii)(A) to set the threshold for Good at 0.10 inch, as discussed in the research.⁸⁶ The FHWA retains the threshold for Poor at 0.15 inch since the same research indicates that a highway with an average of this faulting level would be considered unsatisfactory to all users and not easily repaired.

In response to the concerns with collecting IRI data on lower speed roadways and the request from local governments to consider alternative condition assessment methods, FHWA

⁸⁰ The Mechanistic-Empirical Pavement Design Guide: A Manual of Practice from AASHTO (2008). AASHTO distributed this document to State DOTs upon publication. The document is currently available for purchase on the AASHTO Web site. A copy has been placed on the docket and is available for viewing by the public.

⁸¹ AASHTO, Colorado DOT, Connecticut DOT, Rhode Island DOT, Oregon DOT and North Dakota DOT.

⁸² American Association of State Highway and Transportation Officials, "Report of the AASHTO Joint Task Force on Rutting," Washington, DC, 1989.

⁸³ Mechanistic-Empirical Pavement Design Guide, A Manual of Practice, August 2015, 2nd Edition. American Association of State Highway and Transportation Officials, Washington, DC. Table 7.1.

⁸⁴ AASHTO, Idaho DOT, Connecticut DOT, Tennessee DOT, Mississippi DOT, North Dakota

DOT, Oregon DOT, Rhode Island DOT, Virginia DOT, Louisiana DOTD, Portland Cement Association, Cemex USA, FP² Corporation, Fugro Roadware, and Southeast Pavement Preservation Partnership.

⁸⁵ This is also the standard sensor accuracy required in AASHTO Standard M328–10.

⁸⁶ Improving FHWA's Ability to Assess Highway Infrastructure Health FHWA–HIF–13–042.

has established thresholds to define Good, Fair, and Poor condition levels based on PSR in section 490.313(c)(4). In developing these thresholds, FHWA utilized relationships developed by Michael Darter.⁸⁷ Mr. Darter's research suggests a rough correlation between estimated PSR values and measured IRI. In the final rule, the usage of PSR is restricted only to locations where posted speed limits are less than 40 mph on any NHS highway. The intent of this restriction is to provide an alternative method for areas with "stop-and-go" traffic and where constant speeds needed for proper operation of the measuring devices are not attainable. The PSR is calculated based on a defined process⁸⁸ that uses pavement conditions that include cracking, rutting, and faulting. The overall performance condition rating for these sections is determined directly from the reported PSR values. The comments from the local agencies⁸⁹ indicated that some used methods other than PSR, such as PCI, to rate

pavements. The final rule provides that equivalent methods to determine pavement condition can be used with prior approval from FHWA of the pavement data collection method and the technique to convert values to PSR.

In section 490.313(b)(4), FHWA proposed that roadway sections with missing, unresolved, or invalid data would be considered in Poor condition for each respective condition metric. The FHWA received comments from 41 groups⁹⁰ objecting to the proposal. The majority of the commenters expressed concern that the proposed action would give a false impression of the condition of the network and would mislead the public. Commenters identified common reasons for missing data, including actual or planned construction, road closures, disasters, and similar kinds of events. Most suggested that in any given year it would be unrealistic for a State DOT to reach more than 95 percent of their network, even under the best of conditions. The commenters offered alternative approaches to the proposed method, including: (1) An allowance of

the network to be missed for valid reasons; (2) using previous year reported metrics when data is missing; (3) base the measure only on the sections that were tested and (4) an allowance for construction projects that will improve pavement surface be automatically categorized as Good until a formal rating can be given. The Illinois and Washington DOTs did not specifically object to the proposal, but asked if segments under improvement would default to Poor.

In response, FHWA revised section 490.313(b)(4)(i) to allow no more than 5 percent of the network lane miles, not including bridges, unpaved and "other" surface types (such as cobblestone, planks, brick), to be represented with missing, unresolved, or invalid data due to the reasons noted in Table 2 below. The codes provided in Table 2 are to be documented in the HPMS submission whenever data is missing for any of the required relevant condition metrics or inventory data elements.

TABLE 2—HPMS CODES FOR MISSING DATA

Code	Description
1	Construction—Roadway was under construction.
2	Closure—Roadway was closed to traffic.
3	Disaster—Roadway was located in an area declared as a disaster zone.
4	Deterioration—Roadway is too deteriorated to measure; is already designated as "Poor" and is in the STIP for Capital Improvement Program purposes.
5	Other—Please describe in comments.

The FHWA will determine that a reported section in HPMS has a missing, invalid or unresolved data on June 15, 2019, and annually thereafter for Interstate System (section 490.317(b)) and on August 15, 2018 and biennially thereafter for non-Interstate NHS (sections 490.109(d)(2) and 490.109(d)(4)). Once State DOTs submit data to HPMS by April 15 for the Interstate System (sections 490.311(c)(4) and 490.311(d)(2)) and by June 15 for the non-Interstate NHS (sections 490.311(c)(5) and 490.311(d)(3)), FHWA

will identify the data sections that do not meet the data requirements specified in sections 490.309 and 490.311(c) or do not provide sufficient data to determine its Overall Condition specified in sections 490.313(c) through (f) and FHWA will classify those data sections as "missing or invalid data." The FHWA will then notify State DOTs the list of those data sections classified as missing or invalid data. Upon FHWA notification, State DOTs will have an opportunity to rectify by FHWA data extraction dates (June 15 for the

Interstate System and August 15 for non-Interstate NHS) for determining minimum condition level for the Interstate System and significant progress determination for non-Interstate NHS. If a State DOT does not rectify FHWA identified missing or invalid data by FHWA data extraction dates, then those unrectified data will be classified as "unresolved data." The FHWA will issue guidance on classifying "missing, invalid or unresolved data."

⁸⁷ "Relationships between IRI and PSR", Al-Omari and Darter, ULIU-ENG-92-2013 (1992).

⁸⁸ Carey, W.N. and Irick, P.E. "The Pavement Serviceability Concept" Bulletin 250, Highway Research Board, 1960.

⁸⁹ City of Fremont, CA, City of Santa Rosa, CA, City of Vacaville, CA, Colorado DOT, Contra Costa County, CA, County of Marin, CA, Metropolitan Transportation Commission, Oversight Committee for the California Local Streets and Roads Needs Assessment, Puget Sound Regional Council, Rural Counties Task Force, California DOT, Cemex USA, City of Vancouver, WA, Connecticut DOT, County of Los Angeles, Oregon DOT, South Dakota DOT, Seattle DOT, Orange County Transportation

Authority, City of Portland, OR, City of Sacramento, CA, City of Gilroy, CA, City of Napa, CA, Town of Tiburon, CA, City of Spokane, WA, California Association of Counties, California League of Cities, South Jersey Transportation Planning Organization, Portland Cement Association, American Concrete Pavement Association, Northwest Pavement Management Association, Fugro Roadware, NCE, Brian Domsic, John Harvey.

⁹⁰ Alabama Department of Transportation, Alaska DOT&PF, California (Caltrans), Connecticut DOT, Delaware DOT, Georgia DOT, Idaho DOT, Iowa DOT, Kentucky TTC, Louisiana DOT, Maryland DOT, Michigan DOT, Minnesota DOT, Mississippi DOT, Missouri DOT, Montana DOT, New Jersey DOT, New York State DOT, North Carolina DOT,

North Dakota DOT, Oregon DOT, Pennsylvania DOT, Rhode Island DOT, South Dakota DOT, Tennessee DOT, Texas DOT, Virginia DOT, Washington State DOT, Wyoming DOT, AASHTO, AMPO, National Association of Regional Councils (NARC), New York State Association of Metropolitan Planning Organizations, Northeast Pavement Preservation Partnership, Southeast Pavement Preservation Partnership, Texas Association of Metropolitan Planning Organizations, New York Metropolitan Transportation Council, Atlanta Regional Commission, Community Planning Association of Southwestern Idaho, Knoxville Regional TPO, Fugro Roadware.

The percentage will be determined by total lane-miles with missing, invalid, or unresolved for the network divided by the total lane-miles of the network (excluding the lane-miles of bridges, unpaved surface type, and “other” surface type). As shown above, the criteria for determining missing, invalid, or unresolved values did not include the data completeness of Structure Type data item. However, FHWA expects State DOTs to report comparable data contained their NBI data. Please see discussion sections for 490.313(f)(1) related to excluding bridges. The FHWA plans to check the reasonableness of total lane-miles of bridges reported in HPMS with the reported NBI data.

The final rule prohibits reporting data collected during the previous data collection cycles because it does not accurately represent current pavement conditions required for reporting performance. Similarly, pavements under construction are not in “Good” condition and should not be reported as such. A review of recent submissions to the HPMS indicates that timely and complete data submissions have been problematic for some State DOTs, although 23 CFR 420.105(b) has required State DOTs to “provide data that supports FHWA’s responsibilities to the Congress and to the public” for many years. Failure to comply with this

rule results in inadequate data to report performance, as required in section 490.107 for the NHS, and insufficient data to enforce the provisions of 23 U.S.C. 150(c)(3)(iii) for minimum conditions on the Interstate System. Because of the importance of the Interstate System to demonstrate progress toward the national goals in 23 U.S.C. 150(b), the final rule requires that State DOTs have at least 95 percent of the Interstate pavement data available, and demonstrate that no more than 5 percent of the pavements are in Poor condition to avoid imposition of the penalties under section 490.317.

In addition, FHWA revised section 490.109(e)(4) so that FHWA will determine that a State DOT has not made significant progress toward the achievement of an NHPP target if a State DOT does not comply with the data completeness requirement under this section. (See discussion on section 490.109(e)(4) for more detail.)

Finally, the equation to calculate the measure was revised. It is now based on the total lane-miles collected and reported, not the total lane-miles in the system.

In sections 490.313(c) and (d) FHWA proposed that the method to determine the overall condition of the pavement be based on the conditions levels for each metric. The AMPO and the State DOTs

of Colorado and Illinois commented that the condition metrics should not be considered equally in the determination of overall condition. The North Dakota DOT commented that faulting and IRI are both indicators of roughness and therefore only one should be considered in the condition of jointed concrete pavements.

The FHWA notes that no data on pavement performance, as defined in the NPRM and in the final rule, exists at the present time. The MEPDG⁹¹ suggests that the selected parameters are equally important in predicting future pavement conditions. The FHWA is committed to reevaluating the process through a future rulemaking once sufficient data has been collected. At this point there is no change in the proposed approach to determining the overall condition.

The FHWA established sections 490.313(c)(4) and 490.313(d)(4) to require the overall condition to be equal to the PSR condition level for roadways with posted speed limits less than 40 mph where State DOTs have reported PSR in lieu of the IRI, cracking, rutting, and faulting metrics. If a State DOT elects to collect PSR for pavement sections meeting these requirements, the overall condition of the section will be determined directly from the PSR values, as described in Table 3.

TABLE 3—OVERALL PAVEMENT CONDITION RATING THRESHOLDS USING PSR METRIC

Surface type	Metric	Metric range	Rating
All Pavements	PSR	≥4.0 >2.0 and <4.0 ≤2.0	Good. Fair. Poor.

The FHWA proposed a transition period in section 490.313(e) for implementing cracking, rutting, and faulting metrics for full extent non-Interstate NHS pavement measures to allow State DOTs time to implement the data requirements. During the proposed transition period, the overall condition rating for all pavement types on the non-Interstate NHS would be based on IRI rating only.

The FHWA received one comment on the proposed transition approach. The Washington DOT disagreed with the proposed transition approach. The Washington DOT remarked that the sole reporting of full extent IRI may “exaggerate the Poor condition.” They provided an example in which IRI-based measure calculation yielded 17 percent

Poor, but the measure calculation using all four metrics yielded 6.4 percent Poor for their for their non-Interstate NHS network. The Washington DOT recommended that the overall condition rating during the transition period should be based on HPMS sample sections for all four metrics. They argued that their approach ensures consistency in condition reporting across the entire first performance period. They also stated that MPOs would have no choice but to adopt the statewide targets (section 490.105(f)(3)) because the HPMS sample data would not be sufficient to represent their metropolitan planning area, and therefore they would not be able to establish their own unique targets.

The FHWA appreciates the comment and the recommendation from Washington DOT. As stated in the NPRM, FHWA recognized that complete data for establishing baseline condition/performance for the first performance period will not be available for many State DOTs. The IRI metric data is already required for all NHS routes and can be used by State DOTs and MPOs to estimate the baseline condition/performance during the non-Interstate NHS pavement measure transition period. The FHWA understands Washington DOT’s concerns about the discrepancies between IRI and four metrics based measures. However, on a national basis, the pavement performance metrics using sampled sections of the NHS is substantially less

⁹¹ The Mechanistic-Empirical Pavement Design Guide: A Manual of Practice from AASHTO (2008). AASHTO distributed this document to State DOTs

upon publication. The document is currently available for purchase on the AASHTO Web site. A

copy has been placed on the docket and is available for viewing by the public.

reliable and less representative of actual pavement conditions. For these reasons, FHWA retains section 490.313(e) in the final rule. (See discussion sections for sections 490.105(e)(7) and 490.109(e)(3) for more details on phase-in target establishment requirements and significant progress determination for the pavement condition measures.)

The New Jersey Department of Transportation requested clarification about how to report pavement conditions adjacent to bridges and other obstacles in the roadway. Alaska DOT noted that a significant portion of the NHS in Alaska is not paved and requested clarification about reporting conditions and rating performance on those routes.

Fugro Roadware recommended that sections with pavement surfaces that are not asphalt, PCCP, or CRCP be identified as alternative pavement types and should be excluded from the network length to determine the percent of Good, Fair, and Poor for Interstate and other NHS roadways.

In response to these requests, Section 490.313(f) includes exemptions for the sections of highway where the Structure is identified as a bridge and exempts sections that where the Surface Type is identified as unpaved or a type where pavement conditions cannot be measured, such as cobblestone or brick. The exemption for bridges conforms to the legislative requirement that measurement of performance not include bridges.

Discussion of Section 490.315 Establishment of Minimum Level for Condition of Pavements on the Interstate System

The MAP-21 requires the Secretary to establish minimum condition levels for pavements on the Interstate System to be maintained by State DOTs. The FHWA proposed the requirement that no more than 5 percent of Interstate pavements be classified as Poor. State DOTs are subject to a statutory penalty that would obligate a portion of NHPP funds and transfer a portion of STP funds to address Interstate pavement conditions if they fail to meet this minimum condition requirement for 2 consecutive years. Passage of the FAST Act in 2015 reduced the time from 2 consecutive years to 1 year.

The AASHTO and a number of State DOTs⁹² submitted comments suggesting the following:

- States would not be able to meet the 5 percent requirement.

- FHWA should establish the threshold at 10 percent (or higher) or not establish a threshold at all.

- State DOTs should set their own requirement as part of the target setting process. The requirement should be distinct by region.

- The minimum pavement condition requirements should consider a range of pavement condition thresholds that accommodate regional variation.

- The rule should establish criteria that reflect a rational assessment of a State's Transportation Asset Management Plan.⁹³

- Funds should not be diverted from one program to another as a penalty for not meeting the minimum condition standard.

- The FHWA should delay implementation of the minimum standard for 48 months from the effective date of the rule.⁹⁴

- The FHWA should incorporate safety measures into the minimum condition for the Interstate System.

In the NPRM, FHWA cited a review of the reported conditions in recent HPMS submissions which suggested that at least 40 of the 52 jurisdictions could meet the 5 percent standard. The existing HPMS data is not as comprehensive as was proposed in the NPRM, but suggests that most State DOTs already prioritize funding to maintain Interstates at a high level. The FHWA believes that setting the threshold higher than 5 percent Poor is not justified by any available data and does not accomplish the national goal of keeping the Interstate System in a state of good repair. Acknowledging that there is virtually no existing data on performance, FHWA made a commitment in the NPRM to review the data submission from State DOTs for the first performance period and conduct a separate rulemaking to change the minimum standard if justified by the assessment of Interstate pavement conditions.

In response to the suggestion that State DOTs set their own minimum standard for Interstate highways, the statute clearly indicates the requirement for a national standard as part of the NHPP and specifically directs FHWA to establish it. The minimum standard is seen as the minimum tolerable condition for the Interstate system to meet the national goals set in the legislation.

Recent submissions to the HPMS suggested that State DOTs prioritized Interstate pavement conditions in every State and did not show significant differences in any region, except in Alaska. Alaska's recent submissions to HPMS showed rates of roughness, cracking, and rutting many times more than other parts of the country. The Alaska DOT&PF commented that Interstate highways in Alaska do not resemble Interstate highways elsewhere in the Nation. They cited the obvious climatic issues present in an Arctic and sub-Arctic environment such as embankment failures due to melting permafrost, cracking, and settlement due to extreme temperatures and the need for studded tire use for 7 months of the year. More importantly, Alaska DOT&PF noted that the Interstate routes were not constructed under the expansion of the National System of Interstate and Defense Highways funding that was used to construct much of the Interstate system in other States. When the Interstate System was designated in Alaska in 1976,⁹⁵ the routes typically were two lanes, did not have access control, and had been constructed under a variety of standards, none of which met Interstate requirements. In addition, Alaska DOT&PF requested that Section 490.315 only apply to "signed" Interstates. Furthermore, they requested that non-Interstate roads that are not paved or that have similar design features as Interstates should not be subject to the performance measures for pavement either.

Although Alaska DOT&PF requested an overall exemption from the minimum standard requirement, MAP-21 does not provide that option. However, the regional conditions and issues brought to light by the Alaska DOT&PF suggest that a greater allowance for Poor pavements is appropriate. A review of the recent HPMS submissions from Alaska DOT&PF suggests that a standard of no more than 10 percent Poor should be achievable and appropriate for the conditions, as provided for in section 490.315(b).

Commenters expressed mixed opinions on the establishment of a minimum condition threshold that would become more stringent over time. Several commenters expressed concern that pressure to meet a difficult minimum condition threshold may push State DOTs to implement a "worst-first" approach to pavement preservation, which would run counter to the asset management principles and

⁹² New York State DOT, Connecticut DOT, Delaware DOT, Oregon DOT, Maine DOT, New Hampshire DOT, Vermont DOT, Ohio DOT, New York Association of Municipal Planning Organizations, Alaska DOT&PF, Connecticut DOT,

Georgia DOT, Texas DOT, New York Metropolitan Transportation Council.

⁹³ New York DOT.

⁹⁴ AASHTO, Connecticut DOT, New Jersey DOT.

⁹⁵ 23 U.S.C. 103(c)(1)(B)(ii).

planning approach advocated by FHWA.⁹⁶

However, AASHTO and the State DOTs of California, Louisiana, and Oregon recommended FHWA evaluate the effects of the national level performance measures and targets. They suggested that FHWA consider a graduated approach to setting minimum condition levels to ensure that these policies have a positive impact on management approaches.

The New York State DOT indicated that the establishment of penalties and minimum conditions should take into consideration sound performance and asset management policies. The New York State DOT suggested a delay until State DOTs adopt such measures.

The FHWA agrees that sound performance and asset management policies will aid State DOTs in establishing and achieving desired performance targets. However, it is clear that the intent of 23 U.S.C. 150(b)(2)(iii) and 23 U.S.C. 119(f)(1) is to keep Interstate pavements in a state of good repair in order to achieve the national goals outlined in the statute. The imposition of penalties that transfer Federal funds to Interstate programs is intended as a last resort for State DOTs that have not met this expectation. Delaying this effort would be contrary to the intent of the legislation.

In terms of implementation, the final rule establishes that State DOTs must start collecting Interstate pavement data for the HPMS according to the requirements in the rule not later than January 1, 2018, with the first reporting to HPMS not later than April 15, 2019. The FAST Act eliminated the “two consecutive reporting periods” provisions that were outlined in the NPRM. Therefore, the first evaluation of the Interstate pavement conditions for minimum condition levels will occur based on information in the HPMS database as of June 15, 2019. Delaying this determination is contrary to the intent of the FAST Act.

There are no changes to this section in the final rule except for modifying the 5 percent minimum requirement for Poor pavement condition to 10 percent in the State of Alaska.

Discussion of Section 490.317 Penalties for Not Maintaining Minimum Interstate System Pavement Condition

The FHWA proposed a methodology to annually assess the condition of Interstate pavements to determine

compliance with the minimum condition requirements in 23 U.S.C. 119(f). The MAP-21 specifically applies penalties to State DOTs that do not meet the minimum requirements for pavement condition. These penalties adjust the funding requirements for the Interstate System until the minimum condition standards are met.

The AASHTO and the NCPP outlined concerns from State DOTs over the application and subsequent consequences of not meeting the minimum condition requirements established by Congress and proposed by FHWA in the NPRM with the following arguments:

- Penalties should be eliminated in their entirety because they can lead to a “worst-first” management approach.
- The FHWA should allow longer timeframes for reporting periods before imposing mandatory penalties.
- The transition to the proposed full extent data collection requirements for pavements needs to be fully implemented before assessing penalties for minimum condition.
- Minimum condition and penalties should consider important factors like the current conditions for Interstate pavements or other stressors, such as impacts of State-specific climates.
- The FHWA should defer the imposition of any penalties and minimum condition thresholds to the fullest extent possible. Penalties should be a last resort and only utilized if a State DOT has not adopted sound performance and asset management policies and methods.
- The FHWA should be cautious if establishing a minimum condition goal based primarily on a limited amount of data.
- Attainment of minimum condition thresholds without sufficient and reliable Federal funding will be difficult for some States⁹⁷ and therefore detrimental to off-NHS needs.

Several State DOTs⁹⁸ agreed with AASHTO's comments and suggested that no standard was needed or that the minimum condition standard should be set at a level that would be much easier to meet. The Michigan State Transportation Commission (STC) and Michigan's Transportation Asset Management Council (TAMC) suggested that the “5 percent Poor” (or 95 percent Good/Fair) goal for Interstate pavements should be removed from the rule, arguing that setting such a high standard

for Interstate pavements will undermine State DOTs' ability to improve the condition or ensure the performance of the miles of NHS pavement under their control.

Title 23 U.S.C. 150(a) contains a declaration of policy directing the NHPP to provide efficient investment of Federal transportation funds by focusing on national transportation goals. These goals emphasize the importance of national routes to the economy, safety, and other concerns of the Nation. By including the requirements for a minimum level of condition for Interstate pavements and the penalty provisions in 23 U.S.C. 119(f), the statute focuses on the Interstate system as an essential part of achieving the stated goals. The statute is also clear that redirection of Federal funds is a last resort when Interstate highways do not meet the expectations for state of good repair.

A review of the Highway Statistics table for 2013⁹⁹ indicates that the percentage of State maintained highways that are Interstate lane miles averages 2.5 percent, with no State having more than 7 percent of the State maintained lane miles on the Interstate System. Even in the worst case, maintaining the Interstate lane miles to achieve 95 percent in Fair or better condition would not require the level of investment that would drive a program to a “worst-first” approach. On the contrary, good maintenance and preservation, as currently practiced by many State DOTs, would minimize requirements for major investment on these routes, most likely well below the threshold of 5 percent in Poor condition.

With respect to the timelines for implementation, the final rule takes into account the time State DOTs will need to acquire data collection equipment or arrange for contract data collection in section 490.309(a).

The AASHTO and the concurring State DOTs¹⁰⁰ noted that there may be climatic and other stressors affecting conditions of Interstate pavements. This may be true, but there is no evidence other than State HPMS submissions to estimate whether this variation actually exists. An examination of the 2013 submissions to HPMS suggests that no distinct variations in IRI or other reported pavement characteristics based on regional conditions were reported except in Alaska. Based on this finding

⁹⁷ New York DOT, National Asphalt Paving Association (NAPA).

⁹⁸ New York State DOT, Connecticut DOT, Delaware DOT, Oregon DOT, Maine DOT, New Hampshire DOT, Vermont AOT, New York Association of Municipal Planning Organizations.

⁹⁹ Highway Statistics 2013 Table HM-60.

¹⁰⁰ Alabama DOT, Connecticut DOT, Kentucky DOT, New Jersey DOT, New York State DOT, Tennessee DOT, Texas DOT, Alaska DOT&PF, and Georgia DOT.

⁹⁶ State DOTs of Arkansas, Oregon and Mississippi, the Southern California Association of Governments, the Seattle Department of Transportation.

and the estimation that the majority of State DOTs will meet the minimum pavement condition standard, the final rule was not changed except to accommodate Alaska, as described above. However, due to the limited availability of data on performance, FHWA committed to reexamine the pavement performance parameters after the first performance period and open a new rulemaking effort to make changes, if justified.

The MAP-21 language ties together the requirements for asset management plans and performance measurement. As previously stated, State DOTs are expected to have an asset management plan and sound performance policies within a certain period of time designated in the respective rules. In establishing the implementation schedule for data collection and performance evaluation under subpart C, care was taken to give State DOTs enough time to develop and implement the necessary programs to ensure pavement performance.

The FHWA agrees with AASHTO that the imposition of the penalty is a last resort effort necessary to ensure acceptable performance of the Interstate System to achieve the national goals for the NHPP.

Discussion of Section 490.319 Other Requirements

The FHWA proposed the Data Quality Management program requirements in section 490.319(c) to implement 23 U.S.C. 150(c)(3)(A)(iv) for pavement condition data. As FHWA indicated in the NPRM, the structure of the data quality Management Program is left up to State DOTs but this section proposed that the plan must have methods to ensure that equipment is working properly, people are trained, data quality is being checked, and that a method of error resolution is documented.

However, AASHTO and a few State DOTs¹⁰¹ objected to the language. They suggested that a data quality management program was not called for in the legislation; that no specific details are mentioned in the legislation; and that there is concern with the variability among FHWA Division Office approvals. The Oregon DOT requested clarification on which FHWA office would review and approve the Data Quality Management Program, noting that the requirement for a State DOT to seek approval for any change to the

Program seemed excessive. In their joint letter, the State DOTs of Idaho, Montana, North Dakota, South Dakota, and Wyoming suggested that the requirements for Data Quality Management be revised so that States must certify they have a data quality management program and provide a description to FHWA. Conversely, the Alaska DOT&PF supported the provision to have a Data Quality Management Program and suggested that the Program be approved prior to States using the data for the performance measures.

The FHWA disagrees with the comments from AASHTO and those concurring State DOTs. The FHWA believes that MAP-21 gives it the discretion to establish requirements for implementing 23 U.S.C. 150(c)(3)(A)(iv). The FHWA also believes the data quality management program requirements in section 490.319(c) will ensure quality data and provide a sufficient level of consistency in report expectations. The FHWA believes the proposed language is consistent with the nine principles¹⁰² in the NPRM preamble, which were considered in the development of the proposed regulation. Additionally, a recent FHWA study¹⁰³ on data quality indicated that most State DOTs have implemented parts of programs to ensure data quality but have not documented or formalized their use in the data collection process. As stated in the NPRM, the intent of this section was to ensure that the important step of formalization in the program occurs. The FHWA retains the language that leaves the content of the data quality management plan up to State DOTs because FHWA recognizes that every State DOT has unique methods, needs, and opportunities in the data collection. The FHWA approval of each State DOT's data quality management plan is to be based on its ability to deliver the specific outcomes identified in the NPRM and retained in the final rule. Specific guidance will be provided to Division Offices to ensure consistency in the Pavement Data Quality Plan requirements.

C. Subpart D National Performance Management Measures for Assessing Bridge Condition

Discussion of Section 490.401 Purpose

To implement the provisions of 23 U.S.C. 150(c)(3)(A)(ii)(III), FHWA proposed a statement of purpose which required the establishment of performance measures for State DOTs to use to assess the condition of bridges carrying the NHS which includes on- and off-ramps connected to the NHS. This is done to carry out the NHPP. The FHWA revised section 490.401 to provide clarity as to which highway bridges are subject to this regulation.

The FHWA received two comments on section 490.401. The Oregon DOT argued that the proposed rule would create a conflict by giving the Federal Government the authority to interfere with a State DOT's ability to independently manage its highway infrastructure assets.

The Virginia DOT provided a statement of support. The Virginia DOT argued that the proposed rule would promote a preservation approach to managing highway bridges and is an improvement over the "worst-first" approach.

The overall purpose of this rule and the underlying statutory provisions is to ensure that Federal transportation funds are efficiently invested and that the condition of highway infrastructure assets are maintained in a state of good repair, while increasing accountability and transparency of the Federal-aid highway program. (See 23 U.S.C. 150(a) and (b).) Although recipients of Federal-aid highway funds are expected to make transportation investments with a focus on national goals, the authority to establish performance targets and make project selections is still maintained by State DOTs.

The FHWA retains the language in section 490.401, as proposed in the NPRM, with a minor revision that provides clarity as to which highway bridges are subject to this regulation. The stated purpose is consistent with statutory language in MAP-21 and clear in the purpose of the performance measures.

Discussion of Section 490.403 Applicability

To implement the statutory provisions under 23 U.S.C. 150(c)(3)(A)(ii)(III), FHWA proposed that subpart D be applicable to bridges carrying the NHS which includes on- and off-ramps connected to the NHS.

The FHWA received comments from AASHTO, ARC, and 12 State DOTs (Arkansas, Colorado, Connecticut, Iowa,

¹⁰¹ Alaska DOT&PF, Connecticut DOT, Idaho DOT, Montana DOT, New York DOT, North Dakota DOT, Oregon DOT, South Dakota DOT, Washington DOT, Wyoming DOT.

¹⁰² Nine principles used in the development of proposed regulations for national performance management measures under 23 U.S.C. 150(c), www.regulations.gov, Docket FHWA-2013-0053.

¹⁰³ "Practical Guide for Quality Management of Pavement Condition Data Collection" FHWA-HIF-14-006.

Maine, Michigan, Missouri, New Hampshire, North Dakota, Oklahoma, Tennessee, and Vermont) generally stating that State DOTs should not be responsible for the reporting of data, establishment of targets, asset condition, and managing of assets that are beyond their control.

The FHWA retains the language in section 490.403 with a minor revision that provides clarity as to which highway bridges are subject to this regulation. Section 23 U.S.C. 150(c)(3)(A)(ii)(III) of Title 23 of the U.S. Code requires the establishment of measures for “States to use to assess the condition of bridges on the National Highway System” for the purpose of carrying out the NHPP. The Section does not define the terms “National Highway System” or “States.” The MAP-21 did not provide FHWA with the authority to change the definition of State or NHS. Thus, the definitions in 23 U.S.C. 101(a)(15) and 23 U.S.C. 101(a)(25) have been used in this Rule. Therefore, a State DOT is not alleviated of the responsibilities under sec. 150 for the NHPP. As stated in the NPRM, FHWA recognizes that there is a limit to the direct impact State DOTs and the MPOs can have on the performance outcomes within the State and the metropolitan planning area, respectively. The FHWA encourages State DOTs to consult with relevant entities (e.g., Federal Land Management Agencies, MPOs, local transportation agencies, and tribal governments) as they report performance data and establish targets. Consultation will help State DOTs to better assess condition of bridges carrying the NHS, which includes on- and off-ramps connected to the NHS and better identify and consider factors outside of their direct control that could impact future condition/performance. (See discussion on ownership in discussion section for section 490.105(d).)

The FHWA received comments from six State DOTs (Connecticut, Illinois, Iowa, Michigan, Minnesota, and Missouri) generally stating that the applicability of subparts C and D should be consistent. Specifically, they commented that the regulations apply only to mainline highway bridges carrying the NHS and that highway bridges on on- and off-ramps that connect to the NHS should not be subject to these regulations.

Historically, FHWA has provided guidance stating that ramps are to be considered to be the same functional classification as the highest facility

served.¹⁰⁴ Although the NHS is not solely based on functional classification, but is instead defined by 23 U.S.C. 103, the practice of assigning the highest system served for a ramp is consistent with the FHWA guidance referenced above. Therefore, this section is applicable to the NHS (defined by 23 U.S.C. 103), which includes highway bridges that carry the NHS and bridges on on- and off-ramps connecting to NHS.

The FHWA received comments from five State DOTs (Connecticut, Illinois, Mississippi, Virginia, and Washington) seeking clarification on their responsibility for highway bridges on the NHS that cross the border with a neighboring State. One commenter expressed concern that there would be a “double-counting” of the deck area of highway bridges on the NHS when the bridge performance measures are calculated. Another commenter recommended that the responsibility of a highway bridge that crosses a border with a neighboring State should be based on the percentage of ownership. The commenter further stated that a State that does not own or share such a bridge should not be held responsible.

In regards to the responsibility for highway bridges carrying the NHS that cross a border with a neighboring State, State DOTs should refer to the above discussion on responsibility for the reporting of data, establishment of targets, asset condition, and managing of assets that are beyond the control of State DOTs and MPOs. State DOTs should also refer to the discussion on ownership in the discussion of section 490.105(d). Based on these previous discussions, border bridges are to be regarded in the same manner as any other highway bridge carrying the NHS that is within a State’s boundaries.

In calculating the deck area, the total deck area of all the border bridges that cross a State’s border will be included in the calculation of an individual State DOT’s bridge performance measures and the percentage of the deck area of bridges classified as Structurally Deficient. However, there will be no “double-counting” of deck area as FHWA has not proposed a summation or aggregate calculation of all State DOTs’ bridge performance measures or percentage of the deck area of bridges classified as Structurally Deficient into national percentages.

¹⁰⁴ U.S. Department of Transportation, Federal Highway Administration. Highway Performance Monitoring System, Guidance for the Functional Classification of Highways <http://www.fhwa.dot.gov/policy/ohpi/hpms/fchguidance.cfm>.

The New York DOT suggested that an exception to the bridge performance measures be established for very large or historic bridges as they would “never be replaced” and “should be treated as perpetual maintenance exceptions.” Title 23 U.S.C. 150(c)(3)(A)(ii)(III) provided no exception for certain sized or aged highway bridges. Therefore, any highway bridge that carries the NHS or ramp that connects to the NHS, and meets the section 490.405 definition of a bridge, is subject to the requirements of subparts A and C.

Discussion of Section 490.405 Definitions

To implement 23 U.S.C. 119(f)(2) and 23 U.S.C. 150(c)(3)(A)(ii)(III), FHWA proposed definitions for the terms “bridge” and “structurally deficient.”

The FHWA did not receive any substantive comments regarding the definition for bridge. However, as discussed in section 490.309 (Using Structure Type to Identify and Exclude Bridges), FHWA moved the definition of bridge from this section to subpart A (i.e., section 490.101) to ensure the term is used in a consistent manner throughout this rule.

The FHWA received comments from AASHTO (with support from Michigan and Maryland DOT), NYSAMPO and 12 State DOTs (Alabama, California, Connecticut, Idaho, Montana, New York, North Carolina, North Dakota, South Dakota, Texas, Washington, and Wyoming) suggesting changes to the proposed definition of the bridge classification “structurally deficient.” One suggestion was to lower the threshold for the NBI Items (Items 58-Deck, 59-Superstructure, 60-Substructure, and 62-Culverts) that are used to classify a bridge as structurally deficient. The suggestion was to lower the threshold from a condition rating of four—poor condition, which is described in FHWA’s Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation’s Bridges as Poor: advanced section loss, deterioration, spalling, or scour, to three—serious condition which is described as loss of section, deterioration, spalling, or scour have seriously affected primary structural components; local failures are possible; fatigue cracks in steel or shear cracks in concrete may be present.

Additional suggested changes included removing NBI Item 58-Deck from the calculation of the classification, and changing the definition and calculation of “Structurally Deficient” to be the same as the performance measure “Percentage

of NHS bridges classified as in Poor condition.”

The Missouri and New Hampshire DOTs supported the proposed definition. The Colorado DOT noted that the proposed definition is identical to the historical definition. Three other State DOTs (Connecticut, Iowa, and New Jersey) suggested discontinuing the use of the classification and developing a new term that better serves the purpose of the provisions. The Georgia DOT requested clarification on the differences between the classification of structurally deficient and the bridge performance measure of Poor. The Oregon DOT commented that the proposed definition for the classification of structurally deficient was more “amenable to element level” bridge data rather than bridge components (*i.e.*, deck, superstructure, substructure, and culverts). The PSRC recommended that the calculation of the bridge performance measure for Poor equate to the proposed definition and methodology for the classification of structurally deficient.

The FHWA retains the term “structurally deficient” in the final rule as the statutory language in MAP-21 uses it. Section 119(f)(2) of Title 23 U.S.C. requires FHWA to determine the total deck area of bridges in each State on the NHS that have been classified as structurally deficient, and to apply a penalty, when necessary, based on an established percentage of that classification. The statutory language does not grant FHWA the authority to disregard the use of the term “structurally deficient.”

The FHWA revised the definition and methodology for the classification of structurally deficient so that it equates to the performance measure of bridges classified as in Poor condition. The revision also addresses the concern that the proposed definition was more amenable to element level bridge data rather than the NBI component level data that is used for classification. The revised definition considers only the physical condition of the bridge. As proposed in the NPRM, the classification of structurally deficient goes beyond the metrics of the bridge performance measures and physical condition. It also considers the level of service the bridge provides as compared to a bridge that is built to current standards.

Equating the classification of structurally deficient with bridges classified as in Poor condition provides consistency as it aligns the NHPP provisions for the condition of NHS bridges (23 U.S.C. 119(f)(2)), which use the classification of structurally

deficient. Section 150(c)(3) of Title 23 of the U.S. Code requires the establishment of performance measures for State DOTs to use to assess the condition of bridges on the NHS and for the purpose of carrying out the NHPP.

Additionally, the differences in the population of bridges on the NHS that are classified as structurally deficient by the historical definition and method in NPRM versus in Poor condition are minimal as the calculation methods are similar. According to FHWA’s NBI for the 10-year period of 2005 to 2014, the maximum difference between the methodology proposed in the NPRM and the one in the final rule by both the percentage of number of bridges and percentage of deck area of bridges is 0.2 percent. Lowering the threshold for NBI Items 58, 59, 60, and 62 from a condition rating of four to three and removing NBI Item 58 from the calculation of the classification of structurally deficient were not considered. This would represent fundamental changes to a historical classification method and would result in vastly different populations of bridges carrying the NHS, which includes on- and off-ramps connected to the NHS, than what was intended to be addressed by 23 U.S.C. 119(f)(2).

The Minnesota DOT suggested providing “clear and concise definitions” for the terms so that “there is consistency in the interpretation” of the regulations. The FHWA agrees and believes that clarity is provided in the regulations.

The Missouri DOT requested the NBI algorithms used to calculate and determine if a highway bridge is to be classified as structurally deficient. As discussed above, FHWA revised the definition and methodology for the classification of structurally deficient so that it is the same calculation used for classifying bridges as in Poor condition. The historical NBI algorithms that were used to calculate NBI Items 67 (Structural Evaluation) and 71 (Waterway Adequacy) will not be used.

Discussion of Section 490.407 National Performance Management Measures for Assessing Bridge Condition

To implement the statutory provisions under 23 U.S.C. 150(c)(3)(A)(ii)(III), FHWA proposed two performance management measures for assessing the condition of bridges on the NHS: (1) Percentage of NHS bridges classified as in Good condition; and (2) percentage of NHS bridges classified as in Poor condition.

The ASCE and the Georgia DOT supported the proposed section.

The AASHTO expressed general support of the proposed three classifications and two performance management measures for assessing the condition of bridges on the NHS. However, AASHTO, AMPO, and eight State DOTs (Idaho, Montana, Oregon, North Dakota, Rhode Island, South Dakota, Texas, and Wyoming) recommended that additional language be provided to the classifications and performance measures to communicate and focus on the needs of bridges rather than the condition. For example: (1) Good condition bridges should be described as bridges that need routine or cyclic maintenance; (2) Fair condition bridges should be described as bridges that need condition based preventative maintenance; and (3) Poor condition bridges should be described as bridges that need rehabilitation and or replacement.

While providing such additional language may be beneficial when communicating the needs of bridges, the recommended language may be interpreted as limiting the types of projects that can be performed on bridges in certain conditions. The determination of what projects or activities to perform on a bridge is at the discretion of its owner. The Federal-aid highway program provides such flexibility. Eligible bridge projects, regardless of the condition of the bridge, are defined in each of the programs. For example, under the NHPP, the list of eligible projects that includes bridge activities, can be found under 23 U.S.C. 119(d). Although flexibility exists, it should be noted that as part of performance management, recipients of Federal-aid highway funds must make transportation investments to achieve performance targets that make progress toward national goals. The national performance goal for bridges is to maintain their condition in a state of good repair.

The additional language is also inconsistent with the statutory language that requires FHWA to establish performance measures. In 23 U.S.C. 150(c)(3)(A)(ii)(III), the Secretary is required to establish measures for States to use to assess the condition of bridges on the National Highway System. A bridge condition measure describes the existing, in-place bridge’s physical condition as compared to its as-built physical condition. The statute does not provide that an assessment of needs such as maintenance, rehabilitation, or replacement be used to measure the performance of bridges. Instead, “the condition of bridges” is the performance measure. Therefore, FHWA retains the language in the final rule for the three

classifications and two performance management measures for assessing the condition of bridges carrying the NHS, which includes on- and off-ramps connected to the NHS.

The AMPO, California DOT, California State Association of Counties, COMPASS, Metropolitan Transportation Commission, the NYMTC, and an anonymous citizen suggested that additional factors other than those proposed (NBI Items 58, 59, 60, and 62) be included in the calculation of the performance measures. Suggestions included factors that considered level of use, vehicle speed on the bridge, and seismic and scour vulnerability.

As stated above, the statute that required the establishment of performance measures for bridges on the NHS did not provide for any factors other than "condition." Level of use, such as average daily traffic and vehicle speed, are not considered measures of the condition of a bridge. Instead, these factors are measures of functionality. Such measures are used to describe a bridge in relation to the level of service it provides to its highway. Similarly, seismic and scour vulnerability are not considered measures of condition. They would be considered measures of risk for certain types of extreme events. A bridge's physical condition is one of many factors (*e.g.*, bridge design, location, and others) that should be considered when determining vulnerability or risk to extreme events. However, vulnerability and risk to extreme events are not measures of condition. Therefore, FHWA retains the language for the metrics to be used in calculating the bridge performance measures.

The Connecticut DOT commented that the performance measures should not be weighted only by deck area as this may incentivize bridge owners to prioritize plans and projects for larger bridges over smaller ones. The Connecticut DOT also suggested that having an additional set of performance measures that are weighted by number of bridges instead "will ensure that the State also addresses smaller bridges." This dual set of performance measures "will be helpful for both States and FHWA to assess and report a more accurate description of the nation's infrastructure." The AMPO had a similar comment stating, "There is uncertainty about the use of percent of bridge deck area instead of percent of all bridges. This is probably more of a concern for States with longer bridges (*i.e.*, Louisiana as opposed to Montana). For instance if the Lake Pontchartrain Causeway (26.2 miles) ended up rating as Poor this ends up being the

approximate equivalent of 8,300 culverts being rated as Poor. The end result might force Louisiana to improve the Causeway at the expense of other work."

Requiring additional bridge performance measures weighted by the number of bridges would be inconsistent with one of the nine principles in the NPRM preamble which were considered in the development of the proposed regulation (Minimize the Number of Measures). While performance measures weighted by the number of bridges provide an amount of bridges in certain conditions, performance measures weighted by deck area provide a greater perspective on the extent of the condition of bridges as the size of a bridge is taken into account.

Therefore, FHWA retains the language for the two performance measures for assessing the condition of bridges on the NHS, as weighting the performance measures by deck area provides more information through a minimum number of required performance measures. The FHWA recognizes that performance measures based on deck area may influence State DOTs to prioritize plans and projects for larger bridges over smaller ones so as to achieve improved conditions at a greater rate. However, FHWA is confident that this and the related asset management rulemaking to establish minimum standards for State DOTs to develop their bridge management systems and investment strategies will ensure that State DOTs choose the most efficient investments for Federal transportation funds. This final rule, in combination with the State Asset Management Plan rule (RIN 2125-AF57), will ensure that State DOTs focus on national transportation goals, increase accountability and transparency, and improve investment decisions regardless of bridge size.

The Idaho DOT recommended that a statement be provided in the final rule to clarify that States and MPOs are not precluded "from implementing (whether already in effect or new) systems that include assets in addition to NHS assets, such as non-NHS bridges, provided that the State meets Federal requirements as to the assets that are required to be included in the Federal performance management system by the Federal rule. Moreover, as to non-NHS assets, the rule should not require a State to have to utilize the specifics of the Federal rule." The Oregon DOT provided a similar comment stating, "States must consider all bridges regardless of the system when setting up maintenance, preservation, or replacement programs. State plans to

use available transportation funds should be developed based on priorities that consider the system, traffic volume, and condition, but non-NHS needs must also be addressed in order to maintain economic viability and mobility across an entire transportation system. If the national measures are really intended to be used to measure system improvement resulting from investments, both NHS and non-NHS systems should be reported so a comprehensive view of a state's investment strategies will be presented."

The applicability of subpart D is described in section 490.403. Subpart D is only applicable to bridges carrying the NHS, which includes on- and off-ramps connected to the NHS. Therefore, provided that the requirements of this final rule are met, State DOTs and MPOs may go beyond these minimum requirements when implementing a performance management system or program. (See the Final Rule for Asset Management Plan for further information on implementing a performance management program on non-NHS bridges.)

The Ohio DOT inquired about the process by which State DOT bridge performance targets will be submitted to FHWA; the criteria for changing a bridge performance target; and whether performance targets are to be approved by FHWA.

The requirements for reporting on performance targets are described in section 490.107. In general, State DOTs submit their performance targets to FHWA through an electronic template to be provided by FHWA. The process for adjusting a 4-year target is described in section 490.105 and the required reporting for that adjusted target is in section 490.107. If a State DOT decides to adjust its 4-year target, it must include a discussion in their Mid Performance Period Progress Report on the basis for the adjustment and how the adjusted target supports expectations documented in longer range plans (*e.g.*, State asset management plan and the long-range statewide transportation plan). Regarding FHWA approval of performance targets, MAP-21 did not provide FHWA the authority to approve or reject State DOT and MPO targets.

The Metropolitan Transportation Commission commented that it "uses and supports the use of the National Bridge Investment Analysis System to analyze bridge maintenance needs." They also "recommended that FHWA make the tool available and provide appropriate training."

The NYSAMPO expressed concern that the use of performance measures for bridges (*i.e.*, Poor and Good) will

encourage the use of a “worst-first” approach to investment, and limit the flexibility of State DOTs to employ asset management strategies and approaches. The AMPO expressed a similar concern that “the proposed process encourages a “worst-first” approach rather than focusing on strategically important facilities.”

The FHWA acknowledges that indiscriminately attempting to improve condition could lead to a “worst-first” approach to investment, but believes that the framework provided by MAP-21 will support a more strategic investment strategy in most cases. 23 U.S.C. 150(a) directs the NHPP to provide a means of efficient investment of Federal transportation funds by focusing on national transportation goals. These goals emphasize the importance of national routes to the economy, safety, and other concerns in the entire Nation. In a recent FHWA report to Congress (National Bridge and Tunnel Inventories Report—February 2015), it was shown that for the 10-year period of 2005–2014, the percentage deck area of bridges on the NHS classified as structurally deficient improved from 8.5 percent to 6.0 percent.¹⁰⁵ Therefore, even in the worst case, maintaining bridge conditions on the NHS to achieve 90 percent in Fair or better condition would likely not require the level of investment that would drive a program to a “worst-first” approach. On the contrary, good maintenance and preservation, as currently practiced in many State DOTs, would keep the requirements for major investment on these routes at a minimum, most likely well below the allowable 10 percent classified as structurally deficient.

The Texas DOT commented that three classifications for assessing bridge condition were presented in the NPRM: (1) Percentage of NHS bridges classified as in Good condition; (2) percentage of NHS bridges classified as in Fair condition; and (3) percentage of NHS bridges classified as in Poor condition. They recommended “not defining the Fair condition criteria and not making the States generate and maintain a value that is not utilized in the performance measures.”

Although the classification of bridges in Fair condition and its calculation is retained in the final rule, State DOTs and MPOs are not required to establish or report on performance targets for this classification. The reason FHWA retains

the language is that system-wide monitoring of assets will be done for the three classifications, not just the two bridge performance measures. The Fair classification is a simple calculation from the other two; therefore, there is no requirement for reporting on this classification.

The Colorado DOT commented that the proposed measures are “lag” measures focused on the percentage of structurally deficient deck area on the NHS. Therefore, they do not forecast or predict when a bridge will become structurally deficient. The Colorado DOT suggested that predictive structurally deficient performance measures should be proposed instead. Examples of these performance measures are leaking expansion joints over substructure elements, unsealed decks, failed deck seals, debris collections that accelerate deterioration, and failed steel protection systems. The Colorado DOT also commented that the proposed performance measures do not directly address the risks of bridges that are scour critical or do not meet current design standards.

As discussed in sections 490.405 and 490.411, FHWA revised the definition and methodology for the classification of structurally deficient so that it equates to the performance measure of bridges classified as in Poor condition. Also previously discussed, other than condition, the 23 U.S.C. 150 required the establishment of performance measures for bridges on the NHS but did not provide for any other factors such as forecasting or predicting. The suggested predictive performance measures go beyond describing the existing, in-place physical condition of a bridge. Forecasting or predicting bridge conditions is a bridge management tool or process rather than a measurement of performance. (See the Asset Management Plan final rule (RIN 2125–AF57), as the minimum standards for developing management systems will include forecasting deterioration.)

As for the additional factors based on risk, such as scour critical and not meeting current design standards, these are not considered a measure of condition. Therefore, FHWA retains the metrics in section 490.407 to be used in calculating the bridge performance measures.

Discussion of Section 490.409
Calculation of National Performance Management Measures for Assessing Bridge Condition

To implement 23 U.S.C. 150(c)(3)(A)(ii)(III), FHWA proposed calculation methods to carry out the bridge condition related requirements of

this part and make the significant progress determination in section 490.109. The FHWA revised section 490.409(b) to provide clarity as to which highway bridges are subject to this regulation.

The Metropolitan Transportation Commission expressed support for the proposed classification approach for determining the condition of a bridge, where the lowest rating received for any component of a bridge determines the overall condition.

Three State DOTs (New York, North Carolina, and North Dakota) suggested that an alternative method to the proposed minimum of condition rating method be used for national performance measures under the NHPP. They suggested the weighted average method, which consists of calculating an overall condition rating based on a weighted average of NBI Items 58, 59, and 60. Another method that was offered was to simply not include NBI Item 58 in the calculation of the classification. An additional recommendation was to define Fair as “a bridge that is not structurally deficient and also having at least one NBI score of 5.” The recommendation stated that “a Good bridge would be defined as a bridge that is not structurally deficient and also having a minimum NBI score of 6.”

As was noted in the NPRM, FHWA performed a study (Improving FHWA’s Ability to Assess Highway Infrastructure Health) that evaluated five different methods (four different weighted average methods and one minimum condition rating method) to assign bridge condition based on the classifications of Good, Fair, or Poor.¹⁰⁶ The study concluded that for the Interstate System: (1) Percentages of bridges classified as Good, Fair, or Poor were consistent for all methods with little variation; (2) minimum condition rating method resulted in the highest percentage of bridges in Poor condition; (3) percentages of bridges classified as Good, Fair, or Poor based on the four weighted average methods are not sensitive to the weights; and (4) bridge deck conditions alone are not typically the driving factor in the Good, Fair, or Poor calculations. The FHWA further assessed the different methods and observed that the magnitude in differences between condition ratings for individual NBI items was somewhat nullified when a final average or weighted average method was

¹⁰⁵ U.S. Department of Transportation, Federal Highway Administration. Report to Congress, National Bridge and Tunnel Inventories Report, Fall 2015, has been posted to the Docket.

¹⁰⁶ FHWA (2012). Improving FHWA’s Ability to Assess Highway Infrastructure Health Pilot Study Report, FHWA–HIF–12–049. <http://www.fhwa.dot.gov/asset/pubs/hif12049/hif12049.pdf>.

employed. This observation was also noted in the 2012 study.¹⁰⁷ The masking or obscuring of possible Poor bridge conditions is a major concern with the final average or weighted average methods. This concern also applies to the suggested method of a Fair bridge “having at least one NBI score of 5” and “a Good bridge . . . having a minimum NBI score of 6.” Although these methods could be further refined, the development, subjectivity, and complexity of such methods makes them less desirable than the simple minimum condition rating method. This is especially true because analyses indicate that a refined weighted method would result in the same general classification as the minimum condition rating method.

As for the suggested method to not include NBI Item 58 in the calculation of the classification, the deck is a critical component of a bridge as it provides the surface upon which vehicles travel. Omitting such a fundamental component of a bridge would not provide an accurate assessment of its overall condition or performance. Therefore, FHWA retains the language in section 490.409 for the calculations of the three bridge classifications and the two bridge performance measures. However, FHWA made a minor revision that provides clarity as to which highway bridges are subject to this regulation.

The South Jersey Transportation Planning Organization argued that the proposed minimum condition rating method was controlled by lowest rating of a bridge’s three NBI Items (58, 59, and 60) substructure, regardless of whether any of the proposed metrics were rated the same or not. They suggested that the method “may have a disadvantage in that some categories may be much more expensive to repair, and as such, give a distorted view of the over-all bridge repairs needed.”

As discussed above, in assessing various methods for determining the classification of a bridge, FHWA is concerned with the masking or obscuring of possible Poor bridge conditions when an average or weighted average method is used. Although these methods could be further refined, the development, subjectivity, and complexity of such methods makes them less desirable than the simple minimum condition rating method. As previously stated, analyses indicate that a refined weighted method would result in the same general classification as the minimum condition rating method. Regarding the possible distortion of

estimated costs and overall bridge repair needs, other than “condition,” the statute did not provide for any other factors such as costs or needs.

Four State DOTs (Delaware, Idaho, North Carolina, and North Dakota) disagreed with the proposed calculation methods for the bridge classifications of Good and Fair. Suggestions included making the calculation methods flexible to allow State DOTs to define the classifications and the method of calculations for themselves and to include the NBI condition rating of six in the Good classification. The NBI zero to nine scale for condition ratings for the classifications of Good, Fair, and Poor are based on the historical practice of generalization of the scale and the logical distinctions that are made between the descriptions for the various condition ratings. For example, according to FHWA’s Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation’s Bridges, a condition rating of six is described as “satisfactory condition, structural elements show some minor deterioration.” While some commenters have suggested including this condition rating as Good, doing so would be an inaccurate assessment of the condition of the bridge as Good indicates that there are some minor problems, which is different than minor deterioration. Additionally, the comparative analysis study of bridge conditions conducted through NCHRP 20–24(37)E (Measuring Performance Among State DOTs, Sharing Best Practices—Comparative Analysis of Bridge Conditions), recommended defining: (1) Poor as bridges with deck, superstructure, or substructure ratings less than or equal to four; (2) Good as bridges with deck, superstructure or substructure ratings greater than or equal to seven; and (3) all other bridges as Fair condition.¹⁰⁸ Therefore, FHWA retains the language of the NPRM, with a minor revision that provides clarity as to which highway bridges are subject to this regulation, for the calculation of the classifications of Good, Fair, and Poor.

The Knoxville Regional Transportation Planning Organization suggested that “reconfiguring the NBI condition rating approach from its current zero to nine rating to a Good, Fair, or Poor rating would not be favorable.” They argued that it would be “complicated to convert the data to fit to the new scale.” They also suggested

that “if the Good, Fair, or Poor rating scale was still used, perhaps there could be a matrix created for the conversion that would further define the new condition rating scale.” The FHWA retains the language of the NPRM, with a minor revision that provides clarity as to which highway bridges are subject to this regulation, for the calculation of the three bridge classifications. In section 490.409, the calculation of the classifications are provided in detail, including specific information on how to convert the numerical NBI condition rating to a classification of Good, Fair, or Poor condition (*i.e.*, a conversion matrix is provided).

The Missouri DOT argued against the use of the bridge deck area that is reported with element level bridge data, stating that no deck area for culverts is reported with element level data.

The deck area calculation for culverts and culverts where the roadway is on a fill are in sections 490.409(c)(1) and 490.409(c)(2) (see formulas and explanations for the terms “length” and “width.”) In general, the deck area of a culvert is the product of NBI Items 49 (Structure Length) and 52 (Deck Width). For culvert where the roadway is on a fill, the deck area of a culvert is the product of NBI Items 49 and 32 (Approach Roadway Width).

The California and North Dakota DOTs suggested a change to the proposed calculation of deck area for culverts. The change involves replacing NBI Item 32 with the culvert element length in the calculation. The NBI does not include an item for culvert element length.

In order for such an item to be used for the calculation of deck area, an additional collection burden would be placed on State DOTs. Currently, the NBI includes Item 32, which provides an accurate measurement to calculate a deck area that is influenced by the roadway. By using the proposed alternative of culvert element length, deck area calculations may be exaggerated. For example, culverts where the roadway is on a significant amount of fill can be much longer than the width of roadway that is supported. This would result in a calculated deck area that is much larger than an area influenced only by the roadway. Therefore, FHWA retains the language of the NPRM, with a minor revision that provides clarity as which highway bridges are subject to this regulation, for calculating the deck area of bridges, including culverts.

The California DOT also stated, the proposed deck area calculation “assumes that every bridge is rectangular in shape. This assumption

¹⁰⁸ Transportation Research Board of the National Academies, National Cooperative Highway Research Program, NCHRP 20–24(37)E, Measuring Performance Among State DOTs, Sharing Best Practices, [http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP20-24\(37\)E_FR.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP20-24(37)E_FR.pdf).

¹⁰⁷ Ibid.

ignores ramp area, curved configurations, and other irregular deck shapes. The MAP-21 requires the submission of bridge deck area in the elements that could be used to directly report bridge deck area including all irregular configurations. Use of the element deck areas would improve the accuracy of the measure.” The MAP-21 did not require State DOTs to report a bridge deck area element as part of 23 U.S.C. 144(d)(2).

The Colorado DOT asked whether the areas of approach slabs will be included in the calculation of a bridge’s deck area. The deck area of bridge will be calculated as described in section 490.409. The calculation does not include the areas of approach slabs.

The Iowa DOT suggested that a formula similar to FHWA’s former Sufficiency Rating be used instead to classify bridge condition. Formulas such as the Sufficiency Rating were tools to assist in the identification and prioritization of bridge projects and needs. They are not necessarily indicators of physical condition as they included other factors such as level of service and functional obsolescence. As discussed in section 490.407, the statutory language focused the bridge performance measures on the factor of condition, with the national performance goal of maintaining bridge condition in a state of good repair. It did not provide other factors to be considered for the bridge performance measures or the national performance goal. Therefore, FHWA retains the language in section 490.409 for the metrics to be used in calculating the bridge performance measures.

The Wyoming DOT recommended that the final rule significantly scale back or modify a number of its requirements, such as additional data collection. In regards to the bridge performance measures, there is no additional data collection burden as the data that is currently collected under 23 CFR 650.305 (National Bridge Inspection Standards) will be used to meet the data requirements for this subpart.

The AMPO expressed concern that the combination of bridge data submission requirements (e.g., NBI data and element level bridge data) “will effectively require States to collect duplicative data at considerable cost.” The comment went on to state that the rule should, “Require States to use either the NBI or the new methodology for all bridge related reporting requirements, but not both.” As was stated above, there is no additional data collection burden in regards to the bridge performance measures as the data

that is collected under the NBIS will be used. In regards to element-level data, 23 U.S.C. 144(d)(2) requires the collection of such for bridges on the NHS. This type of data is not duplicative of the NBI data as this data provides more detailed information.

The New York City DOT commented that there is no reference to biennial inspections as the primary source of bridge related information. The commenter further stated that “risk-based scheduling at varying intervals of up to 6 years is proposed at the discretion of the owner. Rather, one could keep the biennial inspection interval fixed, but vary the inspection scope. This would be highly appropriate in large structures with components of very different exposure to aggressive influences.” The NPRM did not propose any such change to the NBIS which define the intervals at which highway bridges are to be inspected. The NPRM did state that the NBI is the definitive source for national bridge information and that the NBI by definition is an FHWA database containing bridge information and inspection data for all highway bridges on public roads, on and off Federal-aid highways, including tribally owned and Federally owned bridges, that are subject to the NBIS.

The California DOT questioned if a scour critical bridge should be considered “Poor” under the provisions of this rule. The California DOT also requested clarification if FHWA’s policy directive related to the Highway Bridge Program of lowering the substructure condition rating (NBI 60) to match the scour code (NBI 113) for scour critical bridges is still in effect as MAP-21 eliminated the Highway Bridge Program. Under this rule, a highway bridge is classified as in Poor condition based on the criteria of section 490.409(b)(3). There is no FHWA policy related to the Highway Bridge Program, which directed the matching of the codes for NBI items 60—Substructure and 113 Scour Critical Bridges. However, the errata to FHWA’s Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation’s Bridges, Report No. FHWA-PD-96-001, December 1995, does state, “The rating factor given to Item 60 should be consistent with the one given to Item 113 whenever a rating factor of 2 or below is determined for Item 113—Scour Critical Bridges.”

The Louisiana DOT requested that an example State be created and the principals of the bridge measures be applied to it, as it would better their understanding of how the practice will be used. The FHWA will issue guidance on step-by-step procedures that detail

the data and the calculations for the national performance measures for 23 U.S.C. 150, which includes the bridge performance measures.

The FHWA made an editorial change in section 490.409(b)(1) through (3) to remove the phrase “of any” to provide clarity in the regulatory text that Good, Fair, or Poor classification of a bridge is determined based on the lowest rating of three NBI items (58, 59, and 60) for that bridge. These paragraphs in the final rule now state: “. . . When the lowest rating of the three NBI items for a bridge (Items 58—Deck, 59—Superstructure, 60—Substructure) is . . .” This editorial change did not alter the intent of the original text in the NPRM.

Discussion of Section 490.411 Establishment of Minimum Level for Condition for Bridges

To implement the statutory provisions under the NHPP for the condition of NHS bridges, FHWA incorporated the minimum condition level established by 23 U.S.C. 119(f)(2). The FHWA revised the NPRM language in section 490.411(a) to provide clarity as to which highway bridges are subject to this regulation.

The AASHTO, with support from six State DOTs (Idaho, Montana, North Dakota, South Dakota, Oklahoma, and Wyoming), suggested changes to the proposed methodology for the classification of structurally deficient. Their suggestion was to lower the threshold of the classification for NBI Items 58, 59, 60, and 62 from a condition rating of four (Poor condition, advanced section loss, deterioration, spalling or scour) to three (serious condition, loss of section, deterioration, spalling, or scour have seriously affected primary structural components. Local failures are possible. Fatigue cracks in steel or shear cracks in concrete may be present). The AASHTO and Alabama DOT also suggested removing NBI Items 67 (Structural Evaluation) and 71 (Waterway Adequacy) from the factors in the determination process.

The New Hampshire DOT “strongly” disagreed with AASHTO’s recommendation of lowering the threshold. The New Hampshire DOT argued that the general public and elected officials currently have a good understanding of the classification of structurally deficient and changing the definition would cause confusion. Additionally, New Hampshire DOT expressed that such a change would result in having “many thousands fewer ‘Structurally Deficient’ bridges, which also implies that there are fewer bridges

that need to be replaced or substantially rehabilitated.” The Missouri DOT recommended not using element level data as it “is cumbersome and results in a large amount of data, which is not meaningful and is complicated to convert to a Good, Fair, or Poor condition rating.” The Georgia DOT requested clarification on whether the NHPP penalty provision is based on the classification of structurally deficient or the bridge performance measure of Poor.

The AASHTO comment also included a suggestion, which four State DOTs supported (Connecticut, Iowa, New Jersey, and New York), that FHWA should note in the final rule that the use of current NBI data for calculating bridge performance measures and classifying bridges on the NHS as structurally deficient is temporary and that there is a transition plan to use element level bridge data.

The New York City DOT similarly commented that the “proposed performance measures are obsolete on arrival” as “FHWA is adopting the AASHTO element level inspection with ratings 1–4.” The comment also stated that the “The AASHTO system, while element—level is not span—specific. Thus, even if updated to element level inspections, NBI will not reflect the complexity of the multi-span bridges.”

As previously discussed, FHWA revised the definition and methodology for the classification of structurally deficient so that it is the same calculation used for classifying bridges as in Poor condition. Although element level bridge data is now being reported to the NBI, the analysis and development as to how this data could be used to calculate the proposed bridge performance measures and classify bridges on the NHS as structurally deficient needs to be conducted and completed. Once completed, element level bridge data, and any other pertinent bridge information or metric that provides an improved indicator for bridge condition, may be considered in revising this regulation in the future. Additionally, it is anticipated that element level data for all of the bridges on the NHS will not be in the NBI until 2019 due to the nature of inspection intervals, which can be up to 48 months. Therefore, the current NBI, with its extensive historical data sets and availability, is the most appropriate metric for assessing the condition of bridges on the NHS and classifying them as Structurally Deficient.

Four State DOTs (Alabama, Maryland, Minnesota, and Missouri) supported the use of the current NBI Items instead of element level bridge data.

The Colorado DOT asked whether the area of approach slabs will be included in the calculation of a bridge’s deck area. The deck area of bridge will be calculated as described in section 490.411. The calculation does not include the area of approach slabs.

The Georgia DOT commented that the March 15 submission date for the most current NBI data on highway bridges to FHWA would result in changes to business practices and require additional resources. The Virginia DOT recommended that the NBI data submittal date remain as April 1 of each year as currently established as it allows for all State bridges inspected in the previous year to be entered in the data base within (and is consistent with) the 90-day period established by 23 CFR 650.315(b) and (c) for Structure Inventory and Appraisal data on State bridges. The FHWA retains the March 15 submission date. Reporting by March 15 is needed in order to administer the NHS bridge minimum condition provision and issue any penalties by the next fiscal year.

Discussion of Section 490.413 Penalties for Not Maintaining Bridge Condition

To implement the penalty for not maintaining the condition of NHS bridges under the NHPP, FHWA incorporated the minimum condition level for bridges on the NHS established by 23 U.S.C. 119(f)(2). The penalty is as follows: If FHWA determines for the 3-year period preceding the date of the determination, that more than 10.0 percent of the total deck area of bridges in the State on the NHS is located on bridges that have been classified as Structurally Deficient, then during the fiscal year following the determination, the State DOT shall obligate and set aside in an amount equal to 50 percent of funds apportioned to such State for fiscal year 2009 to carry out 23 U.S.C. 144 (as in effect the day before enactment of MAP–21) from amounts apportioned to a State for a fiscal year under 23 U.S.C. 104(b)(1) only for eligible projects on bridges on the NHS. The set-aside and obligation requirement shall remain in effect for each subsequent fiscal year until such time as less than 10 percent of the total deck area of bridges in the State on the NHS is located on bridges that have been classified as Structurally Deficient as determined by FHWA.

The ASCE, a private citizen (Nicholas Cazares), and Missouri DOT expressed support for this section.

The FHWA received various comments regarding the statutory provisions under the NHPP for the

penalty of not maintaining the condition of NHS bridges. The NYSAMPO and the State DOTs of Rhode Island and Texas argued that the implementation of a penalty to maintain a minimum condition is inconsistent with the principles of asset management. They argued that the penalty would promote a “worst-first” philosophy, delay the achievement of a state of good repair, and distort a State DOT’s ability to properly invest. Additionally, the New York DOT suggested eliminating the penalty. The Connecticut DOT argued that the 10 percent threshold and 50 percent formula amount for the structurally deficient classification and the set-aside are arbitrary. They commented that the penalty provisions appear “to have no basis in engineering principles or generally accepted asset management practices.” Similarly, ASCE endorsed a goal of 8 percent instead of 10 percent. The Oregon and Texas DOTs suggested an alternative to the set-aside penalty. They suggested that a State DOT submit to FHWA an investment plan to reduce the percentage of deck area of bridges on the NHS classified as structurally deficient. The SCAG suggested that the penalty provisions should not be implemented without the apportionment of additional funds to locals because the penalty imposed on a State DOT would in turn reduce the availability of Federal funds for locals.

The FHWA essentially incorporated the minimum condition level for bridges on the NHS into the final rule consistent with 23 U.S.C. 119(f)(2). The MAP–21 did not provide FHWA the authority to eliminate the penalty provisions or change the threshold for structurally deficient or the set-aside amount.

Three State DOTs (Colorado, Connecticut, and New York) and AASHTO argued that October 1, 2016, the initial date of determination of compliance with the minimum condition requirements specified in 23 U.S.C. 119(f)(2), is “too soon” and “State DOTs will have no time to assess their current situation and then implement reasonable projects to attempt to affect their meeting the 10 percent threshold.”

The MAP–21 and 23 U.S.C. 119(f)(2) have been in effect since July 6, 2012. The FHWA provided guidance ahead of the NPRM on the provisions of 23 U.S.C. 119(f)(2) and its implementation on September 25, 2012. In implementing the 23 U.S.C. 119(f)(2) provisions, the NPRM proposed a definition and computation for the classification of structurally deficient that was unchanged from the programmatic term that was used for

over 30 years to administer the Highway Bridge Program. Bridge owners have been aware and knowledgeable of this well-established classification of structurally deficient, which was one of three statuses used to determine eligibility and apportion funds to State DOTs from the Highway Bridge Program. The initial date of determination proposed in the NPRM provides more than 3 years for owners of NHS bridges to assess the condition of their bridges and implement projects in response to a possible penalty. This was based on data Federal agencies, State DOTs, and tribal governments were already collecting and submitting to FHWA for inclusion into the NBI and for a classification that has been well-known for decades.

However, FHWA revised NPRM implementing the statutory provisions of 23 U.S.C. 119(f)(2) in response to the comments. The revisions were also made due to the revisions to the definition and computation of the classification of structurally deficient and the new methods of calculation for the deck area of culverts and border bridges. In sections 490.405, 490.411(b), and 490.411(c), FHWA provides a transition period for implementing the statutory provisions under the NHPP for the penalty of not maintaining the condition of NHS bridges. This transition period provides State DOTs and MPOs additional time to adjust to the revised definition and computation for the classification of structurally deficient and the new calculations for deck area of culverts and border bridges. Initially, the statutory provisions will be implemented using the historical definition and method of determination for the classification of structurally deficient as used under the Highway Bridge Program, as proposed in the NPRM. Beginning in calendar year 2018 (*i.e.*, the NBI submittal for March 15, 2018), the statutory provisions will be implemented with the revised definition and computation for the classification of structurally deficient and the new methods of calculations for the deck area of culverts and border bridges.

The Mississippi and North Dakota DOTs argued that States should not be responsible for assets that are beyond their control and therefore not incur any penalties that may be due to those assets' conditions.

As discussed previously, FHWA recognizes that there is a limit to the direct impact State DOTs and the MPOs can have on performance outcomes within State and the metropolitan planning area, respectively. However, there is no such limit on the use of NHPP funds for any highway bridge that

is on the NHS. Recipients of NHPP apportionments (*i.e.*, State DOTs) can provide other owners of bridges on the NHS with NHPP funds (and Surface Transportation Block Grant Program funds) to improve the condition of bridges. Therefore, FHWA encourages State DOTs to consult and coordinate with relevant entities (*e.g.*, Federal land Management agencies, MPOs, local transportation agencies, and tribal governments) as they report performance data and establish targets. This will allow the State DOTs to better assess condition of bridges on the NHS and better identify and consider factors outside of their direct control that could impact future condition/performance. (See the previous discussion of responsibility for the reporting of data, establishment of targets, asset condition, and managing of assets that are beyond the control of State DOTs and MPOs and the discussion of ownership in the discussion section for section 490.105(d).)

The FHWA retains the language in section 490.413 as the statutory language in 23 U.S.C. 119 clearly identifies State DOT's apportionment under 23 U.S.C. 104(b)(1) when implementing the penalty. Because the statutory language does not provide that the terms "National Highway System" or "States," as used in this provision, mean anything different than the terms as defined in 23 U.S.C. 101(a)(15) and 23 U.S.C. 101(a)(25). The Missouri DOT requested clarification on the 3-year-period preceding the date of the determination. The determination of compliance with the minimum condition requirements specified in 23 U.S.C. 119(f)(2) would be carried out by FHWA for fiscal year 2017 and annually thereafter. The timing is based on an assessment of minimum condition compliance of NBI data submitted in 2014, 2015, and 2016. If for each of those years the percentage deck area of bridges on the NHS classified as structurally deficient is greater than 10.0 (*e.g.*, 12.5, 11.3, and 10.5), then the penalty would be assessed for fiscal year 2017 and annually thereafter until the percentage is less than 10.0.

VII. Rulemaking Analyses and Notices

The FHWA considered all comments received before the close of business on the extended comment closing date indicated above. The comments are available for examination in the docket (FHWA–2013–0053) at www.regulations.gov. The FHWA also considered comments received after the comment closing date to the extent practicable.

Responses to Public Comments on the NPRM's Regulatory Impact Analysis

The FHWA carefully considered the comments related to: (1) Underestimated costs; (2) alternate cost estimates; (3) the cost for processing additional cracking data and maintaining a data quality management program; (4) the cost of IRI-only data collection on the non-Interstate NHS; (5) the cost of historical pavement condition performance management practices; (6) estimating the cost of establishing performance targets with incomplete knowledge about the availability of tools; (7) understated benefits; (8) the need for a quantitative analysis; (9) unfunded mandates; (10) Americans with Disabilities Act (ADA) issues; and (11) right-of-way (ROW) issues. The FHWA's responses to these comments are discussed below.

Agile Assets Corporation, NYMTC, TEMPO, Transportation for America, and the State DOTs of Michigan, Mississippi, North Carolina, and Oregon commented that FHWA may have underestimated the costs of the proposed rule.

The FHWA reviewed the process used to estimate costs. To develop estimates of the costs of the proposed rule, FHWA interviewed Federal, State, and local practitioners and SMEs. The FHWA researched existing literature on bridge and pavement condition, and reviewed Federal and State agency Web sites for information on current bridge and pavement condition data collection and reporting practices. In the final rule, FHWA retains the NPRM's methodology and assumptions, which are listed in Section 3 and described in detail in Section 4 of the final rule's RIA. The original and updated RIA can be found in the docket for this rulemaking. The estimated level of effort and costs to comply with the rule represent nationwide estimates of current practices as derived from interviews with Federal, State, and local practitioners. Therefore, these estimates represent average costs for a State DOT. The FHWA understands that the actual costs incurred may be higher for some State DOTs and MPOs, and lower for others.

The Michigan and Oregon DOTs provided alternative estimates for the costs they argue were underestimated in the NPRM. Oregon DOT commented that one additional full-time employee would be needed for pavement data collection as a result of the rule, at an incremental cost of \$150,000 per year. Michigan DOT argued that data collection costs would increase by \$100,000 per year. Michigan DOT also

asserted that processing additional cracking data and maintaining a data quality management program would potentially double current costs but did not provide an estimate.

The FHWA compared its estimated costs from the NPRM to the estimates provided by the commenters. The FHWA estimated that the cost to collect data on the Interstate and non-Interstate would be approximately \$97,000 per State DOT per year (see Sections 4.2.1 and 4.2.3 of the final RIA). After additional consultation with SMEs, FHWA revised the final rule's RIA to a cost of \$150,000 per State DOT per year for data collection as recommended by commenters and SMEs.

In response to Michigan DOT's comments on the costs for processing additional cracking data and maintaining a data quality management program, FHWA reviewed the process used to estimate the cost. In the NPRM, FHWA estimated that a State DOT would incur costs of approximately \$37,000 per year for a new cracking data collection program (see Sections 4.2.2 and 4.2.4 of the RIA). In addition, FHWA estimated new quality management programs would cost a State DOT approximately \$62,000 per year, while upgrading an existing program would cost approximately \$31,000 per year (see Section 4.2.7 of the RIA). In the final rule RIA, FHWA maintains these assumptions.

Mississippi DOT commented that the NPRM RIA incorrectly assumed that the costs of IRI-only data collection on the non-Interstate NHS would be offset by efficiencies in other areas. The FHWA reexamined and confirmed the estimated costs of IRI-only data collection on the non-Interstate NHS as presented in Section 4.2.3 of the RIA. Therefore, FHWA did not revise this portion of the RIA for the final rule.

AgileAssets Corporation commented that agencies would continue to use their historical pavement condition performance management practices in addition to new requirements in the NPRM. They also argued that State DOTs would incur additional costs associated with historical pavement condition performance management practices. The FHWA reviewed the analytical approach used in the RIA. The FHWA prepared the NPRM's RIA in accordance with the guidance provided in OMB Circular A-4, "Regulatory Analysis." As such, the analysis accounts for the incremental costs of the rule; that is, those costs incurred above and beyond the costs in the absence of the rule. As discussed in Section 4.1.2 of the NPRM's RIA, FHWA estimated that State DOTs would incur \$53

million for reporting on the new performance measures. Therefore, the RIA costs are maintained for this final rule.

Michigan DOT commented that estimating the cost to establish performance targets with incomplete knowledge about the availability of analytical tools to determine achievable levels of performance would be costly to develop if State DOTs did not already have them.

The FHWA notes that the requirements of this performance measure rule do not explicitly require tools to analyze alternative investment strategies and decisionmaking.¹⁰⁹ Therefore FHWA did not account for them.

A private citizen (Nicholas Cazares) commented that benefits were understated in the NPRM's RIA, as it does not account for the benefits to local economies that will be derived from improvements in transportation. Specifically, Mr. Cazares cited faster commutes due to widened roads or the construction of new bridges (*e.g.*, reduced travel delays and CO₂ emissions). "The California DOT noted the benefits of pavement preservation efforts. The commenter remarked that preservation efforts extend the life of assets in Good and Fair condition and would reduce the number of pavements in the Poor condition category."

The FHWA disagrees that the benefits were understated in the NPRM's RIA. The benefits were estimated based on a break-even analysis. The non-quantifiable benefits derived from the implementation of the rule could include improved pavement and bridge conditions, which would result in improved traffic flow. In the benefits analysis for the NPRM, FHWA also acknowledged that there may be many non-quantitative benefits derived from the implementation of the rule, such as time savings that would result from trucks no longer having to be rerouted from bridges with severe weight restrictions (see Section 5 of the RIA) and reduced traffic and emissions in the RIA for the third performance measure rulemaking (docket number FHWA-2013-0054).

The FHWA reviewed the approach taken in the NPRM's RIA. In the NPRM, FHWA prepared break-even analyses to quantify the benefits of the rulemaking. The break-even analyses provided estimates of the thresholds that must be reached in order for the rule to be cost-

beneficial, an approach endorsed by OMB Circular A-4. The FHWA determined that this approach, rather than a quantifiable approach, is appropriate for evaluating the costs of the rule. For more information on the break-even analyses, agencies should refer to the benefits discussion later in this section, or Section 5 of the RIA document on this docket.

The Mississippi DOT and an anonymous commenter questioned the unfunded mandates aspect of the rulemaking. Specifically, Mississippi DOT disagreed with FHWA's determination that the rule was not an unfunded mandate.

In the final rule, FHWA did not change its determination that the rule is not an unfunded mandate. According to the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, 109 Stat. 48), a rule would contain an unfunded mandate if any of its requirements result in expenditures of \$151 million or more in any 1 year for either State, local, or tribal governments, in the aggregate, or by the private sector (See the discussion on UMRA in Section VII, Rulemaking Analyses and Notices, of this document). The costs in the NPRM did not meet this threshold.

An anonymous citizen argued that repaving and certain pavement maintenance activities would require bringing facilities in conformance with the ADA. The commenter argued that since the ADA, ROW, and facility upgrade costs were omitted from the cost analysis, the costs of the rule were underestimated. The commenter also warned that upgrades to bring the pavements into conformance with ADA, and the related costs, may result in the taking of private property under Executive Order (E.O.) 12630 and may violate UMRA.

The FHWA notes that the NPRM required agencies to report on the condition of pavement. The methods used for pavement maintenance are not expected to change as a result of the rule. Therefore, costs related to ADA or ROW issues, such as those called for in 23 CFR 625.4 and 49 CFR 37.9, are outside the scope of the rule, and would not have taking implications under E.O. 12630 or violate UMRA. Furthermore, current practices regarding upgrading facilities are routinely subject to efficiency determinations that qualify for exemptions on a case-by-case basis, as described in 23 CFR 625.3. The current requirements for upgrading facilities or exception practices are not impacted by the implementation of this rule.

Executive Order 12866 (Regulatory Planning and Review), Executive Order

¹⁰⁹ For more discussion on planned activities, please see the section "Suggestions for how FHWA can best assist States and MPOs to maximize opportunities for successful implementation of the proposed performance measures."

13563 (Improving Regulation and Regulatory Review), and Departments of Transportation Regulatory Policies and Procedures.

The FHWA determined that this final rule constitutes an economically significant regulatory action within the meaning of E.O. 12866 and DOT regulatory policies and procedures. This action complies with E.O.s 12866 and 13563. This action is considered “economically significant” because this rulemaking will result in the transformation of the Federal-aid highway program so that the program focuses on national goals, provides for a greater level of accountability and transparency, and provides a means for the most efficient investment of Federal transportation funds. The FHWA completed an RIA in support of the final rule. The RIA estimated the economic impact, in terms of costs and benefits, on Federal, State, and local governments and private entities regulated under this action, as required by E.O.s 12866 and 13563. However, the RIA did not attempt to directly quantify the changes from the improved decisionmaking. The economic impacts are measured on an incremental basis, relative to current pavement and bridge condition reporting practices.

The RIA identified the estimated costs and benefits resulting from the final rule in order to inform policymakers and the public of its relative value. The complete RIA may be accessed from the

docket (docket number FHWA–2013–0053).

The cornerstone of MAP–21’s highway program transformation is the transition to a performance-based program. The MAP–21 requires State DOTs to invest resources in projects to meet or make significant progress toward meeting performance targets that will make progress toward national goals. The national performance goal area established for infrastructure condition is to maintain the highway infrastructure asset system in a state of good repair. In order to carry out this mandate, MAP–21 requires FHWA to promulgate a rule to establish pavement and bridge condition performance measures and standards. As required by MAP–21, the final rule identifies the following pavement and bridge performance measures for which State DOTs and MPOs must collect and report data, establish targets for performance, and make progress toward achievement of targets:

1. Percentage of lane miles of the Interstate System in Good condition;
2. Percentage of lane miles of the Interstate System in Poor condition;
3. Percentage of lane miles of the non-Interstate NHS in Good condition;
4. Percentage of lane-miles of the non-Interstate NHS in Poor condition;
5. Percentage of NHS bridges classified as in Good condition; and
6. Percentage of NHS bridges classified as in Poor condition.

Estimated Cost of the Final Rule

To estimate costs, FHWA assessed the level of effort, expressed in labor hours and categories, and the capital needed to comply with each component of the final rule. Level of effort by labor category is monetized with loaded wage rates to estimate total costs.

Table 4 displays the total cost of the final rule for the 10-year study period (2016–2025). Total costs are estimated to be \$156.0 million undiscounted, \$120.1 million discounted at 7 percent, and \$138.5 million discounted at 3 percent. The costs in the table assume that approximately half of the estimated 409 MPOs will establish their own targets, and the rest would adopt State DOT targets. It is assumed that State DOTs and MPOs serving Transportation Management Areas (TMA)¹¹⁰ will use staff to establish performance targets. Conversely, it is assumed that MPOs not serving a TMA will agree to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT targets. Therefore, they will not incur any incremental costs. There are currently an estimated 201 MPOs serving TMAs.¹¹¹ The FHWA made this assumption because larger MPOs may have more resources available to develop performance targets. The FHWA believes that this is a conservative estimate, as larger MPOs may elect not to establish their own targets for a variety of reasons, including resource availability.

TABLE 4—TOTAL COST OF THE FINAL RULE

Cost components	10-yr total cost		
	Undiscounted	7%	3%
Section 490.105–109—General Information, Target Establishment, Reporting on Progress, and Making Significant Progress	\$74,095,514	\$51,535,918	\$63,073,229
Coordination between State DOTs and MPOs	867,367	867,367	867,367
Establish and Update Performance Targets	31,750,717	22,897,706	27,448,308
Assess Significant Progress Toward Achieving Performance Targets	40,693,075	27,281,269	34,119,523
Reporting on Performance Targets Progress	784,356	489,576	638,032
Section 490.309—Data Requirements—Interstate IRI, Rutting, and Faulting	5,108,641	3,839,263	4,488,508
Tracking costs: Establish measurement for rutting	523,963	393,771	460,360
Tracking costs: Establish measurement for faulting	1,047,926	787,541	920,720
Data processing costs: Additional rutting data	1,964,862	1,476,639	1,726,349
Data processing costs: Additional faulting data	1,571,890	1,181,312	1,381,079
Section 490.309—Data Requirements—Interstate Cracking	16,259,029	12,671,493	14,506,400
Fully Automated State DOTs: Additional Data Quality Control Costs	1,309,908	984,426	1,150,899
Semi-Automated State DOTs: Additional Data Processing & Quality Control Costs	4,286,328	3,221,275	3,766,014
Manual & State DOTs not currently collecting: Training costs to adopt automated methods	1,820,915	1,820,915	1,820,915
Manual & State DOTs not currently collecting: Data quality control costs	8,841,879	6,644,877	7,768,571
Section 490.309—Data Requirements—Non-Interstate NHS IRI, Rutting, and Faulting	6,203,492	4,473,781	5,362,882
Data Collection costs: Increase IRI Measurement to Cover 100 percent of non-Interstate NHS miles	618,044	445,716	534,296
Data processing costs: Additional rutting and faulting data collected	681,152	491,227	588,852

¹¹⁰ A TMA is an urbanized area having a population of over 200,000 or otherwise requested by the Governor and the MPO and officially designated by FHWA or FTA. 23 U.S.C. 134(k).

¹¹¹ The FHWA updated the estimated total number of MPOs to 409, which is less than the 420

MPOs used at the time that the NPRM was published. The estimated number of MPOs serving TMAs is now 201, less than the estimate of 210 in the NPRM. At the time the RIA was prepared for the NPRM, FHWA assumed that the 36 new urbanized areas resulting from the 2010 Census

would have MPOs designated for them. In reality, some of the newly designated urbanized areas merged with existing MPOs, resulting in the designation of fewer new MPOs than expected.

TABLE 4—TOTAL COST OF THE FINAL RULE—Continued

Cost components	10-yr total cost		
	Undiscounted	7%	3%
Tracking costs: Establish measurement for rutting	2,724,609	1,964,910	2,355,408
Tracking costs: Establish measurement for faulting	2,179,687	1,571,928	1,884,327
Section 490.309—Data Requirements—Non-Interstate NHS Cracking	4,322,696	3,117,405	3,736,946
Additional data quality control costs for new data collection	4,322,696	3,117,405	3,736,946
Section 490.309—Data Requirements—Capital Costs	16,600,000	15,891,841	16,254,041
Profiler	9,100,000	8,391,841	8,754,041
Faulting Software	1,000,000	1,000,000	1,000,000
Cracking Video Equipment and Software Purchase	6,500,000	6,500,000	6,500,000
Section 490.313—Calculation of performance management measures	8,482,450	7,994,228	8,243,938
Reprogramming of software to allow Performance Calculations	6,517,588	6,517,588	6,517,588
FHWA's Management of Data Submissions	261,982	196,885	230,180
Filtering out Bridge Pavement from Pavement Data	1,702,880	1,279,754	1,496,169
Section 490.319—Other Requirements	17,074,492	12,843,230	15,007,381
Develop a Quality Management Program	45,688	45,688	45,688
Run New Quality Management Program	3,274,770	2,461,066	2,877,249
Improve Quality Management Program	13,754,034	10,336,476	12,084,444
Section 490.407—Calculation of bridge performance measures	6,883,091	6,792,272	6,838,723
Update Software to generate Good/Fair/Poor condition	6,517,588	6,517,588	6,517,588
FHWA's Management of Data Submissions	365,503	274,684	321,135
Total Cost of Final Rule	155,979,715	120,109,737	138,462,355

The final rule's 10-year undiscounted cost (\$156.0 million in 2014 dollars) decreased relative to the proposed rule (\$196.4 million in 2012 dollars). As discussed below, FHWA made a number of changes that affected cost.

General Updates

In the final rule RIA, FHWA updated all costs to 2014 dollars from the 2012 dollars used in the proposed rule RIA. In addition, FHWA updated labor costs to reflect current BLS data. These general updates increased the estimated cost of the final rule relative to the proposed rule.

The FHWA deferred the effective date from 2015 to 2016. All costs that related to activities that were scheduled to begin in 2015 will now begin in 2016. Furthermore, the start dates for the performance period, reporting cycles, and phase-in requirements will be delayed by 2 years, with the first performance period beginning in 2018 rather than 2016. The data requirements for non-Interstate NHS IRI, rutting, faulting, and cracking will be deferred 1 year to 2019. The deferment decreased the number of years State DOTs and MPOs will incur costs within the 10-year analysis period. Therefore, the estimated costs that State DOTs and MPOs will incur to comply with the requirements of this final rule have decreased relative to the proposed rule.

The FHWA also updated the estimated total number of MPOs to 409, which is less than the 420 MPOs used at the time that the NPRM was published. The estimated number of MPOs serving TMAs is now 201, less

than the estimate of 210 in the NPRM. The number of non-TMA MPOs is 208, less than the estimate of 210 in the NPRM. At the time the RIA was prepared for the NPRM, FHWA assumed that the 36 new urbanized areas resulting from the 2010 Census would have MPOs designated for them. However, some of these newly designated urbanized areas merged with existing MPOs, resulting in the designation of fewer new MPOs than expected. The FHWA estimates that, on average, only the 201 larger MPOs serving TMAs will establish their own quantifiable performance targets. The FHWA also estimates that the 208 smaller MPOs serving non-TMAs will choose to agree to plan and program projects so that they contribute toward the accomplishment of State DOT pavement and bridge condition-related performance targets. Therefore, only the 201 larger MPOs serving TMAs will incur costs to reprogram and upgrade their software to be able to perform calculations of the performance measures. The reduction in the number of MPOs decreased the estimated costs to comply with the requirements of the final rule relative to the proposed rule.

Comments on Costs and Benefits in the Regulatory Impact Analysis

A number of State DOTs and MPOs took issue with the assumptions and levels of cost analysis associated with the requirements of the NPRM reflected in the benefit-cost analysis.¹¹² In terms

of benefits, Fugro Roadware, a firm that manufactures and operates equipment that is used to measure the pavement conditions on State and municipal networks, asserted that the "entire pavement and traffic assessment management process has been shown to improve the quality of road networks without an overall increase of funding . . ."

Need for Quantitative Analysis

The Colorado DOT argued that FHWA did not adequately justify its statement that benefits would outweigh the costs. They urged FHWA to conduct a quantitative analysis to support its claim.

This rulemaking constitutes a change to Federal regulations and was therefore subjected to an economic analyses according to E.O. 12866, (Regulatory Planning and Review) (58 FR 51735), as supplemented by E.O. 13563 (Improving Regulation and Regulatory Review) (76 FR 3821). These E.O.s direct each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The FHWA completed and included an RIA in support of this final rule on the establishment of national performance management measures for pavement and bridge conditions. The RIA summary estimates the economic impact, in terms of costs and benefits, on Federal, State, and local governments and private entities regulated under this

¹¹² TEMPO, Atlanta Regional Commission, Transportation for America, and State DOTs of

Colorado, North Carolina, Mississippi, Oklahoma, Michigan, Georgia, Louisiana, and Oregon.

action, as required by E.O.s 12866 and 13563. The economic impacts are measured on an incremental basis, relative to current highway infrastructure condition performance reporting practices. To estimate costs for the rule, FHWA assessed the level of effort, expressed in labor hours and categories, and the capital investments needed to comply with each component of the rule. Level of effort by labor category is monetized with loaded wage rates to estimate total costs. These estimates were developed with input from State and MPO interviews. This document presents the summary of the analysis. The complete quantitative analysis can be found in the docket.

Section 490.105 Through 109 General Information, Target Establishment, Reporting on Progress, and Making Significant Progress

The RIA estimates the cost of coordination between State DOTs and MPOs, establishing and updating performance targets, reporting on performance targets progress, and assessing significant progress toward achieving performance targets under sections 490.105 through 490.109. The cost of these sections decreased from \$93.3 million for the proposed rule to \$74.1 million for the final rule. In addition to the general updates described above, the decrease in cost is partially offset by the additional costs of coordinating the establishment of targets in accordance with 23 CFR part 450.

Section 490.309 Data Requirements: Interstate IRI, Rutting, and Faulting

The RIA estimates the cost of data requirements for Interstate IRI, rutting, and faulting under section 490.309. The cost of this section decreased from \$30.7 million for the proposed rule to \$5.1 million for the final rule. In addition to

the general updates described above, the decrease in costs is attributable to FHWA's response to public comments on the burden associated with pavement data collection requirements. In response to public comment, FHWA relaxed the proposed requirement that would have required State DOTs to collect IRI data both directions. The final rule requires IRI data collection in at least one direction, which results in lower data collection costs.

Break-Even Analysis

Currently, State DOTs differ in the way they measure the condition of their pavement. The FHWA does not believe their current methods are inadequate, but they are inconsistent. The differences hinder accurate analysis of infrastructure conditions at the national level. The final rule establishes uniform condition measures for the purpose of carrying out the NHPP to assess condition of pavements on the NHS (excluding the Interstate System), pavements on the Interstate System, and bridges carrying the NHS, which includes on- and off-ramps, connected to the NHS. In addition, the final rule establishes processes that: (1) State DOTs and MPOs use to report measures and establish performance targets and (2) FHWA uses to assess progress that State DOTs have made toward achieving targets.

The FHWA expects that the final rule will result in certain benefits. The final rule will yield greater accountability because the MAP-21-mandated reporting will increase visibility and transparency. In addition, the rule will help focus the Federal-aid highway program on achieving balanced performance outcomes.

These benefits resulting from the rule (*i.e.*, greater accountability and greater

focus on making progress toward the national goal for infrastructure condition) will lead to improved pavement and bridge conditions. The benefits resulting from performance measurement, while real and substantial, are difficult to quantify. Therefore, FHWA quantified these benefits of the rule by performing break-even analyses, as described in OMB Circular A-4. A break-even analysis calculates the threshold a specific variable must achieve in order for benefits to equal costs, holding every other variable in the analysis constant. For pavements and bridges, FHWA focused its break-even analyses on VOC savings because users typically garner the greatest concentration of benefits from transportation projects. The FHWA estimated the number of road miles of deficient pavement that will have to be improved and the number of posted bridges that will have to be avoided in order for the benefits of the rule to justify the costs.

Table 5 presents the results from the pavement break-even analysis. The results represent the savings in VOC to automobile and truck drivers from pavement conditions that are improved from Poor to Good. The analysis shows that the rule will need to result in the net improvement of approximately 71 miles of pavement (*i.e.*, to Good condition) per year, or 710 miles over 10 years, that will otherwise not have been improved without the rule.¹¹³ The annual break-even point represents approximately 0.3 percent of the NHS miles currently estimated to be in Poor condition. Based on recent trends in improving road condition, FHWA believes 71 miles of pavement per year or 710 miles over 10 years as a result of this rule is achievable.

TABLE 5—BREAK-EVEN IMPROVEMENT OF PAVEMENT CONDITIONS

[Improved from poor]

Annual improved VMT from poor needed	Annual poor VMT (total VMT * 11.8%)	Percent of poor VMT needing improvement	Current NHS miles estimated to be in poor condition	Approximate number of annual poor NHS miles needing improvement from poor
a	b	c = a ÷ b	d	e = c * d
562,187,982	193,346,999,390	0.29%	24,386	71

* Please refer to the Summary Report for details on the methodology used in the analysis.

¹¹³ The estimated annual break-even point accounts for the benefit in the year the improvement is made. Although the benefit from improved pavement will extend over multiple

years, the benefit declines year-to-year as the condition of the pavement declines. So, for the purposes of the analysis, we assume that 71 miles of poor pavement will need to be improved per year

in order for the rule to break even (rather than 71 miles total over the 10-year period).

Table 6 presents the results from the bridge break-even analysis, which calculates the number of year-long bridge postings that will need to be reduced as a result of the rule in order for the benefits of the bridge condition requirements to justify the costs. The FHWA estimated the average cost per year of a bridge posting in column E. With the undiscounted cost of the bridge requirements and this average cost of a bridge posting, the analysis estimates the number of year-long

bridge postings that need to be avoided in order to make the benefits of the rule justify the cost. The break-even analysis estimates that three separate 1-year long bridge postings need to be avoided over 10 years in order for benefits to justify costs.

As a basis for comparison, NBI data indicate that there were approximately 85 year-long NHS bridge postings for trucks in 2012. Over the 10-year period of 2003–2012, the number of NHS bridges posted for trucks declined from

145 to 85. Trends in the United States, demonstrated by bridge owners, provide evidence that posted bridges receive priority consideration in work schedules. With the increased performance requirements of the final rule, it is reasonable to assume that, at a minimum, a reduction in the posted load limit of one bridge annually nationwide would be achieved to provide the needed benefit to justify the costs of complying with this rule.

TABLE 6—BREAK-EVEN BRIDGE DETOURS

Undiscounted 10-year cost of bridge rule	Average truck user cost per VMT	Average distance per detour (miles)	Average cost of detour per trucks	Average cost per year of each bridge posting	Equivalent number of year-long posts that need to be avoided	Annual number of year-long posts that need to be avoided
a	b	c	d = b × c	e = d * 2,301 ADT * 365.25	f = a ÷ e	g = f ÷ 10 years
\$43,930,849	\$1.90	11	\$19.86	\$16,692,683	3	0.3

* Please refer to the Summary Report for details on the methodology used in the analysis.

Relative to the proposed rule, the threshold for the pavement break-even analysis decreased in the final rule. Specifically, the number of NHS miles in Poor condition needing improvement to Fair condition decreased from 435 to 71 in the final rule. The break-even point decreased due to an adjustment to the incremental maintenance and repair cost per VMT, a decrease in the undiscounted 10-year cost of the pavement rule, and an increase in the total VMT that are in Poor condition.

The threshold for the bridge break-even analysis increased in the final rule relative to the proposed rule. Specifically, the number of 1-year long bridge postings that need to be reduced increased from 2 to 3 in the final rule. The break-even point increased due to the following updates to input data:

- The average detour for bridges posted with weight limits of at least 40 percent below the legal load decreased from 20 miles to 10.45 miles, and
- The percentage of trucks of total average annual daily traffic on posted bridges decreased from 12.6 percent to 9.7 percent.

Regulatory Flexibility Act

To comply with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA evaluated the effects of this action and determined that it would not have a significant economic impact on a substantial number of small entities. The rule affects State governments and MPOs. State DOTs are not included in the definition of small entity in 5 U.S.C. 601.

The MPOs are considered governmental jurisdictions. The small entity standard for these entities is whether the affected MPOs serve less than 50,000 people. The MPOs impacted by this rule serve urbanized areas with populations of more than 50,000. Therefore, MPOs that incur economic impacts under this rule do not meet the definition of a small entity.

The FHWA certifies that this regulatory action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The FHWA determined that this final rule would not impose unfunded mandates as defined by the UMRA. This rule does not contain a Federal mandate that may result in expenditures of \$151 million or more in any 1 year (2 U.S.C. 1532) for either State, local, and tribal governments in the aggregate, or by the private sector. Additionally, the definition of “Federal mandate” in UMRA excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

The FHWA analyzed this final rule in accordance with the principles and criteria contained in E.O. 13132. The FHWA determined that this action would not have sufficient federalism

implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this rule would not preempt any State law or regulation or affect the States’ ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. This E.O. applies because State and local governments would be directly affected by the proposed regulation, which is a condition on Federal-aid highway funding. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205 (Highway Planning and Construction) for further information.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB prior to conducting or sponsoring a collection of information. The FHWA analyzed this final rule and determined that it contains collection of information requirements for the purposes of the PRA.

The final rule provides definitions and outlines processes for bridge and pavement performance measures and reporting. Some burdens in the rule will be realized in other reporting areas as described below. The PRA activities are already covered by existing OMB clearances. The reference numbers for

those clearances are: HPMS information collection, OMB No. 2125–0028 with an expiration of May 31, 2019; and NBI, OMB No. 2125–0501 with an expiration date of April 30, 2018. Any increase in PRA burdens caused by MAP–21 in these areas was addressed in PRA approval requests associated with those rulemakings.

This rule requires the submission of biennial performance reports. The FHWA analyzed this rule under the PRA and has determined the following:

Respondents: Approximately 684 applicants consisting of State DOTs, MPOs, Washington, DC, and Puerto Rico.

Frequency: Biennially.

Estimated Average Burden per Response: Approximately 416 hours to complete and submit the report.

Estimated Total Annual Burden Hours: Approximately 54,496 hours annually.

National Environmental Policy Act

The FHWA analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and determined that it would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

Executive Order 12630 (Taking of Private Property)

The FHWA analyzed this rule under E.O. 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights). The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under E.O. 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988 (Civil Justice Reform) to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA analyzed this rule under E.O. 13045 (Protection of Children from Environmental Health Risks and Safety Risks). The FHWA certifies that this action would not cause an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA analyzed this action under E.O. 13175. The FHWA believes

that the action: (1) Would not have substantial direct effects on one or more Indian tribes; (2) would not impose substantial direct compliance costs on Indian tribal governments; and (3) would not preempt tribal laws. The final rule addresses obligations of Federal funds to State DOTs for Federal-aid highway projects and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 12898 (Environmental Justice)

The E.O. 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this rule does not raise any environmental justice issues.

Executive Order 13211 (Energy Effects)

The FHWA analyzed this action under E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). The FHWA determined that this is not a significant energy action under E.O. 13211 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identifier Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 490

Bridges, Highway safety, Highways and roads, Incorporation by reference, and Reporting and recordkeeping requirements.

Issued in Washington, DC, on January 6, 2017, under authority delegated in 49 CFR 1.85.

Gregory G. Nadeau,
Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA amends 23 CFR part 490 as follows:

PART 490—NATIONAL PERFORMANCE MANAGEMENT MEASURES

■ 1. The authority citation for part 490 continues to read as follows:

Authority: 23 U.S.C. 134, 135, 148(i), and 150; 49 CFR 1.85.

■ 2. Revise subpart A to read as follows:

Subpart A—General Information

Sec.

490.101 Definitions.

490.103 Data requirements.

490.105 Establishment of performance targets.

490.107 Reporting on performance targets.

490.109 Assessing significant progress toward achieving the performance targets for the National Highway Performance Program.

490.111 Incorporation by reference.

Subpart A—General Information

§ 490.101 Definitions.

Unless otherwise specified, the following definitions apply to this part: *Bridge* as used in this part is defined in § 650.305 of this title, the National Bridge Inspection Standards.

Full extent means continuous collection and evaluation of pavement condition data over the entire length of the roadway.

Highway Performance Monitoring System (HPMS) is a national level highway information system that includes data on the extent, condition, performance, use, and operating characteristics of the Nation's highways.

Mainline highways means the through travel lanes of any highway. Mainline highways specifically exclude ramps, shoulders, turn lanes, crossovers, rest areas, and other pavement surfaces that are not part of the roadway normally travelled by through traffic.

Measure means an expression based on a metric that is used to establish targets and to assess progress toward achieving the established targets (e.g., a measure for flight on-time performance is percent of flights that arrive on time, and a corresponding metric is an arithmetic difference between scheduled and actual arrival time for each flight).

Metric means a quantifiable indicator of performance or condition.

Metropolitan Planning Area (MPA) as used in this part is defined in § 450.104 of this title, Transportation Planning and Programming Definitions.

National Bridge Inventory (NBI) is an FHWA database containing bridge information and inspection data for all highway bridges on public roads, on and off Federal-aid highways, including tribally owned and Federally owned

bridges, that are subject to the National Bridge Inspection Standards (NBIS).

Non-urbanized area means a single geographic area that comprises all of the areas in the State that are not “urbanized areas” under 23 U.S.C. 101(a)(34).

Performance period means a determined time period during which condition/performance is measured and evaluated to: Assess condition/performance with respect to baseline condition/performance; and track progress toward the achievement of the targets that represent the intended condition/performance level at the midpoint and at the end of that time period. The term “performance period” applies to all proposed measures in this part, except the measures proposed for the Highway Safety Improvement Program (HSIP) in subpart B of this part. Each performance period covers a 4-year duration beginning on a specified date (provided in § 490.105).

Target means a quantifiable level of performance or condition, expressed as a value for the measure, to be achieved within a time period required by the Federal Highway Administration (FHWA).

§ 490.103 Data requirements.

(a) *In general.* Unless otherwise noted below, the data requirements in this section applies to the measures identified in subparts C and D of this part. Additional data requirements for specific performance measures are identified in 23 CFR sections—

- (1) 490.309 for the condition of pavements on the Interstate System;
- (2) 490.309 for the condition of pavements on the non-Interstate NHS;
- (3) 490.409 for the condition of bridges on the NHS;
- (4) [Reserved]

(b) *Urbanized area data*—The State DOTs shall submit urbanized area data, including boundaries of urbanized areas, in accordance with the HPMS Field Manual (incorporated by reference, see § 490.111) for the purpose of the additional targets for urbanized and non-urbanized areas in § 490.105(e). The boundaries of urbanized areas shall be identified based on the most recent U.S. Decennial Census, unless FHWA approves adjustments to the urbanized area as provided by 23 U.S.C. 101(a)(34), and these adjustments are submitted to HPMS, available at the time when the State DOT Baseline Performance Period Report is due to FHWA.

(c) [Reserved]

(d) *National Highway System data.* The State DOTs shall document and submit the extent of the NHS in

accordance with the HPMS Field Manual.

§ 490.105 Establishment of performance targets.

(a) *In general.* State departments of transportation (State DOT) shall establish performance targets for all measures specified in paragraph (c) of this section for the respective target scope identified in paragraph (d) of this section with the requirements specified in paragraph (e) of this section, and the Metropolitan Planning Organizations (MPO) shall establish performance targets for all measures specified in paragraph (c) of this section for respective target scope identified in paragraph (d) of this section with the requirements specified in paragraph (f) of this section.

(b) *Highway Safety Improvement Program measures.* State DOTs and MPOs shall establish performance targets for the Highway Safety Improvement Program (HSIP) measures in accordance with § 490.209.

(c) *Applicable measures.* State DOTs and MPOs that include, within their respective geographic boundaries, any portion of the applicable transportation network shall establish performance targets for the performance measures identified in 23 CFR sections—

- (1) 490.307(a)(1) and 490.307(a)(2) for the condition of pavements on the Interstate System;
- (2) 490.307(a)(3) and 490.307(a)(4) for the condition of pavements on the National Highway System (NHS) (excluding the Interstate); and
- (3) 490.407(c)(1) and 490.407(c)(2) for the condition of bridges on the NHS.

(d) *Target scope.* Targets established by the State DOT and MPO shall, regardless of ownership, represent the transportation network, including bridges that cross State borders, that are applicable to the measures as specified in paragraphs (d)(1) and (2) of this section.

(1) State DOTs and MPOs shall establish Statewide and metropolitan planning area wide targets, respectively, that represent the condition/performance of the transportation network that is applicable to the measures, as specified in 23 CFR sections—

- (i) 490.303 for the condition of pavements on the Interstate System measures specified in §§ 490.307(a)(1) and (a)(2);
- (ii) 490.303 for the condition of pavements on the National Highway System (NHS) (excluding the Interstate) measures specified in §§ 490.307(a)(3) and (a)(4); and

(iii) 490.403 for the condition of bridges on the NHS measures specified in §§ 490.407(c)(1) and (c)(2).

(2) [Reserved]

(3) For the purpose of target establishment in this section, reporting targets and progress evaluation in § 490.107 and significant progress determination in § 490.109, State DOTs shall declare and describe the urbanized area boundaries within the State boundary in the Baseline Performance Period Report required by § 490.107(b)(1). Any changes in urbanized area boundaries during a performance period would not be accounted for until the following performance period.

(e) State DOTs shall establish targets for each of the performance measures identified in paragraph (c) of this section for respective target scope identified in paragraph (d) of this section as follows:

(1) *Schedule*—State DOTs shall establish targets not later than 1 year of the effective date of this rule and for each performance period thereafter, in a manner that allows for the time needed to meet the requirements specified in this section and so that the final targets are submitted to FHWA by the due date provided in § 490.107(b).

(2) *Coordination.* State DOTs shall coordinate with relevant MPOs on the selection of targets in accordance with 23 U.S.C. 135(d)(2)(B)(i)(II) to ensure consistency, to the maximum extent practicable.

(3) *Additional targets for urbanized and non-urbanized areas.* In addition to statewide targets, described in paragraph (d)(1) of this section, State DOTs may, as appropriate, for each statewide target, establish additional targets for portions of the State.

(i) A State DOT shall declare and describe in the Baseline Performance Period Report required by § 490.107(b)(1) the boundaries used to establish each additional target. Any changes in boundaries during a performance period would not be accounted for until the following performance period.

(ii) State DOTs may select any number and combination of urbanized area boundaries and may also select a non-urbanized area boundary for the establishment of additional targets.

(iii) The boundaries used by the State DOT for additional targets shall be contained within the geographic boundary of the State.

(iv) State DOTs shall evaluate separately the progress of each additional target and report that progress as required under §§ 490.107(b)(2)(ii)(B) and (b)(3)(ii)(B).

(4) *Time horizon for targets.* State DOTs shall establish targets for a performance period as follows:

(i) The performance period will begin on:

(A) January 1st of the year in which the Baseline Performance Period Report is due to FHWA and will extend for a duration of 4 years for the measures in paragraphs (c)(1) through (c)(3) of this section; and

(B) [Reserved]

(ii) The midpoint of a performance period will occur 2 years after the beginning of a performance period described in paragraph (e)(4)(i) of this section.

(iii) State DOTs shall establish 2-year targets that reflect the anticipated condition/performance level at the midpoint of each performance period for the measures in paragraphs (c)(1) through (c)(3) of this section.

(iv) State DOTs shall establish 4-year targets that reflect the anticipated condition/performance level at the end of each performance period for the measures in paragraphs (c)(1) through (c)(3) of this section.

(5) *Reporting.* State DOTs shall report 2-year targets, 4-year targets, the basis for each established target, progress made toward the achievement of targets, and other requirements to FHWA in accordance with § 490.107, and the State DOTs shall provide relevant MPO(s) targets to FHWA, upon request, each time the relevant MPOs establish or adjust MPO targets, as described in paragraph (f) of this section.

(6) *Target adjustment.* State DOTs may adjust an established 4-year target in the Mid Performance Period Progress Report, as described in § 490.107(b)(2). State DOTs shall coordinate with relevant MPOs when adjusting their 4-year target(s).

(7) *Phase-in of new requirements for Interstate System pavement condition measures.* The following requirements apply only to the first performance period and the measures in §§ 490.307(a)(1) and (a)(2):

(i) State DOTs shall establish their 4-year targets, required under paragraph (e)(4)(iv) of this section, and report these targets in their Baseline Performance Period Report, required under § 490.107(b)(1);

(ii) State DOTs shall not report 2-year targets, described in paragraph (e)(4)(iii) of this section, and baseline condition/performance in their Baseline Performance Period Report; and

(iii) State DOTs shall update the baseline condition/performance in their Baseline Performance Period Report, with the 2-year condition/performance in their Mid Performance Period

Progress Report, described in § 490.107(b)(2)(ii)(A). State DOTs may also adjust their 4-year targets, as appropriate.

(f) The MPOs shall establish targets for each of the performance measures identified in paragraph (c) of this section for the respective target scope identified in paragraph (d) of this section as follows:

(1) *Schedule.* The MPOs shall establish targets no later than 180 days after the respective State DOT(s) establishes their targets, described in paragraph (e)(1) of this section.

(i) The MPOs shall establish 4-year targets, described in paragraph (e)(4)(iv) of this section, for all applicable measures, described in paragraphs (c) and (d) of this section.

(ii) [Reserved.]

(2) *Coordination.* The MPOs shall coordinate with relevant State DOT(s) on the selection of targets in accordance with 23 U.S.C. 134(h)(2)(B)(i)(II) to ensure consistency, to the maximum extent practicable.

(3) *Target establishment options.* For each performance measure identified in paragraph (c) of this section, MPOs shall establish a target by either:

(i) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT target for that performance measure; or

(ii) Committing to a quantifiable target for that performance measure for their metropolitan planning area.

(4) MPOs serving a multistate metropolitan planning area.—For each performance measure identified in paragraph (c)(1) through (c)(3) of this section, MPOs, with metropolitan planning areas extending across multiple State boundaries shall follow these requirements:

(i) For each measure, MPOs may choose different target establishment options, provided in paragraph (3) of this section, for each portion of the metropolitan area within each State.

(ii) If MPOs choose the option to agree to plan and program projects to contribute toward State DOT targets, in accordance with paragraph (3)(i) of this section, for a measure, then they shall plan and program projects in support of State DOT targets for each portion of the metropolitan area within each State.

(5)–(6) [Reserved]

(7) *MPO response to State DOT target adjustment.*—For the established targets in paragraph (3) of this section, if the State DOT adjusts a 4-year target in the State DOT's Mid Performance Period Progress Report and if, for that respective target, the MPO established a target by supporting the State DOT

target as allowed under paragraph (f)(3)(i) of this section, then the MPO shall, within 180 days, report to the State DOT whether they will either:

(i) Agree to plan a program of projects so that they contribute to the adjusted State DOT target for that performance measure; or

(ii) Commit to a new quantifiable target for that performance measure for its metropolitan planning area.

(8) *Target adjustment.* If the MPO establishes its target by committing to a quantifiable target, described in paragraph (f)(3)(ii) of this section, then the MPOs may adjust its target(s) in a manner that is mutually agreed upon by the State DOT and MPO.

(9) *Reporting.* The MPOs shall report targets and progress toward the achievement of their targets as specified in § 490.107(c). After the MPOs establish or adjust their targets, the relevant State DOT(s) must be able to provide these targets to FHWA, upon request.

§ 490.107 Reporting on performance targets.

(a) *In general.* All State DOTs and MPOs shall report the information specified in this section for the targets required in § 490.105.

(1) All State DOTs and MPOs shall report in accordance with the schedule and content requirements under paragraphs (b) and (c) of this section, respectively.

(2) For the measures identified in § 490.207(a), all State DOTs and MPOs shall report on performance in accordance with § 490.213.

(3) State DOTs shall report using an electronic template provided by FHWA.

(b) *State Biennial Performance Report.* State DOTs shall report to FHWA baseline condition/performance at the beginning of a performance period and progress achievement at both the midpoint and end of a performance period. State DOTs shall report at an ongoing 2-year frequency as specified in paragraphs (b)(1), (b)(2), and (b)(3) of this section.

(1) *Baseline Performance Period Report.*—(i) *Schedule.* State DOTs shall submit a Baseline Performance Period Report to FHWA by October 1 of the first year in a performance period. State DOTs shall submit their first Baseline Performance Period Report to FHWA by October 1, 2018, and subsequent Baseline Performance Period Reports to FHWA by October 1 every 4 years thereafter.

(ii) *Content.* The State DOT shall report the following information in each Baseline Performance Period Report:

(A) *Targets.* 2-year and 4-year targets for the performance period, as required

in § 490.105(e), and a discussion, to the maximum extent practicable, of the basis for each established target;

(B) *Baseline condition/performance.*—Baseline condition/performance derived from the latest data collected through the beginning date of the performance period specified in § 490.105(e)(4)(i) for each target, required under paragraph (b)(1)(ii)(A) of this section;

(C) *Relationship with other performance expectations.*—A discussion, to the maximum extent practicable, on how the established targets in paragraph (b)(1)(ii)(A) of this section support expectations documented in longer range plans, such as the State asset management plan for the NHS required by 23 U.S.C. 119(e) and the long-range statewide transportation plan provided in part 450 of this chapter; and

(D) *Urbanized area boundaries and population data for targets.*—For the purpose of determining target scope in § 490.105(d) and establishing additional targets for urbanized and non-urbanized areas in § 490.105(e)(3), State DOTs shall document the boundary extent for all applicable urbanized areas and the latest Decennial Census population data, based on information in HPMS.

(2) *Mid Performance Period Progress Report*—(i) *Schedule.* State DOTs shall submit a Mid Performance Period Progress Report to FHWA by October 1 of the third year in a performance period. State DOTs shall submit their first Mid Performance Period Progress Report to FHWA by October 1, 2020, and subsequent Mid Performance Period Progress Reports to FHWA by October 1 every 4 years thereafter.

(ii) *Content.* The State DOT shall report the following information in each Mid Performance Period Progress Report:

(A) *2-year condition/performance.* The actual condition/performance derived from the latest data collected through the midpoint of the performance period, specified in § 490.105(e)(4), for each State DOT reported target required in paragraph (b)(1)(ii)(A) of this section;

(B) *2-year progress in achieving performance targets.* A discussion of State DOT's progress toward achieving each established 2-year target in paragraph (b)(1)(ii)(A) of this section. The State DOT shall compare the actual 2-year condition/performance in paragraph (b)(2)(ii)(A) of this section, within the boundaries and limits documented in paragraphs (b)(1)(ii)(D) and (b)(1)(ii)(E) of this section, with the respective 2-year target and document in the discussion any reasons for

differences in the actual and target values;

(C) *Investment strategy discussion.* A discussion on the effectiveness of the investment strategies developed and documented in the State asset management plan for the NHS required under 23 U.S.C. 119(e);

(D) [Reserved]

(E) *Target adjustment discussion.*—When applicable, a State DOT may submit an adjusted 4-year target to replace an established 4-year target in paragraph (b)(1)(ii)(A) of this section. If the State DOT adjusts its target, it shall include a discussion on the basis for the adjustment and how the adjusted target supports expectations documented in longer range plans, such as the State asset management plan for the NHS, and the long-range statewide transportation plan. The State DOT may only adjust a 4-year target at the midpoint and by reporting the change in the Mid Performance Period Progress Report.

(F) *2-year significant progress discussion for the National Highway Performance Program (NHPP) targets.*—State DOTs shall discuss the progress they have made toward the achievement of all 2-year targets established for the NHPP measures in § 490.105(c)(1) through (c)(3). This discussion should document a summary of prior accomplishments and planned activities that will be conducted during the remainder of the Performance Period to make significant progress toward that achievement of 4-year targets for NHPP measures;

(G) *Extenuating circumstances discussion on NHPP 2-year targets.*—When applicable, a State DOT may include a discussion on the extenuating circumstance(s), described in § 490.109(e)(5), beyond the State DOT's control that prevented the State DOT from making 2-year significant progress toward achieving NHPP target(s) in paragraph (b)(2)(ii)(F) of this section; and

(H) *NHPP target achievement discussion.*—If FHWA determines that a State DOT has not made significant progress toward the achievement of NHPP targets in a biennial FHWA determination, then the State DOT shall include a description of the actions they will undertake to better achieve NHPP targets as required under § 490.109(f). If FHWA determines under § 490.109(e) that the State DOT has made significant progress, then the State DOT does not need to include this description.

(3) *Full Performance Period Progress Report*—(i) *Schedule.* State DOTs shall submit a progress report on the full performance period to FHWA by October 1 of the first year following the

reference performance period. State DOTs shall submit their first Full Performance Period Progress Report to FHWA by October 1, 2022, and subsequent Full Performance Period Progress Reports to FHWA by October 1 every 4 years thereafter.

(ii) *Content.* The State DOT shall report the following information for each Full Performance Period Progress Report:

(A) *4-year condition/performance.*—The actual condition/performance derived from the latest data collected through the end of the Performance Period, specified in § 490.105(e)(4), for each State DOT reported target required in paragraph (b)(1)(ii)(A) of this section;

(B) *4-year progress in achieving performance targets.*—A discussion of the State DOT's progress made toward achieving each 4-year target established in paragraph (b)(1)(ii)(A) or in paragraph (b)(2)(ii)(E) of this section, when applicable. The State DOT shall compare the actual 4-year condition/performance in paragraph (b)(3)(ii)(A) of this section, within the boundaries and limits documented in paragraph (b)(1)(ii)(D) and (b)(1)(ii)(E) of this section, with the respective 4-year target and document in the discussion any reasons for differences in the actual and target values;

(C) *Investment strategy discussion.*—A discussion on the effectiveness of the investment strategies developed and documented in the State asset management plan for the NHS required under 23 U.S.C. 119(e);

(D) [Reserved]

(E) *4-year significant progress evaluation for NHPP targets.*—State DOTs shall discuss the progress they have made toward the achievement of all 4-year targets established for the NHPP measures in § 490.105(c)(1) through (c)(3). This discussion shall include a summary of accomplishments achieved during the Performance Period to demonstrate whether the State DOT has made significant progress toward achievement of 4-year targets for NHPP measures.

(F) *Extenuating circumstances discussion on NHPP targets.*—When applicable, a State DOT may include discussion on the extenuating circumstance(s), described in § 490.109(e)(5), beyond the State DOT's control that prevented the State DOT from making a 4-year significant progress toward achieving NHPP targets, described in paragraph (b)(3)(ii)(E) of this section;

(G) *NHPP Target Achievement Discussion.*—If FHWA determines that a State DOT has not made significant progress toward the achievement of

NHPP targets in a biennial FHWA determination, then the State DOT shall include a description of the actions they will undertake to better achieve NHPP targets as required under § 490.109(f). If FHWA determines in § 490.109(e) that the State DOT has achieved significant progress, then the State DOT does not need to include this description.

(c) *MPO Report.* The MPOs shall establish targets in accordance with § 490.105 and report targets and progress toward the achievement of their targets in a manner that is consistent with the following:

(1) The MPOs shall report their established targets to their respective State DOT in a manner that is documented and mutually agreed upon by both parties.

(2) The MPOs shall report baseline condition/performance and progress toward the achievement of their targets in the system performance report in the metropolitan transportation plan in accordance with Part 450 of this chapter.

§ 490.109 Assessing significant progress toward achieving the performance targets for the National Highway Performance Program.

(a) *In general.* The FHWA will assess each of the State DOT targets separately for the NHPP measures specified in § 490.105(c)(1) through (c)(3) to determine the significant progress made toward the achievement of those targets.

(b) *Frequency.* The FHWA will determine whether a State DOT has or has not made significant progress toward the achievement of NHPP targets as described in paragraph (e) of this section at the midpoint and the end of each performance period.

(c) *Schedule.* The FHWA will determine significant progress toward the achievement of a State DOT's NHPP targets after the State DOT submit the Mid Performance Period Progress Report for progress toward the achievement of 2-year targets, and again after the State DOT submit the Full Performance Period Progress Report for progress toward the achievement of 4-year targets. The FHWA will notify State DOTs of the outcome of the determination of the State DOT's ability to make significant progress toward the achievement of its NHPP targets.

(d) *Source of data/information.* The FHWA will use the following sources of information to assess NHPP condition and performance progress:

(1) Data contained within the HPMS on June 15 of the year in which the significant progress determination is made that represents conditions from the prior year for targets established for

Interstate System pavement condition measures, as specified in § 490.105(c)(1);

(2) Data contained within the HPMS on August 15 of the year in which the significant progress determination is made that represents conditions from the prior year for targets established for non-Interstate NHS pavement condition measures, as specified in § 490.105(c)(2);

(3) The most recently available data contained within the NBI as of June 15 of the year in which the significant progress determination is made for targets established for NHS bridge condition measures, as specified in § 490.105(c)(3).

(4) Baseline condition data contained in HPMS and NBI of the year in which the Baseline Period Performance Report is due to FHWA that represents baseline conditions for the performance period.

(e) *Significant progress determination for individual NHPP targets.*—(1) *In general.* The FHWA will biennially assess whether the State DOTs has achieved or made significant progress toward each target established by the State DOT for the NHPP measures described in § 490.105(c)(1) through (c)(3). The FHWA will assess the significant progress of each statewide target separately using the condition/performance data/information sources described in paragraph (d) of this section. The FHWA will not assess the progress achieved for any additional targets a State DOT may establish under § 490.105(e)(3).

(2) *Significant progress toward individual NHPP targets.*—The FHWA will determine that a State DOT has made significant progress toward the achievement of each 2-year or 4-year NHPP target if either:

(i) The actual condition/performance level is better than the baseline condition/performance; or

(ii) The actual condition/performance level is equal to or better than the established target.

(3) *Phase-in of new requirements for Interstate System pavement condition measures.*—The following requirements shall only apply to the first performance period and the Interstate System pavement condition targets, described in § 490.105(e)(7):

(i) At the midpoint of the first performance period, FHWA will not make a determination of significant progress toward the achievement of 2-year targets for Interstate System pavement condition measures.

(ii) The FHWA will classify the assessment of progress toward the achievement of targets in paragraph (e)(3)(i) of this section as “progress not

determined” so that they will be excluded from the requirement under paragraph (e)(2) of this section.

(4) *Insufficient data and/or information.* The FHWA will determine that a State DOT has not made significant progress toward the achievement of an individual NHPP target if:

(i) A State DOT does not submit a required report, individual target, or other information as specified in § 490.107 for the each of the measures in § 490.105(c);

(ii) The data contained in HPMS does not meet the requirements under § 490.313(b)(4)(i) by the data extraction date specified in paragraph (d)(1) of this section for the each of the Interstate System pavement condition measures in § 490.105(c)(1);

(iii) The data contained in HPMS does not meet the requirements under § 490.313(b)(4)(i) by the data extraction date specified in paragraph (d)(2) of this section for the each of the non-Interstate NHS pavement condition measures in § 490.105(c)(2);

(iv) A State DOT reported data is not cleared in the NBI by the data extraction date specified in paragraph (d)(3) of this section for each of the NHS bridge condition measures in § 490.105(c)(3); or

(v) The data was determined insufficient, as described in paragraphs (e)(4)(ii) through (iv) of this section, in the year in which the Baseline Period Performance Report is due to FHWA for the measures in § 490.105(c), and the actual condition/performance level is not equal to or better than the established target.

(5) *Extenuating circumstances.* The FHWA will consider extenuating circumstances documented by the State DOT in the assessment of progress toward the achievement of NHPP targets in the relevant State Biennial Performance Report, provided in § 490.107.

(i) The FHWA will classify the assessment of progress toward the achievement of an individual 2-year or 4-year target as “progress not determined” if the State DOT has provided an explanation of the extenuating circumstances beyond the control of the State DOT that prevented it from making significant progress toward the achievement of a 2-year or 4-year target and the State DOT has quantified the impacts on the condition/performance that resulted from the circumstances, which are:

(A) Natural or man-made disasters that caused delay in NHPP project delivery, extenuating delay in data

collection, and/or damage/loss of data system;

(B) Sudden discontinuation of Federal Government furnished data due to natural and man-made disasters or sudden discontinuation of Federal Government furnished data due to lack of funding; and/or

(C) New law and/or regulation directing State DOTs to change metric and/or measure calculation.

(ii) If the State DOT's explanation, described in paragraph (e)(5)(i) of this section, is accepted by FHWA, FHWA will classify the progress toward achieving the relevant NHPP target(s) as "progress not determined," and those targets will be excluded from the requirement in paragraph (e)(2) of this section.

(f) *Performance achievement.* If FHWA determines that a State DOT has not made significant progress toward achieving the NHPP targets, then State DOTs shall include as part of the performance target report under sec. 150(e) [the Biennial Performance Report] a description of the actions the State DOT will undertake to achieve the targets related to the measure in which significant progress was not achieved as follows:

(1) If significant progress is not made for either target established for the Interstate System pavement condition measures, § 490.307(a)(1) and (a)(2), then the State DOT shall document the actions they will take to achieve Interstate Pavement condition targets;

(2) If significant progress is not made for either target established for the Non-Interstate System pavement condition measures, § 490.307(a)(3) and (a)(4), then the State DOT shall document the actions they will take to achieve Non-Interstate Pavement condition targets.

(3) If significant progress is not made for either target established for the NHS bridge condition measures, § 490.407(c)(1) and (c)(2), then the State DOT shall document the actions they will take to achieve the NHS bridge condition targets.

(4)–(5) [Reserved]

(6) The State DOT should, within 6 months of the significant progress determination, amend its Biennial Performance Report to document the information specified in this paragraph to ensure actions are being taken to achieve targets.

§ 490.111 Incorporation by reference.

(a) Certain material is incorporated by reference into this Part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section,

FHWA must publish a notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the Federal Highway Administration, Office of Highway Policy Information (202–366–4631) 1200 New Jersey Avenue SE., Washington, DC 20590, www.fhwa.dot.gov and is available from the sources listed below. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(b) The Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, www.fhwa.dot.gov.

(1) Highway Performance Monitoring System (HPMS) Field Manual, IBR approved for §§ 490.103, 490.309, 490.311, and 490.319.

(2) Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges, includes: Errata Sheet for Coding Guide 06/2011, Report No. FHWA–PD–96–001, December 1995, IBR approved for §§ 490.409 and 490.411.

(c) The American Association of State Highway and Transportation Officials, 444 North Capitol Street NW., Suite 249, Washington, DC 20001, (202) 624–5800, www.transportation.org.

(1) AASHTO Standard M328–14, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Inertial Profiler, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(2) AASHTO Standard R57–14, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Operating Inertial Profiling Systems, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(3) AASHTO Standard R48–10 (2013), Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Determining Rut Depth in Pavements, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(4) AASHTO Standard R36–13, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Evaluating Faulting of Concrete Pavements, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(5) AASHTO Standard R43–13, Standard Specification for Transportation Materials and Methods

of Sampling and Testing, Standard Practice for Quantifying Roughness of Pavement, 2014, 34th/2014 Edition, IBR approved for § 490.311.

■ 3. Add subpart C to read as follows:

Subpart C—National Performance Management Measures for the Assessing Pavement Condition

Sec.

490.301 Purpose.

490.303 Applicability.

490.305 Definitions.

490.307 National performance management measures for assessing pavement condition.

490.309 Data requirements.

490.311 Calculation of pavement metrics.

490.313 Calculation of performance management measures.

490.315 Establishment of minimum level for condition of pavements.

490.317 Penalties for not maintaining minimum Interstate System pavement condition.

490.319 Other requirements.

Subpart C—National Performance Management Measures for the Assessing Pavement Condition

§ 490.301 Purpose.

The purpose of this subpart is to implement the following statutory requirements of 23 U.S.C. 150(c)(3) to:

(a) Establish measures for State DOTs and MPOs to assess the condition of pavements on the Interstate System;

(b) Establish measures for State DOTs and MPOs to assess the condition of pavements on the NHS (excluding the Interstate);

(c) Establish minimum levels for pavement condition on the Interstate System, only for purposes of carrying out 23 U.S.C. 119(f)(1);

(d) Establish data elements that are necessary to collect and maintain standardized data to carry out a performance-based approach; and

(e) Consider regional differences in establishing the minimum levels for pavement conditions on the Interstate System.

§ 490.303 Applicability.

The performance measures in this subpart are applicable to the mainline highways on the Interstate System and on the non-Interstate NHS.

§ 490.305 Definitions.

The following definitions are only applicable to this subpart, unless otherwise provided:

Asphalt pavements means pavements where the top-most surface is constructed with asphalt materials. These pavements are coded in the HPMS as having any one of the following Surface Types:

Code	Surface_type
2	Bituminous.
6	Asphalt-Concrete (AC) Overlay over Existing AC Pavement.
7	AC Overlay over Existing Jointed Concrete Pavement.
8	AC (Bituminous Overlay over Existing CRCP).

Continuously Reinforced Concrete Pavements (CRCP) means pavements where the top-most surface is

constructed of reinforced Portland cement concrete with no joints. These

pavements are coded in the HPMS as having the following Surface Type:

Code	Surface_type
5	CRCP—Continuously Reinforced Concrete Pavement.

Cracking means an unintentional break in the continuous surface of a pavement.

Cracking Percent means the percentage of pavement surface exhibiting cracking as follows:

(1) For asphalt pavements, Cracking Percent is the percentage of the area of the pavement section, exhibiting visible cracking.

(2) For jointed concrete pavements, Cracking Percent is the percentage of concrete slabs exhibiting cracking.

(3) For CRCP, the Cracking Percent is the percentage of pavement surface with longitudinal cracking and/or punchouts, spalling or other visible defects.

Faulting means a vertical misalignment of pavement joints in Portland Cement Concrete Pavements.

International Roughness Index (IRI) means a statistic used to estimate the amount of roughness in a measured longitudinal profile. The IRI is computed from a single longitudinal profile using a quarter-car simulation, as described in the report: "On the Calculation of IRI from Longitudinal Road Profile" (Sayers, M.W., Transportation Research Board 1501, Transportation Research Board, Washington, DC 1995).

Jointed concrete pavements means pavements where the top-most surface is constructed of Portland cement concrete with joints. It may be constructed of either reinforced or unreinforced (plain) concrete. It is coded in the HPMS as having any one of the following Surface Types:

Code	Surface_type
3	Jointed Plain Concrete Pavement (includes whitetopping).
4	Jointed Reinforced Concrete Pavement (includes whitetopping).
9	Unbonded Jointed Concrete Overlay on PCC Pavement.
10	Bonded PCC Overlay on PCC Pavement.

Pavement means any hard surfaced travel lanes of any highway.

Pavement section means a nominally 0.1 mile-long reported segment that defines the limits of pavement condition metrics required by FHWA.

Present Serviceability Rating (PSR) means an observation based system used to rate pavements.

Punchout means a distress specific to CRCP described as the area between two closely spaced transverse cracks and between a short longitudinal crack and the edge of the pavement (or a longitudinal joint) that is breaking up, spalling, or faulting.

Rutting means longitudinal surface depressions in the pavement derived from measurements of a profile transverse to the path of travel on a highway lane. It may have associated transverse displacement.

Sampling as applied to pavements, means measuring pavement conditions on a short section of pavement as a statistical representation for the entire section. Sampling is not to be used to measure or rate NHS pavement conditions.

§ 490.307 National performance management measures for assessing pavement condition.

(a) To carry out the NHPP, the performance measures for State DOTs to assess pavement condition are:

- (1) Percentage of pavements of the Interstate System in Good condition;
- (2) Percentage of pavements of the Interstate System in Poor condition;
- (3) Percentage of pavements of the non-Interstate NHS in Good condition; and
- (4) Percentage of pavements of the non-Interstate NHS in Poor condition.

(b) State DOTs will collect data using the methods described in § 490.309 and will process this data to calculate individual pavement metrics for each section of pavement that will be reported to FHWA as described in § 490.311. State DOTs and FHWA will

use the reported pavement metrics to compute an overall performance of Good, Fair, or Poor, for each section of pavement as described in § 490.313.

§ 490.309 Data requirements.

(a) The performance measures identified in § 490.307 are to be computed using methods in § 490.313 from the four condition metrics and three inventory data elements contained within the HPMS that shall be collected and reported following the HPMS Field Manual, which is incorporated by reference into this subpart (see § 490.111). State DOTs shall report four condition metrics for each pavement section: IRI, rutting, faulting, and Cracking_Percent. State DOTs shall also report three inventory data elements as directed in the HPMS Field Manual: Through Lanes, Surface Type, and Structure Type. All pavement data collected after January 1, 2018 for Interstate highways and January 1, 2020 for non-Interstate National Highway System routes shall meet the requirements of this section.

(b) State DOTs shall collect data in accordance with the following relevant HPMS requirements to report IRI, rutting (asphalt pavements), faulting (jointed concrete pavements), and Cracking percent. State DOTs will be permitted to report present serviceability rating (PSR) for specific locations in accordance with the HPMS requirements as an alternative where posted speed limits are less than 40 miles per hour.

(1) For the Interstate System the following shall apply for all the pavement condition metrics:

(i) State DOTs shall collect data—

(A) From the full extent of the mainline highway;

(B) In the rightmost travel lane or one consistent lane for all data if the rightmost travel lane carries traffic that is not representative of the remainder of the lanes or is not readily accessible due

to closure, excessive congestion, or other events impacting access;

(C) Continuously collected in a manner that will allow for reporting in nominally uniform pavement section lengths of 0.10 mile (528 feet); shorter pavement sections are permitted only at the beginning of a route, end of a route, at bridges, at locations where surface type changes or other locations where a pavement section length of 0.10 mile is not achievable; the maximum length of pavement sections shall not exceed 0.11 mile (580.8 feet);

(D) In at least one direction of travel; and

(E) On an annual frequency.

(ii) Estimating conditions from data samples of the full extent of the mainline highway is not permitted.

(iii) State DOTs may collect and report pavement condition data separately for each direction of divided highways on the Interstate System. Averaging across directions is not permitted. When pavement condition data is collected in one direction only, the measured conditions shall apply to all lanes in both directions for that pavement section for purposes of this part.

(iv) For the portions of the Interstate mainline highway pavements where posted speed limits are less than 40 MPH (*e.g.*, border crossings, toll plazas), State DOTs may collect and report the Present Serviceability Rating (PSR) as an alternative to the IRI, Cracking_Percent, rutting, and faulting in this pavement section and shall follow the following requirements:

(A) The PSR shall be determined as a value from 0 to 5 per the procedures prescribed in the HPMS Field Manual;

(B) Alternative pavement condition methods may be allowed to estimate a PSR with prior approval from FHWA of the method of correlation between their condition determination and PSR as required in the HPMS Field Manual;

(C) The PSR data shall be continuously collected in a manner that will allow for reporting in uniform pavement section lengths of 0.10 mile (528 feet); shorter pavement sections are permitted only at the beginning of a route, end of a route, at bridges, at locations where surface type changes or other locations where a pavement section length of 0.10 mile is not achievable; the maximum length of pavement sections shall not exceed 0.11 mile (580.8 feet);

(D) The PSR data shall be collected in at least one direction of travel; and

(E) The PSR data shall be collected on an annual frequency.

(2) For the non-Interstate NHS the following shall apply:

(i) For the IRI metric, State DOTs shall collect and report data:

(A) From the full extent of the mainline highway;

(B) In the rightmost travel lane or one consistent lane for all data if the rightmost travel lane is not accessible;

(C) Continuously collected in a manner that will allow for reporting in uniform pavement section lengths of 0.10 mile (528 feet); shorter pavement sections are permitted only at the beginning of a route, end of a route, at bridges, at locations where surface type changes or other locations where a pavement section length of 0.10 mile is not achievable; the maximum length of pavement sections shall not exceed 0.11 mile (580.8 feet)

(D) In one direction of travel; and

(E) On a biennial frequency.

(F) Estimating IRI metrics from data samples of the full extent of the mainline will not be permitted.

(ii) For the Cracking percent, rutting and faulting metrics, State DOTs shall collect data—

(A) On the full extent (no sampling) of the mainline highway;

(B) In the rightmost travel lane or one consistent lane for all data if the rightmost travel lane is not accessible;

(C) Continuously collected in a manner that will allow for reporting in uniform pavement section lengths of 0.10 mile (528 feet); shorter pavement sections are permitted only at the beginning of a route, end of a route, at bridges, at locations where surface type changes or other locations where a pavement section length of 0.10 mile is not achievable; the maximum length of pavement sections shall not exceed 0.11 mile (580.8 feet)

(D) In one direction of travel; and

(E) On at least a biennial frequency.

(F) Estimating conditions from data samples of the full extent of the mainline highway will not be permitted.

(iii) For the portions of mainline highways where posted speed limits of less than 40 MPH, State DOTs may collect the Present Serviceability Rating (PSR) as an alternative to the IRI, Cracking_Percent, rutting, and faulting pavement condition metrics, in paragraphs (b)(2)(i) and (ii) of this section, and shall follow the following requirements:

(A) The PSR shall be determined as a 0 to 5 value per the procedures prescribed in the HPMS Field Manual;

(B) Alternative pavement condition methods may be allowed to estimate a PSR with prior approval from FHWA of the method of correlation between their condition determination and PSR as required in the HPMS Field Manual;

(C) The PSR data shall be continuously collected in a manner that

will allow for reporting in uniform pavement section lengths of 0.10 mile (528 feet); shorter pavement sections are permitted only at the beginning of a route, end of a route, at bridges, at locations where surface type changes or other locations where a pavement section length of 0.10 mile is not achievable; the maximum length of pavement sections shall not exceed 0.11 mile (580.8 feet);

(D) The PSR data shall be collected in one direction of travel; and

(E) The PSR data shall be collected on at least a biennial frequency.

(3) Data collection methods for each of the condition metrics shall conform to the following:

(i) The device to collect data needed to calculate the IRI metric shall be in accordance with American Association of State Highway Transportation Officials (AASHTO) Standard M328–14, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Equipment Specification for Inertial Profiler (incorporated by reference, see § 490.111).

(ii) The method to collect data needed to calculate the IRI metric shall be in accordance with AASHTO Standard R57–14, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Operating Inertial Profiling Systems (incorporated by reference, see § 490.111).

(iii) For highways with a posted speed limit less than 40 miles per hour, an alternate method for estimation of IRI is permitted as described in § 490.309(b)(1)(iv) or § 490.309(b)(2)(iii) may be used in lieu of measuring IRI, cracking, rutting and faulting.

(iv) The method to collect data needed to determine the Cracking_Percent metric for all pavement types except CRCP shall be manual, semi-automated, or fully automated in accordance with the HPMS Field Manual (incorporated by reference, see § 490.111).

(v) For CRCP the method to collect the data needed to determine the Cracking_Percent metric is described in the HPMS Field Manual (incorporated by reference, see § 490.111) and includes longitudinal cracking and/or punchouts, spalling, or other visible defects.

(vi) For asphalt pavements, the method to collect data needed to determine the rutting metric shall either be:

(A) A 5-Point Collection of Rutting Data method in accordance with AASHTO Standard R48–10, Standard Specification for Transportation Materials and Methods of Sampling and

Testing, Standard Practice for Determining Rut Depth in Pavements (incorporated by reference, see § 490.111); or

(B) An Automated Transverse Profile Data method in accordance with the HPMS Field Manual (incorporated by reference, see § 490.111).

(vii) For jointed concrete pavements, the method to collect data needed to determine the faulting metric shall be in accordance with AASHTO Standard R36–13, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Evaluating Faulting of Concrete Pavements (incorporated by reference, see § 490.111).

(c) State DOTs shall collect data in accordance with the following relevant HPMS requirements to report Through Lanes, Surface Type, and Structure Type.

(1) State DOTs shall collect data:

(i) For the full extent of the mainline highway of the NHS;

(ii) In at least one direction of travel for the Interstate System and in one direction of travel for the non-Interstate NHS; and

(iii) On an annual frequency on the Interstate routes and on at least a biennial frequency on non-Interstate NHS routes.

(2) Estimating data elements from samples of the full extent of the mainline highway is not permitted.

§ 490.311 Calculation of pavement metrics.

(a) The condition metrics and inventory data elements needed to calculate the pavement performance measures shall be calculated in accordance with the HPMS Field Manual (incorporated by reference, see § 490.111), except as noted below.

(b) State DOTs shall calculate metrics in accordance with the following relevant HPMS requirements.

(1) For all pavements, the IRI metric:

(i) Shall be computed from pavement profile data in accordance with AASHTO Standard R43–13, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Quantifying Roughness of Pavement, 2014, 34th/2014 Edition, AASHTO, 1–56051–606–4 (incorporated by reference, see § 490.111);

(ii) Shall be reported for all pavements as the average value in inches per mile for each section; and

(iii) Shall not be estimated from a PSR or other observation-based method except where permitted in § 490.309(b)(3)(iii).

(2) For asphalt pavements—

(i) The Cracking_Percent metric shall be computed as the percentage of the

total area containing visible cracks to the nearest whole percent in each section; and

(ii) The rutting metric shall be computed as the average depth of rutting, in inches to the nearest 0.01 inches, for the section.

(3) For CRCP, the Cracking_Percent metric shall be computed as the percentage of the area of the section to the nearest whole percent exhibiting longitudinal cracking, punchouts, spalling, or other visible defects. Transverse cracking shall not be considered in the Cracking_Percent metric.

(4) For jointed concrete pavements—

(i) The Cracking_Percent metric shall be computed as the percentage of slabs to the nearest whole percent within the section that exhibit cracking;

(ii) Partial slabs shall contribute to the section that contains the majority of the slab length; and

(iii) The faulting metric shall be computed as the average height, in inches to the nearest 0.01 inch, of faulting between pavement slabs for the section.

(5) For the mainline highways on the non-Interstate NHS with posted speed limits of less than 40 MPH—

(i) The present serviceability rating (PSR) may be used as an alternative to the IRI, Cracking_Percent, rutting, and faulting pavement condition metrics.

(ii) The PSR shall be determined as a 0 to 5 value per the procedures prescribed in the HPMS Field Manual.

(iii) Alternative pavement condition methods may be allowed to estimate a PSR with prior approval from FHWA of the method of correlation between their condition determination and PSR as required in the HPMS Field Manual.

(c) State DOTs shall report the four pavement metrics listed in § 490.309(a) as calculated following the requirements in paragraphs (a) and (b) of this section in accordance with the following relevant HPMS requirements:

(1) Pavement condition metrics shall be reported to the HPMS in uniform section lengths of 0.1 mile (528 feet); shorter sections are permitted only at the beginning of a route, the end of a route, at bridges, or other locations where a section length of 0.1 mile is not achievable; and the maximum length of sections shall not exceed 0.11 mile (580.8 feet)

(2) Each measured section shall have a single value for each of the relevant condition metrics. Sections where condition is estimated from PSR will have one value for the overall condition.

(3) The time and location reference shall be reported for each section as follows:

(i) The State Code, Route ID, Begin Point, and End Point shall be reported as specified in the HPMS field manual (incorporated by reference, see § 490.111) for each of the four condition metrics.

(ii) The Year Record shall be reported as the four digit year for which the data represents for each of the four condition metrics; and

(iii) The Value Date shall be reported as the month and year of data collection for each of the four condition metrics.

(4) Sections for the four condition metrics shall be reported to the HPMS for the Interstate System by April 15 of each year for the data collected during the previous calendar year.

(5) Sections for the four condition metrics shall be reported to the HPMS for the non-Interstate NHS by June 15 of each year for the data collected during the previous calendar year(s).

(d) The three inventory data elements, Through Lanes, Surface Type, and Structure Type shall be reported to the HPMS as directed in Chapter 4 of the HPMS Field Manual for the entire extent of the NHS.

(1) Section Lengths for the three inventory data items are not required to meet the 0.1 mile nominal length but may be any logical length as defined in the HPMS Field Manual.

(2) The three inventory data elements shall be reported to the HPMS for the Interstate System by April 15 of each year.

(3) The three inventory data elements shall be reported to the HPMS for the non-Interstate NHS by June 15 of the each year that data reporting is required.

§ 490.313 Calculation of performance management measures.

(a) The pavement measures in § 490.307 shall be calculated in accordance with this section and used by State DOTs and MPOs to carry out the pavement condition related requirements of this part, and by FHWA to make the significant progress and minimum condition determinations specified in §§ 490.109 and 490.317, respectively.

(b) The performance measure for pavements shall be calculated based on the data collected in § 490.309 and pavement condition metrics computed in § 490.311. The performance measure for pavements shall be based on three condition ratings of Good, Fair, and Poor calculated for each pavement section. The ratings are determined as follows:

(1) IRI rating shall be determined for all pavement types using the following criteria. If an IRI value of a pavement section is:—

(i) Less than 95, the IRI rating for the pavement section is Good;

(ii) Between 95 and 170, the IRI rating for the pavement section is Fair; and

(iii) Greater than 170, the IRI rating for the pavement section is Poor.

(2) Cracking condition shall be determined using the following criteria:

(i) For asphalt pavement sections—

(A) If the Cracking_Percent value of a section is less than 5 percent, the cracking rating for the pavement section is Good;

(B) If the Cracking_Percent value of a section is equal to or greater than 5 percent and less than or equal to 20 percent the cracking rating for the pavement section is Fair; and

(C) If the Cracking_Percent value of a section is greater than 20 percent the cracking rating for the pavement section is Poor.

(ii) For jointed concrete pavement sections—

(A) If the Cracking_Percent value of a section is less than 5 percent, the cracking rating for the pavement section is Good;

(B) If the Cracking_Percent value of a section is equal to or greater than 5 percent and less than or equal to 15 percent the cracking rating for the pavement section is Fair; and

(C) If the Cracking_Percent value of a section is greater than 15 percent the cracking rating for the pavement section is Poor.

(iii) For CRCP sections:

(A) If the Cracking_Percent value of a section is less than 5 percent, the cracking rating for the pavement section is Good;

(B) If the Cracking_Percent value of a section is equal to or greater than 5 percent and less than or equal to 10 percent, the cracking rating for the pavement section is Fair; and

(C) If the Cracking_Percent value of a section is greater than 10 percent, the cracking rating for the pavement section is Poor.

(3) Rutting or faulting rating shall be determined using the following criteria.

(i) For asphalt pavement:

(A) If the rutting value of a section is less than 0.20 inches, the rutting rating for the pavement section is Good;

(B) If the rutting value of a section is equal to or greater than 0.20 inches and less than or equal to 0.40 inches, the rutting rating for the pavement section is Fair; and

(C) If the rutting value of a section is greater than 0.40 inches, the rutting rating for the pavement section is Poor.

(ii) For jointed concrete pavement:

(A) If the faulting value of a section is less than 0.10 inches, the faulting rating for the pavement section is Good;

(B) If the faulting value of a section is equal to or greater than 0.10 inches and less than or equal to 0.15 inches, the faulting rating for the pavement section is Fair; and

(C) If the faulting value of a section is greater than 0.15 inches, the faulting rating for the pavement section is Poor.

(4) The FHWA will determine that a reported section in HPMS has a missing, invalid or unresolved data on the dates specified in § 490.317(b) for Interstate System and § 490.109(d)(2) and (d)(4) for non-Interstate NHS, if a reported section does not meet any one of the data requirements specified in §§ 490.309 and 490.311(c) or that reported section does not provide sufficient data to determine its Overall Condition specified in paragraphs (c) through (f) of this section:

(i) Total mainline lane-miles of missing, invalid, or unresolved sections for Interstate System and non-Interstate NHS shall be limited to no more than 5 percent of the total lane miles less the sections excluded in § 490.313(f)(1). For each pavement section without collected its condition metrics and inventory data, State DOTs shall note in the HPMS submittal with a specific code identified in the HPMS Field Manual (incorporated by reference, see § 490.111) noting the reason it was not collected.

(ii) Calculation of overall pavement conditions in any State meeting the requirements of § 490.309(b) shall be based only on sections containing data reported in the HPMS Submittal as of the submission dates required in § 490.311(c)(4) and (5). State DOTs not meeting the requirements of § 490.309(b) will be considered as not in compliance with § 420.105(b) requiring State DOTs to submit data to the HPMS and not in compliance with § 490.107 requiring reporting on performance targets. Failure to report data meeting the requirements of § 490.309(b) by the submission dates for the Interstate System will be considered as not meeting the minimum requirements for pavement conditions on the Interstate System and that State DOT is subject to the penalties in § 490.315.

(c) The Overall condition for asphalt and jointed concrete pavement sections shall be determined based on the ratings for IRI, Cracking_Percent, rutting and faulting, as described in paragraphs (b)(1), (b)(2), (b)(3) and (b)(4) of this section, respectively, for each section as follows:

(1) A pavement section shall be rated an overall condition of Good only if the section is exhibiting Good ratings for all three conditions (IRI, Cracking_Percent, and rutting or faulting);

(2) A pavement section shall be rated an overall condition of Poor if two or more of the three conditions are exhibiting Poor ratings (at least two ratings of Poor for IRI, Cracking_Percent, and rutting or faulting).

(3) A pavement section shall be rated an overall condition of Fair if it does not meet the criteria in paragraphs (c)(1) or (c)(2) of this section.

(4) For sections on roadways where the posted speed limit is less than 40 MPH and where the State DOT has reported PSR in lieu of the IRI, Cracking_Percent, rutting, and faulting metrics the PSR condition level shall be determined using the following criteria:

(i) If the PSR of a section is equal to or greater than 4.0 the PSR rating for the pavement section is Good;

(ii) If the PSR of a section is less than 4.0 and greater than 2.0 the PSR rating for the pavement section is Fair; and

(iii) If the PSR of a section is less than or equal to 2.0 the PSR rating for the pavement section is Poor.

(d) The Overall condition for CRCP sections shall be determined based on two ratings of IRI and Cracking_Percent, as described in paragraphs (b)(1) and (b)(2) of this section or based on PSR where appropriate as described in paragraph (c)(4) of this section, respectively, for each section as follows:

(1) A pavement section shall be rated an overall condition of Good only if the section is exhibiting Good ratings for both conditions (IRI and Cracking_Percent);

(2) A pavement section shall be rated an overall condition of Poor if it exhibits Poor ratings for both conditions (IRI and Cracking_Percent);

(3) A pavement section shall be rated an overall condition of Fair if it does not meet the criteria in paragraphs (d)(1) or (d)(2) of this section.

(4) For pavement sections that are on roadways with a posted speed limit of less than 40 MPH where the State DOT reported the PSR metric in lieu of the IRI, Cracking_Percent, faulting, and rutting metrics the pavement section shall be rated an overall condition equal to the PSR condition rating as described in section (c)(4) above

(e) State DOTs shall not be subject to paragraphs (c) and (d) of this section for Pavements on the until after the data collection cycle ending December 31, 2018, for Interstate highways and December 31, 2021, for the non-Interstate NHS. During this transition period, the Overall condition for all pavement types will be based on IRI rating, as described in paragraph (b)(1) of this section, or on PSR as described in paragraphs (c)(4) or (d)(4) of this section.

(f) The pavement condition measures in § 490.307 shall be computed as described below. The measures shall be used for establishing targets in accordance with § 490.105 and reporting the conditions of the pavements in the biennial performance reporting required in § 490.107 as follows:

(1) Bridges shall be excluded prior to computing all pavement condition measures by removing the sections where the Structure_Type data item in the HPMS is coded as 1. Sections that have an unpaved surface or an “other” surface type (such as cobblestone, planks, brick) shall be excluded prior to computing all pavement condition

measures by removing the sections where the Surface_Type data item in the HPMS is coded as 1 or as 11.

(2) For § 490.307(a)(1) the measure for percentage of lane-miles of the Interstate System in Good condition shall be computed to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{g=1}^{Good} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ g}}{\sum_{t=1}^{Total} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ t}}$$

Where:

Good = total number of mainline highway Interstate System sections where the overall condition is Good;

g = a section's overall condition is determined Good per paragraphs (b) or (c) of this section;

t = an Interstate System section;

Total = total number of mainline highway Interstate System sections excluding bridges, unpaved surface and “other” surface types, and missing data sections, described in paragraph (f)(1) and (b)(4)(i) of this section.

Begin_Point = Begin Milepost of each section g or t ;

End Point = End Milepost of each section g or t ; and

Through_lanes = the number of lanes designated for through-traffic represented by a section g or t .

(3) For § 490.307(a)(2) the measure for percentage of lane-miles of the Interstate System in Poor condition shall be computed to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{p=1}^{Poor} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ p}}{\sum_{t=1}^{Total} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ t}}$$

Where:

Poor = total number of mainline highway Interstate System sections where the overall condition is Poor;

p = a section's overall condition is determined Poor per paragraphs (b) or (c) of this section;

t = an Interstate System section;

Total = total number of mainline highway Interstate System sections excluding bridges, unpaved surface and “other” surface types, and missing data sections, described in paragraph (f)(1) and (b)(4)(i) of this section;

Begin_Point = Begin Milepost of each section p or t ;

End Point = End Milepost of each section p or t ; and

Through_lanes = the number of lanes designated for through-traffic represented by a section p or t .

(4) For § 490.307(a)(3) the measure for percentage of lane-miles of the non-Interstate NHS in Good condition in § 490.307(a)(3) shall be computed to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{g=1}^{Good} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ g}}{\sum_{t=1}^{Total} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ t}}$$

Where:

Good = total number of mainline highway non-Interstate NHS sections where the overall condition is Good;

g = a section's overall condition is determined Good per paragraphs (b), (c) or (d) of this section;

t = a non-Interstate NHS section;

Total = total number of mainline highway non-Interstate NHS sections excluding bridges, unpaved surface and “other” surface types, and missing data sections, described in paragraph (f)(1) and (b)(4)(i) of this section;

Begin_Point = Begin Milepost of each section g or t ;

End Point = End Milepost of each section g or t ; and

Through_lanes = the number of lanes designated for through-traffic represented by a section g or t .

(5) For § 490.307(a)(4) the measure for percentage of lane-miles of the non-Interstate NHS in Poor condition in § 490.307(a)(4) shall be computed to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{p=1}^{Poor} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ p}}{\sum_{t=1}^{Total} \{ \langle End_Point - Begin_Point \rangle \times Through_lanes \}_{section\ t}}$$

Where:

Poor = total number of mainline highway non-Interstate NHS sections where the overall condition is Poor;

p = a section's overall condition is determined Poor per paragraphs (b), (c) or (d) of this section;

t = a non-Interstate NHS section;

Total = total number of mainline highway non-Interstate NHS sections excluding bridges, unpaved surface and "other" surface types, and missing data sections, described in paragraph (f)(1) and (b)(4)(i) of this section;

Begin_Point = Begin Milepost of each section p or t ;

End Point = End Milepost of each section p or t ; and

Through_lanes = the number of lanes designated for through-traffic represented by a section p or t .

§ 490.315 Establishment of minimum level for condition of pavements.

(a) For the purposes of carrying out the requirements of 23 U.S.C. 119(f)(1), the percentage of lane-miles of Interstate System in Poor condition, as computed per § 490.313(e)(3), shall not exceed 5.0 percent except as noted in paragraph (b) of this section.

(b) For the purposes of carrying out the requirements of 23 U.S.C. 119(f)(1), the percentage of lane-miles of Interstate System in Poor condition within the State of Alaska, as computed per § 490.313(e)(3), shall not exceed 10.0 percent.

§ 490.317 Penalties for not maintaining minimum Interstate System pavement condition.

(a) The FHWA shall compute the Percentage of lane-miles of the Interstate System, excluding sections on bridges, in Poor Condition, in accordance with § 490.313(e)(3), for each State annually.

(b) Each year, FHWA shall extract data contained within the HPMS on June 15 that represents conditions from the prior calendar year for Interstate System pavement conditions to carry out paragraph (a) of this section, beginning with data collected during the 2018 calendar year.

(c) The FHWA shall determine if a State DOT is in compliance with § 490.315(a) or § 490.315(b) and 23 U.S.C. 119(f)(1) after the first full year of data collection for the Interstate System and each year thereafter.

(d) The FHWA will notify State DOTs of their compliance with 23 U.S.C. 119(f)(1) prior to October 1 of the year in which the determination was made.

(e) If FHWA determines through conduct of paragraph (d) of this section a State DOT to be out of compliance with 23 U.S.C. 119(f)(1) then the State DOT shall, during the following fiscal year:

(1) Obligate, from the amounts apportioned to the State DOT under 23 U.S.C. 104(b)(1) (for the NHPP), an amount that is not less than the amount of funds apportioned to the State for Federal fiscal year 2009 under the Interstate Maintenance program for the

purposes described in 23 U.S.C. 119 (as in effect on the day before the date of enactment of the MAP-21), except that for each year after Federal fiscal year 2013, the amount required to be obligated under this clause shall be increased by 2 percent over the amount required to be obligated in the previous fiscal year; and

(2) Transfer, from the amounts apportioned to the State DOT under 23 U.S.C. 104(b)(2) (for the Surface Transportation Program) (other than amounts sub-allocated to metropolitan areas and other areas of the State under 23 U.S.C. 133(d)) to the apportionment of the State under 23 U.S.C. 104(b)(1), an amount equal to 10 percent of the amount of funds apportioned to the State for fiscal year 2009 under the Interstate Maintenance program for the purposes described in 23 U.S.C. 119 (as in effect on the day before the date of enactment of the MAP-21).

§ 490.319 Other requirements.

(a) In accordance with the HPMS Field Manual (incorporated by reference, see § 490.111), each State DOT shall report the following to the HPMS no later than April 15 each year:

(1) The pavement condition metrics specified in § 490.311 that are necessary to calculate the Interstate System condition measures identified in §§ 490.307(a)(1) and (a)(2) and;

(2) The data elements specified in § 490.309(c) for the Interstate System

(b) In accordance with the HPMS Field Manual (incorporated by reference, see § 490.111), each State DOT shall report to the HPMS no later than June 15 each year the pavement condition metrics specified in § 490.311 that are necessary to calculate the non-Interstate NHS condition measures in §§ 490.307(a)(3) and (a)(4).

(c) Each State DOT shall develop and utilize a Data Quality Management Program, approved by FHWA that addresses the quality of all data collected, regardless of the method of acquisition, to report the pavement condition metrics, discussed in § 490.311, and data elements discussed in § 490.309(c).

(1) In a Data Quality Management Programs, State DOTs shall include, at a minimum, methods and processes for:

(i) Data collection equipment calibration and certification;

(ii) Certification process for persons performing manual data collection;

(iii) Data quality control measures to be conducted before data collection begins and periodically during the data collection program;

(iv) Data sampling, review and checking processes; and

(v) Error resolution procedures and data acceptance criteria.

(2) Not later than 1 year after the effective date of this regulation, State DOTs shall submit their Data Quality Management Program to FHWA for approval. Once FHWA approves a State DOT's Data Quality Management Program, the State DOT shall use that Program to collect and report data required by §§ 490.309 to 490.311. State DOTs also shall submit any proposed significant change to the Data Quality Management Program to FHWA for approval prior to implementing the change.

■ 4. Add subpart D to read as follows:

Subpart D—National Performance Management Measures for Assessing Bridge Condition

Sec.

490.401 Purpose.

490.403 Applicability.

490.405 Definitions.

490.407 National performance management measures for assessing bridge condition.

490.409 Calculation of National performance management measures for assessing bridge condition.

490.411 Establishment of minimum level for condition for bridges.

490.413 Penalties for not maintaining bridge condition.

Subpart D—National Performance Management Measures for Assessing Bridge Condition

§ 490.401 Purpose.

The purpose of this subpart is to implement the requirements of 23 U.S.C. 150(c)(3)(A)(ii)(III), which requires the Secretary of Transportation to establish performance measures for the purpose of carrying out the NHPP and for State DOTs and MPOs to use in assessing the condition of bridges carrying the NHS which includes on- and off-ramps connected to the NHS.

§ 490.403 Applicability.

The section is only applicable to bridges carrying the NHS, which includes on- and off-ramps connected to the NHS.

§ 490.405 Definitions.

The following definitions are only applicable to this subpart, unless otherwise provided:

Structurally deficient as used in §§ 490.411 and 490.413 is a classification given to a bridge which has any component in Poor or worse condition or the adequacy of the waterway opening provided by the bridge is determined to be insufficient to the point of causing overtopping with intolerable traffic interruptions. Beginning with calendar year 2018 and

thereafter, *structurally deficient* as used in §§ 490.411 and 490.413 is a classification given to a bridge which has any component in Poor or worse condition.

§ 490.407 National performance management measures for assessing bridge condition.

(a) There are three classifications for the purpose of assessing bridge condition. They are:

(1) Percentage of NHS bridges classified as in Good condition;

(2) Percentage of NHS bridges classified as in Fair condition; and

(3) Percentage of NHS bridges classified as in Poor condition.

(b) [Reserved]

(c) To carry out the NHPP, two of the three classifications are performance measures for State DOTs to use to assess bridge condition on the NHS. They are:

(1) Percentage of NHS bridges classified as in Good condition; and

(2) Percentage of NHS bridges classified as in Poor condition.

(d) Determination of Good and Poor conditions are described in § 490.409.

§ 490.409 Calculation of National performance management measures for assessing bridge condition.

(a) The bridge measures in § 490.407 shall be calculated in accordance with this section and used by State DOTs and MPOs to carry out the bridge condition related requirements of this part and by FHWA to make the significant progress determination specified in § 490.109.

(b) The condition of bridges carrying the NHS, which includes on- and off-ramps connected to the NHS, shall be classified as Good, Fair, or Poor following the criteria specified in this paragraph. The assignment of a classification of Good, Fair, or Poor shall be based on the bridge's condition ratings for NBI Items 58—Deck, 59—Superstructure, 60—Substructure, and 62—Culverts. For the purposes of national performance measures under the NHPP, the method of assessment to determine the classification of a bridge will be the minimum of condition rating method (*i.e.*, the condition ratings for lowest rating of a bridge's 3 NBI Items, 58—Deck, 59—Superstructure, and 60—Substructure). For culverts, the rating of its NBI Item, 62—Culverts, will determine its classification. The bridges carrying the NHS which includes on- and off-ramps connected to the NHS

will be classified as Good, Fair, or Poor based on the following criteria:

(1) *Good*: When the lowest rating of the 3 NBI items for a bridge (Items 58—Deck, 59—Superstructure, 60—Substructure) is 7, 8, or 9, the bridge will be classified as Good. When the rating of NBI item for a culvert (Item 62—Culverts) is 7, 8, or 9, the culvert will be classified as Good.

(2) *Fair*: When the lowest rating of the 3 NBI items for a bridge is 5 or 6, the bridge will be classified as Fair. When the rating of NBI item for a culvert is 5 or 6, the culvert will be classified as Fair.

(3) *Poor*: When the lowest rating of the 3 NBI items for a bridge is 4, 3, 2, 1, or 0, the bridge will be classified as Poor. When the rating of NBI item for a culvert is 4, 3, 2, 1, or 0, the culvert will be classified as Poor.

(c) The bridge measures specified in § 490.407(c) shall be calculated for the applicable bridges per paragraph (a) that pertain to each target established by the State DOT or MPO in §§ 490.105(e) and 490.105(f), respectively, as follows:

(1) For § 490.407(c)(1), the measure for the percentage of bridges classified as in Good condition shall be computed and reported to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{g=1}^{\text{GOOD}} [\text{Length} \times \text{Width}]_{\text{Bridge } g}}{\sum_{s=1}^{\text{TOTAL}} [\text{Length} \times \text{Width}]_{\text{Bridge } s}}$$

Where:

GOOD = total number of the applicable bridges, where their condition is Good per paragraph (b)(1) of this section;

g = a bridge determined to be in Good condition per paragraph (b)(1) of this section;

Length = corresponding value of NBI Item 49—Structure Length for every applicable bridge;

Width = corresponding value of NBI Item 52—Deck Width or value of Item 32 Approach Roadway Width for culverts where the roadway is on a fill [*i.e.*, traffic does not directly run on the top slab (or wearing surface) of the culvert] and the headwalls do not affect the flow of traffic for every applicable bridge.

s = an applicable bridge per paragraph (b) of this section; and

TOTAL = total number of the applicable bridges specified in paragraph (b) of this section.

(2) For § 490.407(c)(2), the measure for the percentage of bridges classified as in Poor condition shall be computed and reported to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{p=1}^{\text{POOR}} [\text{Length} \times \text{Width}]_{\text{Bridge } p}}{\sum_{s=1}^{\text{TOTAL}} [\text{Length} \times \text{Width}]_{\text{Bridge } s}}$$

Where:

POOR = total number of the applicable bridges, where their condition is Poor per paragraph (b)(3) of this section;

p = a bridge determined to be in Poor condition per paragraph (b)(3) of this section;

Length = corresponding value of NBI Item 49—Structure Length for every applicable bridge;

Width = corresponding value of NBI Item 52—Deck Width or value of Item 32 Approach Roadway Width for culverts

where the roadway is on a fill [*i.e.*, traffic does not directly run on the top slab (or wearing surface) of the culvert] and the headwalls do not affect the flow of traffic for every applicable bridge.

s = an applicable bridge per paragraph (b) of this section; and

TOTAL = total number of the applicable bridges specified in paragraph (b) of this section.

(d) The measures identified in § 490.407(c) shall be used to establish targets in accordance with § 490.105 and

report targets and conditions described in § 490.107.

(e) The NBI Items included in this section are found in the Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges, which is incorporated by reference (see § 490.111).

§ 490.411 Establishment of minimum level for condition for bridges.

(a) State DOTs will maintain bridges so that the percentage of the deck area of bridges classified as Structurally Deficient does not exceed 10.0 percent. This minimum condition level is applicable to bridges carrying the NHS, which includes on- and off-ramps connected to the NHS within a State, and bridges carrying the NHS that cross a State border.

(b) For the purposes of carrying out this section and § 490.413, a bridge will

be classified as Structurally Deficient when one of its NBI Items, 58—Deck, 59—Superstructure, 60—Substructure, or 62—Culverts, is 4 or less, or when one of its NBI Items, 67—Structural Evaluation or 71—Waterway Adequacy, is 2 or less. Beginning with calendar year 2018 and thereafter, a bridge will be classified as Structurally Deficient when one of its NBI Items, 58—Deck, 59—Superstructure, 60—Substructure, or 62—Culverts, is 4 or less.

(c) For all bridges carrying the NHS, which includes on- and off-ramps connected to the NHS and bridges carrying the NHS that cross a State border, FHWA shall calculate a ratio of the total deck area of all bridges classified as Structurally Deficient to the total deck area of all applicable bridges for each State. The percentage of deck area of bridges classified as Structurally Deficient shall be computed by FHWA to the one tenth of a percent as follows:

$$100 \times \frac{\sum_{SD=1}^{\text{Structurally Deficient}} [\text{Length} \times \text{Width}]_{\text{Bridge SD}}}{\sum_{s=1}^{\text{TOTAL}} [\text{Length} \times \text{Width}]_{\text{Bridge s}}}$$

Where:

Structurally Deficient = total number of the applicable bridges, where their classification is Structurally Deficient per this section and § 490.413;

SD = a bridge classified as Structurally Deficient per this section and § 490.413;

Length = corresponding value of NBI Item 49—Structure Length for every applicable bridge;

Width = corresponding value of NBI Item 52—Deck Width

Beginning with calendar year 2018 and thereafter, Width = corresponding value of NBI Item 52—Deck Width or value of Item 32 Approach Roadway Width for culverts where the roadway is on a fill [i.e., traffic does not directly run on the top slab (or wearing surface) of the culvert] and the headwalls do not affect the flow of traffic for every applicable bridge.

s = an applicable bridge per this section and § 490.413; and

TOTAL = total number of the applicable bridges specified in this section and § 490.413.

(d) The FHWA will annually determine the percentage of the deck area of NHS bridges classified as Structurally Deficient for each State DOT and identify State DOTs that do not meet the minimum level of condition for NHS bridges based on data cleared in the NBI as of June 15 of each year. The FHWA will notify State DOTs of their compliance with 23 U.S.C. 119(f)(2) prior to October 1 of the year in which the determination was made.

(e) For the purposes of carrying out this section, State DOTs will annually submit their most current NBI data on highway bridges to FHWA no later than March 15 of each year.

(f) The NBI Items included in this section are found in the Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges, which is incorporated by reference (see § 490.111).

§ 490.413 Penalties for not maintaining bridge condition.

(a) If FHWA determines for the 3-year period preceding the date of the determination, that more than 10.0 percent of the total deck area of bridges in the State on the NHS is located on bridges that have been classified as Structurally Deficient, the following requirements will apply.

(1) During the fiscal year following the determination, the State DOT shall obligate and set aside in an amount equal to 50 percent of funds apportioned to such State for fiscal year 2009 to carry out 23 U.S.C. 144 (as in effect the day before enactment of MAP-21) from amounts apportioned to a State for a fiscal year under 23 U.S.C. 104(b)(1) only for eligible projects on bridges on the NHS.

(2) The set-aside and obligation requirement for bridges on the NHS in a State in paragraph (a) of this section for a fiscal year shall remain in effect for each subsequent fiscal year until such time as less than 10 percent of the total deck area of bridges in the State on the NHS is located on bridges that have been classified as Structurally Deficient as determined by FHWA.

(b) The FHWA will make the first determination by October 1, 2016, and each fiscal year thereafter.

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DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****23 CFR Part 490**

[Docket No. FHWA-2013-0054]

RIN 2125-AF54

National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule is the third and last in a series of three related rulemakings that together establishes a set of performance measures for State departments of transportation (State DOT) and Metropolitan Planning Organizations (MPO) to use as required by the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Fixing America's Surface Transportation (FAST) Act. The measures in this third final rule will be used by State DOTs and MPOs to assess the performance of the Interstate and non-Interstate National Highway System (NHS) for the purpose of carrying out the National Highway Performance Program (NHPP); to assess freight movement on the Interstate System; and to assess traffic congestion and on-road mobile source emissions for the purpose of carrying out the Congestion Mitigation and Air Quality Improvement (CMAQ) Program. This third performance measure final rule also includes a discussion that summarizes all three of the national performance management measures

rules and the comprehensive regulatory impact analysis (RIA) to include all three final rules.

DATES: This final rule is February 17, 2017.

FOR FURTHER INFORMATION CONTACT: For technical information: Francine Shaw Whitson, Office of Infrastructure, (202) 366–8028; for legal information: Alla Shaw, Office of Chief Counsel, (202) 366–0740, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

The notice of proposed rulemaking (NPRM) was published at 81 FR 23806 on April 22, 2016. A copy of the NPRM, all comments received, and all background material may be viewed online at <http://www.regulations.gov>. Electronic retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Web site at <http://www.ofr.gov> and the Government Publishing Office's Web site at <http://www.gpo.gov>.

Table of Contents for Supplementary Information

- I. Executive Summary
 - A. Purpose of the Regulatory Action
 - B. Summary of the Major Changes Made to the Regulatory Action in Question
 - C. Costs and Benefits
- II. Acronyms and Abbreviations
- III. Background
- IV. Summary of the Notice of Proposed Rulemaking
- V. Response to Comments
 - A. Significant Issues Raised in Comments
 1. Summary of Significant Issues Raised in the Comments
 2. Summary of Major Changes Made in Response to These Comments
 - B. Subpart A—General Information
 1. Implementation Date Alignment and Coordination
 2. Reporting and Implementation Dates
 3. Accessibility and Connectivity
 4. Definition of Mainline Highway
 5. Data Processing and Conflation of Datasets
 6. Population Estimates
 7. Replacement of Missing Travel Time Data
 8. Segment Lengths
 9. NHS Coverage in the NPMRDS Data
 10. Travel Times
 11. Alternative Data Sets
 12. Corridors
 13. Weather and Construction Impacts
 14. Holidays
 15. Annual Reporting of Travel Time Metrics
16. Establishing Performance Targets
17. Target Establishment Frequency
18. Target Adjustment Schedule
19. Ownership and Applicability of Measures/Targets
20. Fiscal or Calendar Year Based Performance Periods
21. Boundaries
22. Unified Targets
23. CMAQ Measures Applicability
24. Due Date for Initial Performance Reports
25. MPO Reporting
26. Optional Target Reporting
27. Significant Progress Determination
- C. Subpart E—National Performance Management Measures for the NHPP System Performance
 1. Establishment of the Greenhouse Gas (GHG) Emissions Measure
 2. Removal of Peak Hour Travel Time Reliability Measures
 3. NHPP Reliability
 - a. Reliability—Use of Traffic Volumes Versus People Traveling
 - b. Applicability of the Non-Interstate NHS NHPP Reliability Measure
 - c. Excluding Weekends From LOTTR Calculations Time Periods for LOTTR Calculations
 - d. Use of 1.50 Threshold To Determine Reliable Segments
- D. Subpart F—National Performance Management Measures for Freight Movement on the Interstate
 1. Removal of Truck Congestion Measure
 2. Consistency Between All-Vehicle and Freight Reliability Measures
 3. Relationship Between the Freight Measure Provisions and the National Freight Program and State Freight Planning
 4. Weighting by Truck Volume
 5. Vehicle Classes
 6. Definition of Freight Bottlenecks
- E. Subpart G—National Performance Measures for CMAQ Program—Traffic Congestion
 1. Excessive Delay Measure
 - a. Applying Peak Hours to Excessive Delay Measure To Create Peak Hour Excessive Delay
 - b. Peak Hour Time Periods
 - c. Traffic Volume Profiles
 - d. Person Throughput Versus Vehicle Throughput
 - e. Thresholds
 - f. Use of Population for Normalization
 - g. Census Annual Population Estimates in Lieu of Decennial Values
 - h. Outliers in Speed Data
 2. Decision To Include a Multimodal Measure
 3. Data for Multimodal Measure
 4. Applicability of the CMAQ Traffic Congestion Measures
- F. Subpart H—National Performance Measure for the CMAQ Program—On Road Mobile Source Emissions
 1. General Comments
 2. Concerns about MPO Targets and Reporting
 3. Applicability
 4. Applicability of New Standards
 5. Reporting
 6. Concerns Related to Quantification of Emissions
7. Application Beyond CMAQ Projects
8. Attainment Definition—Removal of Areas Beyond 20-Year Maintenance Plan
9. Modification of Emissions Information at 2-Year Report
10. Concerns about the CMAQ Public Access System Data—Use of Observed Data and Other Alternative Methods
11. Applicability of Measure to All Criteria Pollutants and Precursors
12. Use of Standard System Versus Metric System To Measure Emissions
- VI. Section-by-Section Discussion of the General Information and National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program
 - A. Subpart A—General Information
 - B. Subpart E—National Performance Management Measures for the NHPP System Performance
 - C. Subpart F—National Performance Management Measures for Freight Movement on the Interstate
 - D. Subpart G—National Performance Measures for CMAQ Program—Traffic Congestion
 - E. Subpart H—National Performance Measure for the CMAQ Program—On Road Mobile Source Emissions
- VII. Rulemaking Analyses and Notices
 - A. Rulemaking Analysis and Notices: Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures
 - B. Regulatory Flexibility Act
 - C. Unfunded Mandates Reform Act of 1995
 - D. Executive Order 13132 (Federalism Assessment)
 - E. Executive Order 12372 (Intergovernmental Review)
 - F. Paperwork Reduction Act
 - G. National Environmental Policy Act
 - H. Executive Order 12630 (Taking of Private Property)
 - I. Executive Order 12988 (Civil Justice Reform)
 - J. Executive Order 13045 (Protection of Children)
 - K. Executive Order 13175 (Tribal Consultation)
 - L. Executive Order 13211 (Energy Effects)
 - M. Executive Order 12898 (Environmental Justice)
 - N. Privacy Impact Assessment
 - O. Regulation Identifier Number

I. Executive Summary

A. Purpose of the Regulatory Action

The MAP–21 (Pub. L. 112–141) transforms the Federal-aid highway program by establishing new requirements for performance management to ensure the most efficient investment of Federal transportation funds. Performance management increases the accountability and transparency of the Federal-aid highway program and provides a framework to

support improved investment decisionmaking through a focus on performance outcomes for key national transportation goals.

As part of performance management, recipients of Federal-aid highway funds will make transportation investments to achieve performance targets that make progress toward the following national goals:

- **Safety**—To achieve a significant reduction in traffic fatalities and serious injuries on all public roads.
- **Infrastructure condition**—To maintain the highway infrastructure asset system in a state of good repair.
- **Congestion reduction**—To achieve a significant reduction in congestion on the NHS.
- **System reliability**—To improve the efficiency of the surface transportation system.
- **Freight movement and economic vitality**—To improve the national freight network, strengthen the ability of rural communities to access national and international trade markets, and support regional economic development.
- **Environmental sustainability**—To enhance the performance of the transportation system while protecting and enhancing the natural environment.
- **Reduced project delivery delays**—To reduce project costs, promote jobs and the economy, and expedite the movement of people and goods by accelerating project completion through eliminating delays in the project development and delivery process, including reducing regulatory burdens and improving agencies' work practices.

The purpose of this final rule is to implement MAP-21 and FAST Act (PL 114-94) performance management requirements. Prior to MAP-21, there were no explicit requirements for State DOTs to demonstrate how their transportation program supported national performance outcomes. State DOTs were not required to measure condition or performance, establish targets, assess progress toward targets, or report on condition or performance in a nationally consistent manner that FHWA could use to assess the entire system. Without States reporting on the above factors, it is difficult for FHWA to examine the effectiveness of the Federal-aid highway program as a means to address surface transportation performance at a national level.

This final rule is one of several rulemakings to implement MAP-21's new performance management framework. The collective rulemakings will establish the regulations needed to more effectively evaluate and report on surface transportation performance across the Nation. This final rule will:

- Provide for greater consistency in the reporting of condition and performance;
- Establish specific national performance measures to be used to assess performance of the NHS, freight movement on the Interstate and CMAQ traffic congestion and on-road mobile source emissions;
- Require the establishment of targets that can be aggregated at the national level;
- Improve transparency by requiring consistent reporting on progress through a public reporting system;
- Require State DOTs to make significant progress toward meeting their targets; and
- Establish requirements for State DOTs that have not met or made significant progress toward achieving their NHPP and NHFP targets.

State DOTs and MPOs will be expected to use the information and data generated as a result of the new regulations to inform their transportation planning and programming decisions. The new performance aspects of the Federal-aid highway program that result from this rule will provide FHWA the ability to better communicate a national performance story and to assess the impacts of Federal funding investments more reliably. The FHWA is in the process of creating a new public Web site to help communicate the national performance story and display State DOT performance reports. The Web site will likely include infographics, tables, charts, and descriptions of the performance data that State DOTs will be reporting to FHWA.

The FHWA is required to establish performance measures to assess performance in 12 areas¹ generalized as follows: (1) Serious injuries per vehicle miles traveled (VMT); (2) fatalities per VMT; (3) number of serious injuries; (4) number of fatalities; (5) pavement condition on the Interstate System; (6) pavement condition on the non-Interstate NHS; (7) bridge condition on the NHS; (8) performance of the Interstate System; (9) performance of the non-Interstate NHS; (10) freight movement on the Interstate System; (11) traffic congestion; and (12) on-road mobile source emissions. This rulemaking is the third of three that establish performance measures for State DOTs and MPOs to use to carry out Federal-aid highway programs and to assess performance in each of these 12 areas. This final rule establishes

¹ These areas are listed within 23 U.S.C. 150(c), which requires the Secretary to establish measures to assess performance or condition.

national performance measures for the NHPP, freight movement, and the CMAQ program (numbers 8 through 12 in the above list). See Table 1 for a summary of all measures.

The final measures in this rule have been adjusted in response to comments, and those changes are summarized in Section I.B of the Executive Summary. Details about data requirements and calculation methodologies for each measure can be found in Section VI.

Three measures are established for assessing the performance of the NHS under the NHPP. Two measures assess reliability: (1) Percent of Person-Miles Traveled on the Interstate System That Are Reliable (the Interstate Travel Time Reliability measure); and (2) Percent of Person-Miles Traveled on the Non-Interstate NHS That Are Reliable (the Non-Interstate NHS Travel Time Reliability measure). Together they are the Travel Time Reliability measures. Both of these measures assess Level of Travel Time Reliability (LOTTR), defined as the ratio of the 80th percentile travel time to a "normal" travel time (50th percentile). Data are derived from the travel time data set using either the National Performance Management Research Data Set (NPMRDS) or equivalent. A third measure, Percent Change in Tailpipe CO₂ Emissions on the NHS from the Calendar Year 2017, assesses environmental performance. This measure is calculated using data on fuel use and VMT.

The performance measure to assess freight movement on the Interstate is Percentage of the Interstate System Mileage providing for Reliable Truck Travel Times, or Truck Travel Time Reliability (TTTR) Index (the Freight Reliability measure). The measure also uses the Travel Time Data Set of NPRMDS, but unlike the LOTTR which uses a threshold to determine reliability, TTTR Index is expressed as an average for the entire applicable area.

Three measures are established under the CMAQ program (the CMAQ measures) including two measures for traffic congestion: (1) Annual Hours of Peak-Hour Excessive Delay Per Capita (the PHED measure); and (2) Percent of Non-SOV Travel where SOV stands for single-occupancy vehicle. Data for these two measures are derived from the travel time data set of NPMRDS. The second measure is a new measure developed to recognize the role of lower-emissions modes in meeting air quality goals. State DOTs and MPOs have three options for providing data for this measure.

The third measure under the CMAQ program is Total Emissions Reduction.

This measure uses data from the CMAQ Public Access System to calculate total emission reductions for applicable

criteria pollutants or precursors. A summary of all the national

performance management measures rulemakings are listed in Table 1 below.

TABLE 1—SUMMARY OF RULEMAKINGS TO IMPLEMENT THE NATIONAL PERFORMANCE MANAGEMENT MEASURE RULES

Rulemaking	23 CFR part 490 section	Final performance measures	Measure applicability
Safety PM Final Rule.	490.207(a)(1)	Number of fatalities	All public roads.
	490.207(a)(2)	Rate of fatalities	All public roads.
	490.207(a)(3)	Number of serious injuries	All public roads.
	490.207(a)(4)	Rate of serious injuries	All public roads.
	490.207(a)(5)	Number of non-motorized fatalities and non-motorized serious injuries.	All public roads.
Infrastructure PM Final Rule	490.307(a)(1)	Percentage of pavements of the Interstate System in Good condition.	The Interstate System.
	490.307(a)(2)	Percentage of pavements of the Interstate System in in Poor condition.	The Interstate System.
	490.307(a)(3)	Percentage of pavements of the non-Interstate NHS in Good condition.	The non-Interstate NHS.
	490.307(a)(4)	Percentage of pavements of the non-Interstate NHS in Poor condition.	The non-Interstate NHS.
	490.407(c)(1)	Percentage of NHS bridges classified as in Good condition	NHS.
System Performance PM Final Rule.	490.407(c)(2)	Percentage of NHS bridges classified as in Poor condition ..	NHS.
	490.507(a)(1)	Percent of the Person-Miles Traveled on the Interstate That Are Reliable.	The Interstate System.
	490.507(a)(2)	Percent of the Person-Miles Traveled on the Non-Interstate NHS That Are Reliable.	The non-Interstate NHS.
	490.507(b)	Percent Change in Tailpipe CO ₂ Emissions on the NHS Compared to the Calendar Year 2017 Level.	NHS.
	490.607	Truck Travel Time Reliability (TTTR) Index	The Interstate System.
	490.707(a)	Annual Hours of Peak Hour Excessive Delay Per Capita	The NHS in urbanized areas with a population over 1 million for the first performance period and in urbanized areas with a population over 200,000 for the second and all other performance periods that are also in nonattainment or maintenance areas for ozone (O ₃), carbon monoxide (CO), or particulate matter (PM ₁₀ and PM _{2.5}).
	490.707(b)	Percent of Non-SOV Travel.	
	490.807	Total Emissions Reduction	
			All projects financed with funds from the 23 U.S.C. 149 CMAQ program apportioned to State DOTs in areas designated as non-attainment or maintenance for ozone (O ₃), carbon monoxide (CO), or particulate matter (PM ₁₀ and PM _{2.5}).

In addition, this final rule establishes the process for State DOTs and MPOs to establish and report targets and the process that FHWA will use to assess the progress State DOTs have made in achieving targets. State DOTs will be required to establish performance targets and assess performance in the above mentioned 12 areas established by MAP-21, and FHWA will assess ² their progress toward meeting targets in

10 of these areas ³ in accordance with MAP-21 and the FAST Act. State DOTs that fail to meet or make significant progress toward targets in a biennial performance reporting period will be required to document the actions they will undertake to achieve their targets in

³ Serious injuries per vehicle VMT; fatalities per VMT; number of serious injuries; number of fatalities; pavement condition on the Interstate System; pavement condition on the non-Interstate NHS; bridge condition on the NHS; performance of the Interstate System; performance of the non-Interstate NHS under MAP-21; and freight movement on the Interstate System under the FAST Act.

their next biennial performance report. Failure to make progress in the safety metrics requires additional actions as outlined in the published Safety final rule.

The FHWA received extensive and substantive comments on the NPRM. The FHWA made significant alterations to the measures in response to these comments, and a summary of major issues raised can be found at the beginning of Section V, with detailed responses following. The FHWA also recognizes that data collection and analytic capacity are not yet developed

² 23 U.S.C. 148(i) and 23 U.S.C. 119(e)(7).

enough to respond effectively to many commenters' suggestions, particularly in measuring multimodal performance. Therefore, FHWA is working to develop more sophisticated performance metrics and may issue an updated rulemaking on performance measures related to person throughput and multi-modal performance in the future, following completion of ongoing research regarding multimodal system performance measures in Fall 2018.

Lastly, FHWA recognizes that implementation of the performance management requirements in this final rule will evolve with time for a variety of reasons such as: The introduction of new technologies that allow for the collection of more nationally consistent and/or reliable performance data; shifts in national priorities for the focus of a goal area; new federal requirements; or the emergence of improved approaches to measure condition/performance in supporting investment decisions and national goals. The FHWA is committed to performing a retrospective review of this rule after the first performance period, to assess the effectiveness of the requirements to identify any necessary changes to better support investment decisions through performance-based planning and programming and to ensure the most efficient investment of Federal transportation funds. In implementation of this rule, FHWA realizes that there are multiple ways that State DOTs and MPOs can make decisions to achieve more efficient and cost effective investments; as part of a retrospective review, FHWA will also utilize implementation surveys to identify how agencies complying with

the rule are developing their programs and selecting their projects to achieve targets.

B. Summary of the Major Changes Made to the Regulatory Action in Question

This final rule retains the majority of the major provisions of the NPRM, but it makes the following significant changes.

- Removing the proposed NHFP measure for percentage of the Interstate congested.
- Merging the proposed peak-hour travel time measure under NHPP with the proposed excessive delay measure under CMAQ Traffic Congestion into one measure under CMAQ, the PHED measure. This new measure focuses on excessive delay experienced during peak hours in applicable urbanized areas.
- Introducing two new measures in response to extensive public comments:
 - Under NHPP System Performance—a new measure to assess system performance, specifically the percent change in CO₂ emissions from the reference year 2017, generated by on-road mobile sources on the NHS (the GHG measure). All State DOTs and MPOs that have NHS mileage in their State geographic boundaries and metropolitan planning areas, respectively, will be required to establish targets and report on progress. The FHWA will assess every 2 years to determine if a State DOT has made significant progress toward achieving their targets.
 - Under CMAQ Traffic Congestion—a new measure to assess modal share, specifically the Percent of Non-SOV

Travel measure. State DOTs and MPOs are provided the opportunity to use localized surveys or measurements to report on this measure and will be encouraged to report to FHWA any data not currently available in national sources (e.g., bike counts).

- Changing the weighting of the travel time measures from system miles to person-miles traveled, focusing on bus, auto, and truck occupancy levels, and providing opportunities for State DOTs and MPOs to capture more specific local occupancy levels for particular corridors or areas.

- These changes result in one fewer measure than proposed in the NPRM, for a total of 7 measures. Now, four of these are derived from vehicle travel times, three of which reflect all people traveling on the system, a change requested by many commenters.

- Phasing in expanded applicability of the CMAQ Traffic Congestion measures beginning with urbanized areas with a population over 1 million in the first performance period and expanding to urbanized areas with a population over 200,000 beginning in the second performance period. These measures are to carry out the CMAQ program; therefore, the areas will be limited to urbanized areas that contain any part of nonattainment or maintenance areas for one or more pollutants listed in 23 U.S.C. 149 (ozone, carbon monoxide, or particulate matter).

- Taking steps to simplify and otherwise respond to suggestions regarding the data processing and calculation of the measures.

TABLE 2—SUMMARY OF FINAL MEASURES IN THE THIRD PERFORMANCE MEASURE FINAL RULE

Measure groups (program area)	Performance measures	Measure/target applicability	Metric data source & collection frequency	Metric
NHPP	Percent of Person-Miles Traveled on the Interstate That Are Reliable. Percent of Person-Miles Traveled on the Non-Interstate NHS That Are Reliable. Percent Change in CO ₂ Emissions on the NHS Compared to the Calendar Year 2017 Level.	Mainline of the Interstate System within a State or each metropolitan planning area. Mainline of the non-Interstate NHS within a State or each metropolitan planning area. NHS within a State or each metropolitan planning area.	All traffic/vehicles data in NPMRDS or Equivalent—every 15-minutes. All traffic/vehicles data in NPMRDS or Equivalent—every 15-minutes. Annual state total fuel sales data from Highway Statistics and VMT estimates on NHS and all public roads from HPMS.	Level of Travel Time Reliability (LOTTR). Level of Travel Time Reliability (LOTTR). Annual Total Tailpipe CO ₂ Emissions on the NHS.
Freight movement on the Interstate System measure (NHFP).	Truck Travel Time Reliability (TTTR) Index.	Mainline of the Interstate System within a State or each metropolitan planning area.	Truck data in NPMRDS or equivalent data set—every 15—minutes.	TTTR Index.

TABLE 2—SUMMARY OF FINAL MEASURES IN THE THIRD PERFORMANCE MEASURE FINAL RULE—Continued

Measure groups (program area)	Performance measures	Measure/target applicability	Metric data source & collection frequency	Metric
CMAQ	Annual Hours of Peak-Hour Excessive Delay Per Capita.	Mainline of NHS in urbanized areas with a population over 1M/200k in nonattainment or maintenance for any of the criteria pollutants under the CMAQ program.	All traffic/vehicles data in NPMRDS or equivalent data set—every 15 minutes (bus, car and truck volumes in HPMS; occupancy factors published by FHWA. ACS, local survey, or local counts (includes bike/pedestrian counts).	Total Peak-Hour Excessive Delay person-hours.
	Percent of N SOV Travel.	Urbanized areas with a population over 1M/200k in nonattainment or maintenance for any of the criteria pollutants under the CMAQ program.	ACS, local survey, or local counts (includes bike/pedestrian counts).	n/a.
	Total Emission Reductions.	All nonattainment and maintenance areas for CMAQ criteria pollutants.	CMAQ Public Access System	n/a.

The FHWA updated these and other elements in this final rule based on the review and analysis of comments received. For additional detail on all the changes FHWA made in the final rule, please refer to Sections V and VI of this document. The FHWA has also prepared a comment response document available on the docket for this rulemaking. The following summarizes the regulatory impact analysis for the final rule. Section references below refer to sections of the regulatory text for title 23 of the Code of Federal Regulations (23 CFR).

This final rule adds to subpart A, general information applicable to part 490, to include requirements for target establishment, reporting on progress, and how determinations would be made on whether State DOTs have made significant progress toward NHPP targets. Subpart A also includes definitions and clarifies terminology associated with target establishment, reporting, and making significant progress. Section 490.105 describes the process State DOTs and MPOs must use to establish targets. State DOTs will establish their first statewide targets 1 year after the effective date of this rule. The MPOs have up to 180 days after State DOTs establish their targets to establish their own targets. The FHWA has placed a timeline on the docket that illustrates how this transition could be implemented.

C. Costs and Benefits

The FHWA estimated the incremental costs associated with the new requirements that represent a change to current practices of USDOT, State DOTs, and MPOs.⁴ The FHWA derived the costs of the new requirements by

assessing the additional capital needed and the expected increase in the level of labor effort for FHWA, State DOTs, and MPOs to standardize and update data collection and reporting systems, and establish and report targets.

The FHWA sought opinions from subject matter experts (SMEs) on NHS performance, freight movement, and traffic congestion and emissions to estimate impacts of the final rule. Cost estimates were developed based on information received from SMEs.

To estimate costs, FHWA multiplied the level of effort, expressed in labor hours, with a corresponding loaded wage rate that varied by the type of laborer needed to perform the activity.⁵ Where necessary, capital costs were also included. Many of these measures rely on the use and availability of NPMRDS data provided by FHWA for use by State DOTs and MPOs. Because there is uncertainty regarding the ongoing funding of NPMRDS by FHWA, FHWA estimated the cost of the final rule under two scenarios. First, assuming that FHWA provides State DOTs and MPOs with the required data from NPMRDS, the 10-year undiscounted incremental costs to comply with this rule are \$144.0 million (Scenario 1). Alternatively, under “worst case” conditions where State DOTs will be required to independently acquire the necessary data, the 10-year undiscounted incremental costs to comply with this rule are \$205.5 million (Scenario 2). The total 10-year undiscounted cost is approximately 43 percent higher under Scenario 2 than under Scenario 1.

The final rule’s 10-year undiscounted cost (\$144.0 million in Scenario 1 and \$205.5 million in Scenario 2, both in 2014 dollars) decreased relative to the

proposed rule (\$165.3 million in Scenario 1 and \$224.5 million in Scenario 2, both in 2014 dollars). The FHWA made several changes that affected the cost estimate. These changes include updating costs to 2014 dollars from 2012 dollars and labor costs to reflect current Bureau of Labor Statistics (BLS) data. In addition, FHWA revised the final rule Regulatory Impact Analysis (RIA), found in the docket of this final rulemaking, to reflect: (1) The elimination of three of the proposed performance measures (removing the proposed NHPP measure for percent of the Interstate congested and merging two proposed peak-hour travel time measures under NHPP with the proposed excessive delay measure under CMAQ Traffic Congestion into one measure under CMAQ); (2) the elimination of one of the proposed performance metrics (for the Total Emissions Reductions measure); (3) the elimination of costs for the Initial Performance Report, which State DOTs have already submitted to FHWA; (4) the addition of two new performance measures (Percent of Non-SOV Travel measure and the GHG measure; and (5) the adjustment of level of effort and number of affected entities consistent with the new requirements under the final rule and updated population estimates.

The FHWA expects that the rule will result in significant benefits, although they are not easily quantifiable. Specifically, the rule will allow for more informed decisionmaking at a Federal, State, and regional level for NHS performance-, freight movement-, or congestion and emissions-related projects, programs, and policy choices. The rule will also yield greater accountability because MAP-21 mandated reporting increases visibility

⁴ See Tables 3 and 4 in Section VII, Rulemaking Analysis and Notices.

⁵ Bureau of Labor Statistics Employee Cost Index, 2014.

and transparency. The data reported to FHWA by State DOTs will be available to the public and will be used to communicate a national performance story.

The FHWA performed break-even analyses as the primary approach to quantify benefits. The FHWA identified four variables (or outcomes) for which to estimate break-even thresholds: (1) Number of passenger travel hours, (2) tons of transportation-related carbon dioxide emissions, (3) number of truck travel hours, and (4) kilograms of on-road mobile source emissions, comprising volatile organic compounds, nitrogen oxide, particulate matter, and carbon monoxide. The FHWA selected these variables because it is reasonable to assume that the performance measures will influence each of these variables relative to current baseline levels.

FHWA assumes that there will be no overall change in the total amount of expenditure on highway projects by State DOTs and MPOs. Instead, FHWA assumes that States and MPOs will choose a different mix of projects or delay some projects, relative to what they would have done without the rule, in order to fund projects that help to meet performance goals. There will be some costs to delaying or foregoing some projects, but their will be benefits from projects that are prioritized to meet performance goals. To perform a breakeven analysis, FHWA considered both these benefits and costs and considered how large of a net gain in benefits would be needed to offset the costs of the rule.

After identifying these variables, FHWA combined the final rule costs associated with the performance measures that will influence each variable. The FHWA expects that implementation of four of the rule's performance measures (the Travel Time Reliability measures, the PHED measure and the Percent of Non-SOV Travel measure) will influence passenger travel hours. The FHWA expects that implementation of the GHG measure will influence tons of carbon dioxide emissions. The FHWA expects that implementation of the Freight Reliability measure will influence number of truck travel hours. The FHWA expects that implementation of the performance measure for Total Emissions Reduction will influence kilograms of on-road mobile source emissions.

Two variables (number of passenger travel hours and number of truck travel hours) are associated with performance measures whose costs differ under two

scenarios feasible under the final rule; in Scenario 1, FHWA provides travel time data to State DOTs, and in Scenario 2, State DOTs acquire the necessary data independently. To account for this, FHWA performed the break-even analyses twice for these two variables (*i.e.*, once using Scenario 1 costs, and a second time using Scenario 2 costs). The costs associated with the remaining two variables (tons of carbon dioxide emissions and kilograms of on-road mobile source emissions) do not change under Scenarios 1 and 2; therefore, only one break-even threshold is calculated for each analysis. In all, FHWA presents six break-even thresholds: (1) Number of passenger travel hours under Scenario 1, (2) number of passenger travel hours under Scenario 2, (3) tons of carbon dioxide emissions, (4) number of truck travel hours under Scenario 1, (5) number of truck travel hours under Scenario 2, and (6) kilograms of on-road mobile source emissions.

The results show that the rule must result in the reduction of approximately 3.7 million hours of passenger car travel under Scenario 1 and 5.6 million hours under Scenario 2, 312,000 tons of carbon dioxide emissions, 980,000 hours of freight travel under Scenario 1 and 1.6 million hours under Scenario 2, and 29 million kilograms of total on-road mobile source emissions over 10 years: To generate enough benefits to outweigh the cost of the rule. The FHWA believes that the benefits of this rule will surpass this threshold. Therefore, the benefits of the rule are anticipated to outweigh the costs.

Relative to the proposed rule, the total number of hours of passenger travel time needed to be saved over the period of analysis increased for the break-even analysis covering the Travel Time Reliability measures and the CMAQ Traffic Congestion measures. The undiscounted cost of these performance measures in the final rule decreased from \$88.4 million over 11 years (in 2012 dollars) in the proposed rule to \$86.1 million over 10 years (in 2014 dollars) in the final rule under Scenario 1. Under Scenario 2, costs increased from \$123.9 million over 11 years (in 2012 dollars) in the proposed rule to \$132.2 million over 10 years (in 2014 dollars) in the final rule. The Percent of Non-SOV Travel measure was added to the final rule, but the additional costs of this requirement were outweighed by the cost reductions associated with the removal of the peak-hour travel time reliability performance measures. For the final rule, FHWA added a break-even threshold for the GHG measure

because it was not a part of the proposed rule. The undiscounted cost for Scenario 2 increased because a greater share of the travel time dataset costs under \$490.103 in Scenario 2 was attributable to these Travel Time Reliability measures and the CMAQ Traffic Congestion measures. Specifically, the share of data requirements costs is driven by the proportion of performance measures in each break-even analysis, which for these performance measures increased from 60 percent in the proposed rule to 75 percent in the final rule. In addition, moving from an 11-year period of analysis to a 10-year period of analysis affected the break-even point. The average annual number of hours of travel that need to be reduced increased from approximately 350,000 in the proposed rule under Scenario 1 to 370,000 in the final rule, and from approximately 500,000 in the proposed rule under Scenario 2 to 560,000 in the final rule.

The threshold for the NHFP performance measure break-even analysis significantly decreased in the final rule. This change was largely due to the elimination of the proposed Average Truck Speed performance measure. The undiscounted cost of freight performance provisions in the final rule is \$25.8 million (in 2014 dollars) under Scenario 1 and \$41.1 million (in 2014 dollars) under Scenario 2, compared to \$46.9 million (in 2012 dollars) under Scenario 1 and \$70.6 million (in 2012 dollars) under Scenario 2 in the proposed rule. Average annual number of hours of travel that need to be reduced decreased from 168,044 in the proposed rule to 98,224 in the final rule under Scenario 1, and from 252,896 hours in the proposed rule to 156,874 hours in the final rule under Scenario 2.

Regarding the break-even analysis for Total Emissions Reduction, units were changed from tons to kilograms based on revised rule language. The undiscounted costs of total emissions reduction decreased from \$30.0 million (in 2012 dollars) in the proposed rule to \$18.2 million (in 2014 dollars) in the final rule. The average annual amount of total emissions to be reduced decreased from 4,417 short tons (approximately 4 million kilograms) in the proposed rule to 2.9 million kilograms in the final rule.

Table 2 displays the Office of Management and Budget (OMB) A-4 Accounting Statement as a summary of the cost and benefits calculated for this rule.

TABLE 3—OMB A-4 ACCOUNTING STATEMENT

Category	Estimates			Units			Source/ citation
	Primary	Low	High	Year dollar	Discount rate (%)	Period covered	
Benefits							
Annualized Monetized (\$ mil- lions/year).	None None	None None	None None	NA NA	7 3	NA NA	Not Quantified.
Annualized Quantified	None None	None None	None None	NA NA	7 3	NA NA	Not Quantified.
Qualitative	More informed decision-making on congestion-, freight-, and air quality-related project, program, and policy choices; greater accountability due to mandated reporting, increasing visibility and transparency; enhanced focus of the Federal-aid highway program on achieving balanced performance outcomes.						Final Rule RIA.
Costs							
Annualized Monetized (\$/ year).	Scenario 1: \$15,145,514; Scenario 2: \$21,801,333.	.....	.....	2014	7	10 Years	Final Rule RIA.
	Scenario 1: \$14,717,670; Scenario 2: \$21,082,985.	.....	.....	2014	3	10 Years	
Annualized Quantified	None None	None None	None None	2014 2014	7 3	10 Years 10 Years	Final Rule RIA.
Qualitative							
Transfers	None						
From/To	From:			To:			
Effects							
State, Local, and/or Tribal Government.	Scenario 1: \$14,768,979 Scenario 2: \$21,795,847. Scenario 1: \$14,347,569 Scenario 2: \$21,077,992.	.....	.....	2014 2014	7 3	10 Years 10 Years	Final Rule RIA.
Small Business	Not expected to have a significant impact on a substantial number of small entities			NA	NA	NA	Final Rule RIA.

II. Acronyms and Abbreviations

Acronym or abbreviation	Term	Acronym or abbreviation	Term	Acronym or abbreviation	Term
		GHG	Greenhouse gas.	NPMRDS	National Performance Man- agement Research Data Set.
AADT	Annual Average Daily Traffic.	HPMS	Highway Performance Moni- toring System.	NPRM	Notice of proposed rule- making.
AADTT	Annual Average Daily Truck Traffic.	HSIP	Highway Safety Improvement Program.	O ₃	Ozone.
AASHTO	American Association of State Highway and Transpor- tation Officials.	HSP	Highway Safety Plan.	OMB	Office of Management and Budget.
ACS	American Community Survey.	IFR	Interim Final Rule.	PM	Particulate matter.
CAA	Clean Air Act.	LOTTR	Level of Travel Time Reli- ability.	PHED	Peak Hour Excessive Delay.
CFR	Code of Federal Regulations.	MAP-21	Moving Ahead for Progress in the 21st Century Act.	PHTTR	Peak Hour Travel Time Ratio.
CMAQ	Congestion Mitigation and Air Quality Improvement Pro- gram.	MPH	Miles per hour.	PRA	Paperwork Reduction Act of 1995.
CO	Carbon monoxide.	MPO	Metropolitan Planning Organi- zations.	PSL	Posted Speed Limit.
CO ₂	Carbon dioxide.	NAAQS	National Ambient Air Quality Standards.	RIA	Regulatory Impact Analysis.
DOT	U.S. Department of Transpor- tation.	NCHRP	National Cooperation High- way Research Program.	RIN	Regulatory Identification Num- ber.
EO	Executive Order.	NHFP	National Highway Freight Pro- gram.	SHSP	Strategic Highway Safety Plan.
EIA	Energy Information Agency, U.S. Department of Energy.	NHPP	National Highway Perform- ance Program.	SME	Subject matter experts.
EPA	U.S. Environmental Protection Agency.	NHS	National Highway System.	SOV	Single Occupancy Vehicle.
FAST Act	Fixing America's Surface Transportation Act.	NHTS	National Household Travel Survey.	State DOTs ..	State departments of trans- portation.
FHWA	Federal Highway Administra- tion.	NHTSA	National Highway Traffic Safety Administration.	TMA	Transportation Management Areas.
FPM	Freight Performance Meas- urement.	NO _x	Nitrogen oxide.	TMC	Traffic Message Channel.
FR	Federal Register.			TTI	Texas Transportation Insti- tute.
				TTTR	Truck Travel Time Reliability.
				U.S.C.	United States Code.

Acronym or abbreviation	Term
VMT	Vehicle miles traveled.
VOC	Volatile organic compound.

III. Background

The DOT implemented MAP-21's performance requirements through several rulemakings. As a summary, these rulemaking actions are listed below and should be referenced for a complete picture of performance management implementation. The summary below describes the main provisions in each rulemaking.

On March 15, 2016, FHWA published a final rule (81 FR 13882) covering the safety-related elements of the Federal-aid highway performance measures rulemaking that included the following: (1) The definitions that are applicable to the new 23 CFR part 490; (2) the process to be used by State DOTs and MPOs to establish their safety-related performance targets that reflect the safety measures; (3) a methodology to be used to assess State DOTs' compliance with the target achievement provision specified under 23 U.S.C. 148(i); and (4) the process State DOTs must follow to report on progress toward meeting or making significant progress toward safety-related performance targets. The final rule also included a discussion of the collective rulemaking actions FHWA intends to take to implement MAP-21 and FAST Act performance related provisions. Elsewhere in this issue of the **Federal Register**, FHWA published a second performance measures final rule which includes the following: (1) Final national performance management measures for the condition of NHS pavements and bridges; (2) the process to be used by State DOTs and MPOs to establish their pavement and bridge condition related performance targets that reflect the final measures; (3) the process State DOTs must follow to report on progress toward meeting or making significant progress toward meeting pavement and bridge condition related performance targets; (4) a methodology to be used to assess State DOTs' compliance with the target achievement provision specified under 23 U.S.C. 148(i); and (5) the minimum levels for the condition of pavement on the Interstate System and bridges carrying the NHS, which includes on- and off-ramps connected to the NHS.

The FHWA published the third national performance management measures NPRM on April 22, 2016, 81 FR 23806. In this NPRM, FHWA proposed national measures for the remaining areas under 23 U.S.C. 150(c)

that were not discussed under the first and second measure rules. The third rulemaking effort proposed performance measures to assess: (1) The performance of the Interstate System and non-Interstate NHS for the purpose of carrying out the NHPP; (2) freight movement on the Interstate System; and (3) traffic congestion and on-road mobile source emissions for the purpose of carrying out the CMAQ program. In addition, the NPRM proposed State DOT and MPO target establishment requirements for the Federal-aid highway program and performance progress reporting requirements and timing.

When FHWA began implementation of MAP-21, the three related Federal-aid highway performance measure rules were proposed to be published at the same time to allow for a single, common effective date for all three rules. The process to develop and implement all of the Federal-aid highway performance measures required in MAP-21, however, has been lengthy. In light of this, each of the three Federal-aid highway performance measures rules will have individual effective dates. The FHWA expects that even though each rule sets its respective effective date, the compliance schedule for all the rules will be aligned through a common performance period and reporting requirements. A timeline for Biennial Performance Reports is shown in Figure 1 in § 490.105(e)(1).

Although FHWA believes that individual implementation dates will help State DOTs and MPOs transition to performance based planning, FHWA will provide guidance to State DOTs and MPOs on how to carry out the new performance requirements to lessen any potential burden of staggered effective dates.

The FHWA also commits to assist State DOTs and MPOs as they take steps to manage and improve the performance of the highway system by implementing the new rules. As a Federal agency, FHWA is in a unique position to review and share strategies that can improve performance. The FHWA will continue to provide technical assistance, technical tools, and guidance to State DOTs and MPOs to assist them in making performance-based decisions. The FHWA intends to engage at a local and national level to provide resources and assistance to identify opportunities to improve performance and to assist State DOT and MPO compliance with the performance-related regulations. The FHWA technical assistance activities will include conducting national research studies, improving analytical modeling tools, identifying

and promoting best practices, training classes and workshops, preparing guidance materials, and developing data quality assurance tools.

IV. Summary of the Notice of Proposed Rulemaking

This NPRM was published on April 22, 2016 (81 FR 23806). The NPRM proposed a set of national measures for State DOTs to use to assess the performance of the Interstate and non-Interstate NHS for the purpose of carrying out the NHPP; to assess freight movement on the Interstate System; and to assess traffic congestion and on-road mobile source emissions for the purpose of carrying out the CMAQ Program.

After consulting with State DOTs, MPOs, and other stakeholders and a review of nationally recognized reports, FHWA proposed eight national performance measures in these areas. To support the new measures, the NPRM proposed to establish standardized data requirements that prescribed State DOTs' travel time and emissions data practices. State DOTs and MPOs would use the National Performance Management Research Data Set (NPMRDS) to calculate the travel time and speed-related metrics, although the NPRM offered flexibility to State DOTs and MPOs to use alternative travel time datasets with FHWA's approval. For Total Emission Reduction measure, the NPRM required State DOTs and affected MPOs to use data included in the existing CMAQ Public Access System.

The NPRM also proposed to establish the processes for State DOTs and MPOs to establish and report progress toward achieving targets, and the process for FHWA to determine whether State DOTs have made significant progress in achieving targets. The FHWA selected the measures, data requirements, and related processes proposed in the NPRM after preliminarily determining that they represented the best choices for achieving consistency among State DOTs and MPOs in compiling accurate system performance, freight movement, traffic congestion, and on-road mobile source emissions performance information, following processes for target setting, and reviewing progress toward targets. The FHWA expected the proposed measures to enhance accountability and support a strong national focus on maintaining and improving the condition and performance of the Nation's highways, while minimizing additional burden on State DOTs and MPOs and maintaining reasonable flexibility for State DOTs and MPOs as they manage risk, differing priorities, and fiscal constraints. Lastly, FHWA anticipated that the proposed

measures could be implemented in the timeframe required under MAP-21, without imposing excessive burden on State DOTs.

System Performance Measures

The four system performance measures proposed in the NPRM were: (1) Percent of the Interstate System Providing for Reliable Travel; (2) Percent of the Interstate System Where Peak Hour Travel Times Meet Expectations; (3) Percent of the Non-Interstate NHS Providing for Reliable Travel; and (4) Percent of the Non-Interstate NHS Where Peak Hour Travel Times Meet Expectations.

System Performance Data Requirements and Metrics

In the NPRM, FHWA proposed calculating the performance measures using two performance metrics: The LOTTR metric and the Peak Hour Travel Time Ratio (PHTTR) metric. Under the proposal, State DOTs and MPOs would be required to calculate these metrics for all applicable roadway segments for the applicable time periods and report them to FHWA annually.

The NPRM also proposed that State DOTs coordinate with MPOs in order to establish and submit reporting segments to be used as the basis for calculating and reporting metrics to the FHWA and for State DOTs and MPOs to calculate the measures to assess Interstate System and non-Interstate NHS performance.

Calculation of System Performance Measures

The FHWA designed the proposed system performance measures to reflect a percentage of the system, by length, operating at a specified level of performance. In the NPRM, FHWA proposed a threshold level that represented reliable travel to highway users of LOTTR of 1.50. This LOTTR level represented the difference between the longer travel times (80th percentile) observed on a roadway segment and those that are normal travel times (50th percentile). For PHTTR, a threshold level of 1.50 represented peak hour travel times that meet expectations of State DOTs, MPOs, and local operating agencies. This PHTTR level represents a condition where observed (or estimated) travel times in large urbanized areas are no more than 50 percent higher than what would be desired for the roadway, as identified by the State DOT and MPO.

Freight Movement on the Interstate System Measures

The two freight movement measures proposed in the NPRM were: (1) Percent

of the Interstate System Mileage Providing for Reliable Truck Travel Time and (2) Percent of the Interstate System Mileage Uncongested.

Freight Movement on the Interstate System Data Requirements and Metrics

The FHWA proposed determining performance measures for freight movement using two metrics: TTTR and the Average Truck Speed metrics. For the TTTR metric, FHWA proposed having the State DOTs use the same basic method as discussed for the LOTTR metric to calculate truck travel time reliability. State DOTs also would calculate the Average Truck Speed metric for each reporting segment, which would be derived from truck travel speeds contained in the NPMRDS travel time data set.

Calculation of Freight Movement on the Interstate System Measures

The FHWA designed the proposed freight movement performance measures to reflect a percentage of the system, by length, operating at a specified level of performance. The NPRM proposed establishing the truck travel time reliability threshold at 1.50 to represent the level at which truck travel times become unreliable. This level represents a condition where travel time could be no more than 50 percent longer than what would be expected during normal travel time conditions. For average truck speed, the NPRM proposed that any travel speeds occurring below 50 mph would be representative of congested conditions for freight flow.

Traffic Congestion Measure

The proposed traffic congestion measure was Annual Hours of Excessive Delay Per Capita.

Traffic Congestion Data Requirements and Metric

The NPRM proposed one metric for traffic congestion: Total Excessive Delay (as measured in vehicle-hours) for each applicable reporting segment on the NHS. To develop the metric, the NPRM proposed that State DOTs with large urbanized areas that contain nonattainment or maintenance areas for any of the criteria pollutants under the CMAQ program use a travel time data set like NPMRDS (as is required for the system performance and freight movement performance measures). The NPRM proposed two threshold travel speeds to indicate when operating conditions have deteriorated to the point that excessive travel time delays would occur. Any measured travel speeds below the threshold would

represent the operating condition level that would result in excessive delays. These thresholds were 35 mph for Interstates, freeways, or expressways and 15 mph for all other NHS roadways.

Using these thresholds and travel time segment lengths, a State DOT would determine the Excessive Delay Threshold Travel Time for each travel time segment to represent the time that it could take for a vehicle to traverse the reporting segment before excessive delay would occur. The excessive delay would be determined by comparing the recorded average travel time to the Excessive Delay Threshold Travel Time for the corresponding segment.

Calculation of Traffic Congestion Measure

The proposed traffic congestion performance measure would be calculated by summing the total excessive delay of all reporting segments in the applicable area and then dividing this total by the population for the applicable area.

On-Road Mobile Source Emissions Measures

The proposed on-road mobile source emissions measure was Total Tons of Emissions Reduced from CMAQ Projects for Applicable Criteria Pollutants and Precursors.

On-Road Mobile Source Emissions Data Requirements and Metric

Under the NPRM, State DOTs and MPOs would calculate the annual emission reductions for projects reported to the CMAQ Public Access System in a Federal fiscal year. The metric would be calculated for each CMAQ-funded project and for each applicable criteria pollutant and precursor. The proposed method would convert the emissions reductions reported in the CMAQ Public Access System from units of kg per day to short tons per year. The emissions reductions would be summed for all projects within the applicable reporting area, by criteria pollutant or precursor, for a Federal fiscal year.

Calculation of On-Road Mobile Source Emissions Measure

Under the NPRM, State DOTs and MPOs would calculate on-road mobile source emissions reductions by summing the annual tons of emissions reduced by CMAQ projects by criteria pollutant, using the 2- and 4-years of available data from the Public Access System.

Potential GHG Performance Measure

The NPRM also sought comment on whether and how to establish a CO₂ emissions measure in the final rule. The NPRM posed questions to the public on how GHG emissions could be estimated and used to inform planning and programming decisions to reduce long term emissions. The NPRM indicated that a potential GHG emissions performance measure would be best measured as the total annual tons of CO₂ from all on-road mobile sources. The FHWA asked for comment on the potential establishment and effectiveness of a GHG measure, and on various considerations in the design of a measure.

Performance Targets

The NPRM described a process to be used by State DOTs and MPOs to establish quantifiable statewide performance targets to be achieved over a 4-year performance period, with the first performance period starting in 2018. In the NPRM, FHWA proposed that a State DOT or MPO could consider a number of factors (e.g., funding availability and local transportation priorities) that could impact the targets they ultimately establish. The FHWA discussed the statutory requirement that State DOTs establish 2- and 4-year targets for the eight national performance measures to assess performance of the Interstate and non-Interstate NHS for the purpose of carrying out the NHPP, freight movement on the Interstate system, traffic congestion, and on-road mobile source emissions within 1 year after the effective date of the rule. The MPOs would establish targets by either supporting the State DOT's statewide target, or defining a target unique to the metropolitan planning area each time the State DOT establishes a target. In accordance with MAP-21, the NPRM proposed providing MPOs with an additional 180-day period to set targets following the date on which the State DOT established their targets.

State DOT and MPO Reporting

The NPRM proposed that State DOTs submit biennial reports to FHWA on the condition and performance of the NHS. The FHWA proposed that State DOTs submit their targets in a baseline report at the beginning of each performance period and report progress in achieving targets at the midpoint and end of the performance period. State DOTs would be allowed to adjust their 4-year target at the midpoint of the performance period. The MPOs would not be required to provide separate reporting to

FHWA. However, State DOTs and MPOs would need to agree on a reporting process as part of their Metropolitan Planning Agreements.

Determination of Significant Progress

The NPRM proposed the method for FHWA to determine if State DOTs achieved significant progress toward their target based on an analysis of estimated condition/performance and measured condition/performance of each of the targets. If applicable, State DOTs could have the opportunity to discuss why targets were not achieved or significant progress was not made. If a State DOT failed to achieve significant progress, then the State DOT would be required to document in their next biennial performance report, and encouraged to document sooner, the actions they would undertake to achieve their targets.

V. Response to Comments

This final rule is based on FHWA's review and analysis of comments received. The FHWA received 8889 letters to the docket, including letters from 43 State DOTs and local government agencies, more than 100 associations and advocacy groups, over 7800 individuals and consultants, and various other government agencies as well as 3 letters cosigned by 19 U.S. Senators. Of all the letters to the docket, 95 percent specifically addressed a request for a multimodal performance measures and greenhouse gas performance measure or both. Given the large number of comments received, FHWA has decided to organize the response to comments in the following manner. This section of the preamble provides a response to the most significant issues raised in the comments received, organized by summarizing and responding to comments that raise significant issues applicable to the NPRM and then those that raise issues applicable to specific subparts of the rule. Responses to all other comments (*i.e.*, comments deemed less significant) are located in a separate comment/response document posted in the docket for this rulemaking.

A. Significant Issues Raised in Comments

The following summarizes the most significant issues raised in the comments to the NPRM and describes how FHWA has addressed these issues. More specific detail regarding these issues is provided in the sections that follow (Sections V–B through V–F).

1. Summary of Significant Issues Raised in the Comments

The NPRM Was Too Focused on Vehicle Travel Time—Many commenters expressed concern that 7 of the 8 proposed measures were based on vehicle travel time data.

The Rule Needs to Account for All People—The largest volume of comments received expressed concern that the proposed measures did not appear to reflect the travel experience of all people using the system and, in particular, those that use public transportation, walk, or bike.

The Rule Needs to Account for Multimodal Travel—Many commenters perceived that the proposed measures would encourage highway expansion and would not recognize strategies that provide for greater transportation choices.

The Proposed Rule Was Overly Complex—Many State DOTs and MPOs raised concern with the complexity of the design of the measure calculations and asked for the method to be simplified.

The Coordination Requirements in the NPRM Would be Difficult to Implement—Many State DOTs and MPOs expressed concern with the level of coordination required to agree on data sources, travel time expectations, and targets for urbanized areas.

The Rule Should or Should Not Include a Greenhouse Gas Measure—Comments were received both supporting and objecting to the inclusion of a GHG emissions measure in the final rule. Supporting comments came from thousands of individual citizens, several State DOTs, and hundreds of other organizations, including local governments, non-profits, and businesses. Comments against a GHG measure came from several State DOTs and 27 industry associations.

The NPRM's Proposed Speed Thresholds Were Problematic—Commenters expressed concerns with the use of an absolute speed threshold to determine congested conditions and the use of a single threshold to define reliable conditions.

2. Summary of Major Changes Made in Response to These Comments

The FHWA made a number of changes in the final rule in response to the comments received. These changes include the following:

The FHWA revised the suite of measures to simplify the rule and reduce the burden of compliance. The final rule contains 7 measures. Four of these are derived from vehicle travel

times, compared to 7 in the NPRM, 3 of which reflect all people traveling on the system. More specifically, the final rule does not include one of the proposed measures that focused on freight congestion and merges three additional proposed measures (two under NHPP System Performance and one under CMAQ Traffic Congestion) into one new measure, focused on excessive delay experienced during peak hours that will be under CMAQ Traffic Congestion. In addition, the final rule includes two new measures:

- **Under NHPP System Performance**—The rule includes a new GHG measure to assess system performance, specifically the percent change in CO₂ emissions from 2017, generated by on-road mobile sources on the NHS. State DOTs will be required to estimate CO₂ emissions based on annual fuel sales, EIA published emission conversion factors, and the proportion of statewide VMT that occurs on the NHS. MPOs will be provided options as to how they calculate CO₂ emissions. All State DOTs, and MPOs that have NHS mileage in their metropolitan planning area, will be required to establish targets and report on progress. State DOTs will report annual CO₂ emissions every 2 years to FHWA in their Biennial Performance Report. The FHWA will assess every 2 years if the State DOT has made significant progress towards the achievement of their target.

- **Under CMAQ Traffic Congestion**—The rule includes a new measure to assess modal share percentage, specifically Percent of Non-SOV, Travel, which includes travel avoided by telecommuting. A minimum option for doing so will be use of the American Community Survey “Journey to Work” data. States and MPOs will be provided the opportunity to use localized surveys or measurements to report on this measure and will be encouraged to report any data not available in national sources today to FHWA (e.g., bike counts).

The final rule simplifies the process. The FHWA simplifies the required data processing and calculation of the metrics. In general these steps include:

- Use of 15 minute travel time intervals instead of 5 minute intervals;
- Consistent time periods for all travel time-derived measures;
- Recognition of commercial data sets that could be pre-approved by FHWA;
- Removal of the requirement to “fill” missing data with travel times at posted speed limits; and
- Use of all vehicle travel times, regardless of speed, to replace missing truck travel times.

- In addition, FHWA is committed to working with State DOTs and MPOs to establish a pooled fund effort to acquire services and tools that will help with the processing and analysis of data.

The final rule modifies measures to address comments regarding the overreliance on vehicle travel times and the need to include multimodal travel. The final rule includes three measures that reflect the number of people traveling on the system, including two measures that have been modified so they are based on person-travel instead of vehicle travel, and a new multi-modal percent of non-SOV travel measure mentioned above. Specifically, the final rule changes the weighting of the Travel Time Reliability measures from system miles to person-miles traveled using overall occupancy factors from national surveys. It also changes the expression of the PHED measure to account for all travelers using the NHS based on volumes and occupancy factors for cars, buses, and trucks. The FHWA will provide occupancy factors based on national surveys and NTD data. State DOTs and MPOs may use more accurate local data if such data are available. The final rule creates the new Percent of non-SOV measure for CMAQ traffic congestion.

Furthermore, FHWA will revisit this issue and consider approaches to more effectively consider multimodal performance in the measures after the completion of ongoing research regarding multimodal system performance measures in fall, 2018.

The final rule addresses concerns with the use of absolute thresholds. The rule changes the proposed excessive delay threshold from 15/35 mph to 20 mph or 60 percent of the posted speed limit, whichever is greater. The rule encourages State DOTs to report the full extent of posted speed limits to the HPMS and requires that these be reported for applicable areas under the CMAQ Traffic Congestion measures. In addition, the rule changes the form of the Freight Reliability measure from one based on the percent of the system providing for reliable travel to an overall average truck reliability index for the Interstate. This change removes the 1.50 threshold in the definition of “reliable travel” for trucks and recognizes incremental improvements that could be made to improve reliability.

The final rule addresses comments regarding applicability of the rule. Specifically, the rule revises the applicability of the CMAQ Traffic Congestion measures to begin with urbanized areas (in nonattainment or maintenance) with populations over 1 million in the first performance period

(4 years begin in 2018) and then expands the applicability in the second reporting period (beginning in 2022) to urbanized areas (in nonattainment or maintenance) with a population over 200,000. Additionally, the final rule moves the date of measure applicability determination up 1 year earlier. The NPRM proposed that FHWA would determine measure applicability based on the most recent available data on October 1 of the first year in the performance period. The final rule changes this to be October 1 of the year before the beginning of a performance period. Finally, the final rule changes the use of the most recent decennial census population to determine measure applicability and to normalize the PHED measure to the most recent annual population estimate published by the U.S. Census.

The final rule relaxes some CMAQ Emission Requirements. The rule revises the definition of “Maintenance Area” to exclude any areas that have completed their 20 year maintenance plan. It also removes the requirement to develop a “metric” (by rolling the metric step into the measure calculation) to simplify the process. In addition, under the final rule, States and MPOs can request their areas to be excluded from the CMAQ performance requirements at the midpoint of the performance period if they reach attainment status (or achieve their 20 year maintenance plan).

B. Subpart A—General Information

1. Implementation Date Alignment and Coordination

The Georgia DOT commented that implementation dates for NPRMs (Asset Management, Pavement and Bridge Performance Measures, etc.) related to the new Statewide and Metro Planning Rule should be aligned to ensure accuracy and consistency. The Florida Metropolitan Planning Organization Advisory Council recommended aligning the various reporting due dates. While each rulemaking may not be finalized at the same time, the commenter requested that FHWA set a future point in time when all reporting of measures will align. The Atlanta Regional Commission (ARC) also recommended aligning the schedule for safety, pavement, bridge, travel time reliability, peak hour travel time, freight movement, traffic congestion, and on-road mobile source emissions target setting and reporting into one consolidated rotation. The New York State Association of Metropolitan Planning Organizations (NYSAMPO), Georgia Association of Metropolitan Planning Organizations, and American

Association of State Highway and Transportation Officials (AASHTO) urged FHWA to use a single effective date for all three performance management rules.

Although FHWA anticipated establishing one common effective date for the three performance management rules, the length of the rulemaking process made that approach impractical. Each rule has its own effective date. This approach allows FHWA, State DOTs, and MPOs to begin implementing some of the performance management requirements before all the rules are issued. In this final rule, FHWA aligned the performance periods (described in § 490.105(e)(4)(i)) and State Biennial Performance Report due dates (described in § 490.107) with the pavement and bridge condition measures for the second performance management rule in effort to consolidate reporting requirements. Throughout the process for all related performance management rulemakings (e.g., National Highway System Asset Management Plan,⁶ National Performance Management Measures for Pavement and Bridge Condition rule), FHWA has worked to coordinate the implementation dates for all of the rules for consistency and time alignment.

2. Reporting and Implementation Dates

The Michigan DOT, Macatawa Area Coordinating Council, and Ozarks Transportation Organization recommended designating the first performance period as a pilot period for the system performance measures. The National Association of Regional Councils (NARC) recommended postponing target establishment requirements to the second performance period. The Orange County Transportation Authority, Oregon Metro Council and the Joint Policy Advisory Committee on Transportation, Texas DOT, and TRANSCOM urged that sufficient time needs to be provided in order to effectively and appropriately develop and deploy target setting and implementation processes. The New York City DOT recommended that FHWA should coordinate with MPOs and State DOTs to set a reasonable and achievable implementation timeline. The COMPASS requested postponing target setting until transportation agencies have had a chance to familiarize themselves with the

NPMRDS data and to develop current and forecasted reliability and speed measures. The AASHTO and Iowa, Maryland, and New Jersey DOTs recommended that FHWA consider a phased approach which includes a 2-year testing period following the effective date of the final rule to allow State DOTs and MPOs to develop “non-binding targets” in order to more fully understand the use of the data and the implications of those targets. The San Francisco County Transportation Authority recommended that FHWA should coordinate with MPOs and State DOTs to set a reasonable and achievable implementation timeline. The DOTs of Idaho, Montana, South Dakota, North Dakota, and Wyoming and AASHTO suggested including “waiver provisions of part 490, in whole or part, with or without time limits or other conditions, and/or extend deadlines, for good cause shown” because they said that the new 23 CFR part 490 is a complex and multifaceted rule so that there will be unanticipated or unusually difficult circumstances in its implementation. The New York State Association of MPOs noted that a separate NPRM on MPO Coordination and Planning Area Reform was issued jointly by FHWA and FTA on June 27 and said that the proposed rule addresses “MPO geography.” The New York State Association of MPOs recommended that consideration of the implementation of this rule be suspended until the MPO Coordination and Planning Area Reform rule becomes final.

The FHWA appreciates the comments received regarding the implementation dates and reporting dates for this rule. However, MAP-21 establishes the target establishment dates and reporting dates for this rule. State DOT target establishment “not later than 1 year of the effective date of this rule” in § 490.105(e)(1) is based on a statutory requirement under 23 U.S.C. 150(d). The date for reporting progress toward targets of October 1, 2016, is also based on a statutory requirement under 23 U.S.C. 150(e), which requires State reporting “not later than 4 years after enactment of MAP-21 and biennially thereafter.” As indicated in the NPRM, FHWA believes the phase-in approach will allow sufficient time for State DOTs and MPOs to become more proficient in managing performance of non-Interstate roadways and congestion on the NHS in applicable urbanized areas as the coverage of the data becomes more complete in the NPMRDS. The FHWA retains in the final rule the phase-in requirement language in § 490.105(e)(7), (e)(8)(vi), and (f)(5)(vi) for the Non-

Interstate NHS Travel Time Reliability measure in § 490.507(a)(2) and the PHED measure in § 490.707(a), respectively. This phase-in will only require State DOTs to establish 4-year targets for the first performance period for this rule (reported in the first State Biennial Performance Report) for non-Interstate NHS Travel Time Reliability measure and the PHED measure. Under this final rule, at the midpoint of the first performance period, State DOTs will have the option to adjust the 4-year targets they established at the beginning of the performance period in their Mid-Performance Period Progress Report (due in October 2020). This option will allow State DOTs to consider more complete data in their decisions on the 4-year targets for non-Interstate NHS Travel Time Reliability and the PHED measures in applicable urbanized areas.

The Chicago Metropolitan Agency for Planning commented that the effective date of this regulation should be set 1 year after FHWA provides an NPMRDS data set with sample sizes for each epoch-TMC record. The commenter said that this timeline would allow time for agencies to determine which records have low sample sizes and collect probe data.

The NPMRDS has been available since July 2013, and many State DOTs and MPOs have been using the NPMRDS for over 3 years. The final rule and schedule for baseline reports and target establishment clarify how much time there is to prepare the data. In general, State DOTs and MPOs will have approximately 18 months to process data before the first set of metric data is required to be submitted to FHWA. The FHWA has simplified several of the measures to reduce the calculation burden, thereby reducing the amount of time necessary for State DOTs or MPOs to prepare the data.

The FHWA also acknowledges the comment regarding deferring implementation of this final rule until completion of the MPO Coordination and Planning Area Reform rulemaking. The FHWA plans to issue guidance on dealing with metropolitan planning area change during a performance period. The FHWA believes that the implementation timeline provided in this final rule provides sufficient lead time to accommodate any requirements that may arise out of a final MPO rule. So, the FHWA declines to defer the implementation of this rule.

⁶ Final rule on “Asset Management Plans and Periodic Evaluations of Facilities Repeatedly Requiring Repair and Reconstruction Due to Emergency Events” (October 2016)—**Federal Register** Vol. 81, No. 205 RIN 2125-AF57, Docket No. FHWA-2013-0052: <https://www.gpo.gov/fdsys/pkg/FR-2016-10-24/pdf/2016-25117.pdf>.

3. Accessibility and Connectivity

The FHWA received many comments⁷ urging FHWA to establish an accessibility performance measure. The California Association of Councils of Government (CALCOG) said that Federal databases should be made available to States and MPOs to support the monitoring of accessibility metrics. The Southern California Association of Governments (SCAG) said it currently measures accessibility by taking afternoon or PM peak period travel demand model results for the base and forecast years and identifying the percentage of commute or home-based work trips that are completed within 45 minutes. The Delaware Valley Regional Planning Commission (DVRPC) recommended “shorter multimodal journey-to-work travel time than average” and “number of jobs accessible within a given time budget” as accessibility measure.

The FHWA recognizes that accessibility and connectivity are important aspects of successful transportation systems that serve all users. In addition to the comments described above, stakeholder comments on these issues during outreach before publication of the NPRM expressed a variety of views, including that the establishment of an accessibility measure might encourage greater consideration of non-auto travel modes like transit, carpooling, walking, and biking. The FHWA agrees that the time-based measures proposed in the NPRM, such as the traffic congestion excessive delay measure, may not capture modal options, modal usage, or better accessibility. As described above, the final rule establishes a modal share measure that will do much to address

these concerns. While the final rule does not include a measure dedicated to directly assessing transportation connectivity or accessibility, the rule reflects a necessary balancing of performance management needs across a broad spectrum and implementation burdens on the State DOTs and MPOs.

The FHWA is working on several fronts to address accessibility and connectivity issues outside of this rulemaking. The FHWA, in cooperation with FTA, is actively working with transportation operating agencies and planning organizations on efforts to understand and advance best practices in assessing and managing transportation network connectivity to improve public accessibility to essential services. Through the Department’s Ladders of Opportunity initiatives, efforts are currently underway to evaluate how measures can be used to assess accessibility/connectivity.⁸ These initiatives will test different approaches to measure performance in this area that will help DOT better understand if and how accessibility and connectivity performance can be measured effectively at a local, State, and national level. The FHWA will use the results of these efforts to determine if a measure to assess accessibility/connectivity can be integrated into the Federal-aid Highway Program’s performance management requirements in the future.

4. Definition of Mainline Highway

Illinois DOT supports the definition of mainline highways to exclude ramps, shoulders, turn lanes, etc., but expressed concern that the NPRMDS does not exclude these parts of the transportation system. The commenter said that this will lead to extensive manual work to identify and remove these parts of the transportation system from the data it would have to use to comply with the proposed rule.

Texas DOT commented that “mainline highway” includes the primary traveled portion of the roadway and excludes ramps, climbing lanes, shoulders and non-normally traveled pavement surfaces. The commenter said the definition would seem to include managed lanes or high occupancy toll lanes. According to Texas DOT, traffic on these lanes typically travels at a higher rate of speed, which may influence the travel time reliability and percent of the Interstate System mileage that is uncongested. Texas DOT inquired whether FHWA considered these lanes to be part of a “mainline highway.” Florida DOT suggested that TMC should have categories for general

purpose lane, separated managed lane, separated collector/distributor, and ramp.

The Washington State and New York State DOTs, NARC, and Portland Metro Region MPO commented that managed lanes may be omitted in system performance calculations. They stated that the proposed rule would likely mask benefits from HOV and HOT lanes, toll roads, transit, and other operational enhancements and could discourage investment in these best practices. The Washington State DOT and NARC requested that FHWA either seek a way to differentiate the data with the data provider or account for HOV, HOT, toll roads, and other managed lanes. The AASHTO commented that FHWA should allow State DOTs the flexibility to better address the significant role that managed lanes play in the operation of the transportation system, as many regions in the United States have implemented some aspect of management lanes. The AASHTO recommended that FHWA develop an approach in the final rule that allows, but does not require, State DOTs and MPOs to specifically address managed lanes on their roadway network either through an improved NPRMDS that distinguishes between general purpose and management lanes or through supplementary analysis that takes into account the benefits of the managed lanes. The Los Angeles County Metropolitan Transportation Authority and Southwest Energy Efficiency Project commented that the proposed measure for congestion focuses exclusively on vehicle speed, ignoring the significant role that public transit, high occupancy/managed lanes, and active transportation have in reducing congestion and improving overall performance of the regional transportation system.

The FHWA agrees that ramps should not be included in measure calculations or in the NPRMDS dataset as the travel time derived measures are only applicable to mainline roadways. The next procurement of the NPRMDS will have a requirement to report mainline NHS segments only. If any ramp segments appear in the NPRMDS, State DOTs and MPOs should notify FHWA so these ramp segments can be removed in future NPRMDS deliverables.

The FHWA actively promotes managed lanes as a strategy for managing operations, which can include reducing congestion and increasing person throughput. However, at this time, it is difficult to delineate these lanes in both the segment and probe data. Lane-specific speed data are not available through the NPRMDS unless

⁷ American Association On Health and Disability and the Lakeshore Foundation, American Council of Exercise, American Public Transportation Association, BikeWalkLee, California Association of Councils of Government, Chicago Metropolitan Agency for Planning (CMAP), City of San Antonio, Delaware Valley Regional Planning Commission, Los Angeles County Metropolitan Transportation Authority, Mid-Ohio Planning Commission, Mountainland Association of Governments, Utah Department of Transportation, Utah Transit Authority, Wasatch Front Regional Council, Nashville Area Metropolitan Planning Organization, NARC, National Coalition for Promoting Physical Activity, National League of Cities, National Recreation and Park Association, New York Bicycling Coalition, North Front Range Metropolitan Planning Organization, Oregon Metro Council and the Joint Policy Advisory Committee on Transportation, Parks & Trails New York, Regional Transportation Alliance, Southern California Association of Governments, Southwest Energy Efficiency Project (SWEET), Transportation for America (T4A), Trust for America’s Health, Utah Transit Authority, as well as 1,114 citizen letter campaigns sponsored by National Complete Streets Coalition, 150 citizen letter campaigns sponsored by T4A, and 11 citizen letters.

⁸ <https://www.transportation.gov/opportunity>.

the managed lane is listed as a separate NHS facility (*i.e.*, different TMC code). In addition, not all probe data are able to accurately differentiate traffic speed by lane on a roadway. The FHWA does not believe it is possible, at this time, to uniformly separate managed lanes given the available data. If State DOTs have appropriate segment-specific data for managed lanes, State DOTs may certainly track these and include this information in any reports. State DOTs or MPOs may use alternative data sources that include separate segments for managed and conventional lanes provided these data meet the requirements for equivalent data in section 490.103. State DOTs and MPOs are welcome to provide information on managed lanes in performance reports.

5. Data Processing and Conflation of Datasets

Alaska, Arkansas, California, Ohio, Pennsylvania, Utah, Vermont, and Washington DOTs, AMPO, Georgia Association of MPOs, and many others asked FHWA to process the NPMRDS and develop a tool to calculate metrics. Many commenters made the same argument that the burden on States and MPOs is too great if they are each to process the NPMRDS themselves, and that this would represent a greatly inefficient duplication of effort. The AMPO and others agreed that processing the database nationally also would help ensure consistency across the country and thus aid in comparisons nationally. These commenters said that this processing should include all imputation needed to make the data set ready for calculations. Several commenters suggested that FHWA develop a Web-based tool for State DOTs and MPOs to process data and calculate the required metrics. Caltrans further suggested that Federal funding be made available for training. However, the New York Metropolitan Transportation Council suggested that States and MPOs should have the option, if they so choose, to do their own calculations of the required performance metrics and measures.

Others, such as Virginia DOT and TRANSCOM, more generally requested technical assistance and support for States and MPOs in undertaking metric and measure calculation. Michigan DOT suggested a case study of what the process and outputs would look like. The Mayors Innovation Project would like to see commercially available tools to relate speed, modal network availability, and location to help assess not only speed but accessibility.

Many comments noted the particular burden of handling the NPMRDS,

processing and developing the metrics even if they did not call on FHWA to perform these tasks. Commenters expressed concern about not only the time and resources it would take but also if State DOT and MPO staff would even have the skills to perform these tasks at all. Many commenters were concerned that the NPRM required data from both Traffic Message Channel (TMC) networks (*e.g.*, NPMRDS) and linear referencing systems (*e.g.*, HPMS) and that these two datasets are not conflated. Commenters requested that either FHWA provide conflated datasets or a tool for States to use. The FHWA recognizes and appreciates the effort required to download, store, process, and analyze the data in the NPMRDS in order to calculate the metrics required in the rule (and this is taken into account in the RIA). Some organizations have expressed that they are ready and capable of providing technical services and online applications to process and analyze data. The FHWA believes that the most effective way to address the concerns regarding the challenges with conflating data sets (linking travel time data with other roadway information such as traffic volumes) is by having organizations that have the skills and resources to handle and process large data sets provide these services and tools to State DOTs, MPOs, and FHWA. The FHWA is committed to working with State DOTs and MPOs to set up a pooled fund approach to data processing, analysis, metric/measure calculation and reporting, and potentially additional analysis tools. The economies of scale of all interested parties working together should help alleviate burdens. In addition, the Advanced Transportation and Congestion Management Technologies program offers grants that could be used to support the collective need to provide technologies that could be used by State DOTs and MPOs to better manage system performance. The FHWA is using authorized funds under the new Performance Management Data Support Program (FAST Act Sec. 6028) to fund the acquisition of travel time data and to develop enhancements to the HPMS to support the data requirements of this rule.

The FHWA anticipates that the next NPMRDS contract will include HPMS referencing for each TMC segment. This will simplify the process to conflate the travel time data to roadway information contained within the HPMS. The FHWA is also committed to help State DOTs and MPOs understand how they can most effectively process and analyze the travel time data sets. Technical support

is already included in the NPMRDS contract where quarterly webinars are provided and technical assistance is offered on request. The FHWA intends to build on these services to support State DOT and MPO needs for assistance.

6. Population Estimates

The Portland Metropolitan Region MPO recommended regional population be taken from Census-based annual estimates already obtained by MPOs for regional planning purposes from their own staff, reputable academic institutions, or qualified consultancies. The North Jersey Transportation Planning Authority (NJTPA) recommended using the most recent population estimate for the urbanized area. This commenter added that a constant population, as proposed, means that the only changes being measured and reported are the changes in delay; therefore, increases in delay associated with an increased population would not factor into the measure. The T4A also said that America's urban areas are witnessing large population shifts that have the opportunity to be omitted from two 4-year reporting cycles because of the reliance on decennial U.S. Census population estimates. This commenter requested discussion in the final rule for how States and MPOs could use population estimates from 5-year ACS estimates for each year reporting cycle.

The Oregon and Washington State DOTs stated that the proposed language, to keep the population numbers used in the delay measure constant for the duration of the performance period, would give an inaccurate picture of congestion in fast-growing cities as more people use the roadways. The Washington State DOT requested that the delay measure be derived by dividing the total annual excessive delay by an estimated commuter population.

The FHWA agrees with the comments that suggested the use of annual population estimates to determine measure applicability and to calculate the PHED measure. The FHWA believes that the use of annual estimates will provide for a more accurate estimation of population at the time when applicability determinations are made and when annual measures are calculated.

Therefore, the final rule uses the most recent annual population estimate published by the U.S. Census Bureau (in lieu of Decennial Census population estimates) to compute the PHED measure and to determine which State DOTs and MPOs will be implementing

CMAQ traffic congestion measures (both PHED and non-SOV Travel). Please see discussion section for §§ 490.709(g) and 490.105(e)(8)(iii) and (f)(5)(iii) for more details. To maintain consistency throughout all CMAQ measures, the final rule also uses the most recent annual population estimate published by the U.S. Census Bureau to determine which MPOs are required to develop and submit MPO CMAQ Performance Plan (Section 490.107(c)(3)).

7. Replacement of Missing Travel Time Data

Several commenters expressed concern about replacing travel time data missing from the NPMRDS with imputed data. Chicago Metropolitan Agency for Planning stated that imputation should be avoided as it may lead to under- or over-reporting, depending on the level of congestion present, and suggested that if imputation is used, FHWA should apply consistent rules for the replacement of missing values for all measures. Ozarks Transportation Organization, Oregon Metro Council and the Joint Policy Advisory Committee on Transportation, Association of Metropolitan Planning Organizations, and Puget Sound Regional Council argued that imputation, while perhaps unavoidable, would increase inaccuracy in data sets.

Some commenters, including North Jersey Transportation Planning Authority and Florida DOT, expressed general support for replacing missing travel time data with imputed data. Nebraska Department of Roads argued that the proposed restriction on using imputed data is inconsistent with the current use of estimates in the NPMRDS and further recommended that FHWA permit the use of estimates in alternative data sets. The AASHTO suggested that imputed data be smoothed and include information on whether the data were imputed at multiple confidence intervals. The commenter also recommended that in the future FHWA should require the provider(s) of NPMRDS data to follow recognized, industry-accepted methods for imputing incomplete or missing data. The New York State Association of Metropolitan Planning Organizations argued that the use of imputed data should be conditional on vendors providing details about the data (e.g., the methodology used to develop them).

Many commenters expressed support for imputation based on sources other than speed limit data, arguing that the alternatives have tested well in the field and are more accurate, efficient, and sophisticated than speed limit data are, and recommended that FHWA allow

States the flexibility to use such data from providers like HERE, INRIX, and TomTom. These commenters included DVRPC, New York State Association of Metropolitan Planning Organizations, AASHTO, and the State DOTs of Texas, Washington State, Oregon, Connecticut, New York, and Pennsylvania. The AMPO suggested that where observed data are unavailable, travel time interpolated between adjoining segments should be used instead of speed limit data. The Kentucky Transportation Cabinet recommended that, depending on the time of day for which data is required, imputation could involve either treating missing data as a maximum travel time or inserting historical data into the data set.

The final rule provides State DOTs the flexibility to select and use an alternative data set to the NPMRDS provided the data are considered “equivalent” as defined in section 490.103(e). The FHWA has established these requirements to ensure, through FHWA approvals, that data from different data sources are nationally comparable. The FHWA recognizes the concern with the degree of missing data and outliers in the NPMRDS as it existed when the NPRM was published. The FHWA supports approaches to filling in missing data provided they are based on observed travel during the same timeframe and roadway location, which is typically referred to as path processing. The original contract for the NPMRDS only allowed point-based probes to be included in the dataset (*i.e.*, that determine travel time based on the detection of a vehicle at one point in location). This method often recorded vehicles waiting at signalized intersections or missed them entirely during the detection period (5 minutes). The FHWA is currently updating the NPMRDS to allow for the determination of individual travel times during specified time intervals based on tracking the movement of single vehicles passing through a series of segments. This approach will maintain FHWA’s desire to use observed travel times without the challenges associated with single point detection. The FHWA is confident that travel time providers will be able to provide data sets that follow this approach.

To maintain consistency at a national level and to maintain an acceptable level of bias from the actual travel times occurring on the roadway throughout the year, FHWA discourages the use of methods to predict travel times based on historical trends or reference speeds. Consequently, to address concerns regarding the prohibition of the use of

imputed travel times, FHWA has revised the final rule in section 490.103(e)(5)(iii) to allow “observed” travel times that may be derived from travel times reported over a longer time period of measurement (path processing or equivalent). The final rule will not allow missing data to be filled with data that are imputed from historical data or predicted based on statistical analysis approaches.

8. Segment Lengths

The AASHTO and Illinois DOT expressed concern that the NPMRDS TMC segments are not consistent lengths across months and years. To address this issue, AASHTO recommended that FHWA require the NPMRDS provider to maintain segment definitions existing at the start of the year throughout the year. Because under this scenario, new roads and interchanges would not show up in the NPMRDS until the year following their opening, AASHTO commented that this approach would allow some time for State DOTs to get familiar with how new facilities are being used by the traveling public before they need to set targets and report on their performance. The Illinois DOT commented that the changing TMC segments would result in having to maintain conflation across each month’s data in order to be able to analyze the measures and complete the calculations. The commenter asserted that this would impact the measures for a segment over time as it would not be comparing similar segments across the 4-year reporting timeframe.

The AASHTO, Illinois, Minnesota, and Georgia State DOTs, Florida Metropolitan Planning Organization Advisory Council, Hampton Roads Transportation Planning Organization, Ozarks Transportation Organization, and Denver Regional Council of Governments recommended that FHWA allow State DOTs and MPOs flexibility to establish reporting segments that best reflect the needs of an individual State, which may be longer than the proposed limit of 1/2 mile for urban areas and 10 miles for non-urban areas. For example, AASHTO and Florida Metropolitan Planning Organization Advisory Council said that the segments could be based on logical termini, such as intersecting NHS facilities or the start or end of an urbanized area. The AASHTO and Connecticut DOT asserted that the proposed maximum length of reporting segments (1/2 mile in urbanized areas, 10 miles in non-urbanized areas) for a reliability measure are not consistent with prevailing practices in calculating travel time reliability measures (e.g., SHRP 2 Reliability Program).

Specifically, New York State Association of Metropolitan Planning Organizations proposed that FHWA permit urban travel time segments up to 5 miles in length. Requesting to see FHWA's research behind the proposed reporting segment length caps, Oregon and Washington State DOTs recommended that FHWA revise proposed § 490.103(f) so as not to be misinterpreted as allowing longer groups of TMCs (one "reporting segment") if one of the TMCs within the group is longer than the threshold.

The Great Lakes Regional Transportation Operations Coalition and University of Wisconsin-Madison Traffic Operations and Safety Laboratory recommended that FHWA remove the option to aggregate segments if using the NPMRDS, arguing that it is unnecessary, would involve extra work, and could invite a sort of gerrymandering where poorly performing TMCs can be bundled with better TMCs so measures meet targets. The Minnesota and New Jersey State DOTs, NJTPA, Metropolitan Council, and Wichita Area Metropolitan Planning Organization requested a clarification on the treatment of segments that cross MPO and/or urbanized area boundaries. The NJTPA said that the proposed rule is unclear as to how reporting segments that cross MPO and/or urbanized area boundaries are to be handled. Moreover, it said that none of the measures that MPOs need to report at the MPO level mention how to handle reporting segments that cross an "MPO boundary."

The NJTPA also urged FHWA to revise the rule to allow one set of reporting segments for the freight measures and another set of reporting segments for the remaining measures, reasoning that the standard for locating TMC segment endpoints is not standardized across commercial vendors. According to this commenter, the proposed rule would effectively require that, if a State opts to use an equivalent data set, it would have to use the TMC definitions used by HERE, the vendor that provides the NPMRDS. In order to clarify the default reporting segment in the event that States and MPOs do not agree, AASHTO, Illinois DOT, and Connecticut DOT recommended that FHWA revise the definition of "reporting segment" to say that a reporting segment is the segment set forth in the NPMRDS data set provided by FHWA (or an alternative data set used by the State) unless the State and any applicable MPO determine otherwise. New York State Association of Metropolitan Planning Organizations also recommended that

the definition of "reporting segment" address the process of which agency defines reporting segments within the urbanized area or MPA, proposing that FHWA amend the proposed definition to state "the State and MPOs cooperatively define . . ." Oregon and Washington State DOTs requested clarification regarding what type of documentation will be adequate for demonstrating coordination between State DOTs and MPOs for establishing reporting segments.

The FHWA recognizes that changes in segment length can present challenges in metric calculation. Segment length changes in the NPMRDS can occur sometimes due to the provider splitting long segments or new roads/improvements necessitating changes in the segmentation. Although it will be difficult to lock in segment lengths for a full year, FHWA will work with the NPMRDS provider to limit segment changes and document any changes made. Also, the proposed Pooled Fund approach to processing/analysis could help alleviate this issue.

In regard to aggregation, although there remains an option to join travel time segments into Reporting Segments of longer lengths, State DOTs are not required to take this action. The FHWA has retained the option to allow State DOTs to relate Travel Time Segments to their own roadway segmentation and to ensure travel time data are used at a sufficiently detailed level to provide useful metric calculations. In response to several comments asking if segments in urban areas could be longer than 0.5 miles, in this final rule, FHWA has changed the maximum length for reporting segments to one mile in urban areas, unless an individual Travel Time Segment is longer.

The FHWA intends to develop guidance to assist State DOTs and MPOs in the processing of segments to calculate metrics. The final rule does not specify how segments that cross boundaries should contribute to the metric. It is anticipated that data processing guidance will recommend that segments should contribute to the metric only if the entire length of the segment is contained within the applicable area.

9. NHS Coverage in the NPMRDS Data

The Great Lakes Regional Transportation Operations Coalition and University of Wisconsin-Madison Traffic and Safety Laboratory commented that NHS coverage in the NPMRDS changes with each static file change, which would alter the calculations. The commenter recommended that calculations be based

on only those TMCs that exist in all static file versions within a year.

The Illinois DOT commented that since NPMRDS TMC segments are not consistent lengths across months and years, it would be difficult to perform proper analysis because States would not be comparing similar segments across the 4-year reporting time frame. Ozarks Transportation Organization provided a similar comment and noted that the NPMRDS would need to be adjusted regularly in order to be used for performance measures and reporting.

The FHWA will work with the NPMRDS contractor to make sure the NHS updates are reflected in the NPMRDS travel time data as soon as is possible. There are inherent delays in providing data on a system that can change, and FHWA has addressed the issues in the rule by making certain requirements consistent throughout a reporting period. Comments received in the second performance measure rulemaking (pavement and bridge conditions) suggested that the impact of measure outcomes due to variations of NHS limits from year to year are not sufficient enough to warrant locking in one definitive NHS limit for a full performance period. This final rule follows the same approach.

10. Travel Times

Several commenters expressed support for travel times of 15 minutes (or longer), being used for the travel time-based measures. The commenters asserted that this would lead to, among other benefits, fewer bins with no data, reduced data storage burden, less effort required for quality control and quality assurance, and greater utility for members of the public interested in the data. Commenters argued that the higher level of granularity available in data from 5-minute bins, which provides more precision but not necessarily greater accuracy, does not confer enough additional benefits to justify the extra burden they would impose. Other commenters stated that due to low traffic volumes there may not be any travel time recorded in many 5-minute segments.

The NARC commented that if FHWA were to follow its recommendation for processing data centrally, FHWA could then obtain the data in 5-minute (or even 1-minute) bins but provide them to States in 15-minute bins. The AASHTO expressed support for the use of 5-minute bins for national-level performance reporting but stated that data with higher temporal resolution (e.g., 1-minute bins) have benefits for other purposes such as research.

Southeast Michigan Council of Governments expressed concern that for data on freight movements, 5-minute bins may not contain enough data points to maintain the anonymity of individual trucks. The Maine DOT commented that 60-minute bins would be better suited to its needs due to the limited and seasonal nature of its congestion and reliability issues as a rural State with low population density.

The FHWA agrees with and appreciates the concerns raised by commenters on the challenges with using 5-minute temporal granularity in the calculation of travel time metrics. Using 15-minute time periods would significantly simplify data analysis in terms of the size of the data set; FHWA estimates that the data set would be reduced by approximately two-thirds. The FHWA received many comments noting the amount of missing data when using 5-minute time intervals. The FHWA conducted an analysis to compare the amount of missing data when using 5-minute time periods to 15-minute time periods and determined that, for the segments analyzed, switching to 15-minute time periods improved data completeness by 25 percent to 30 percent for non-Interstate NHS segments; the resulting NHPP reliability measures differed by no more than 5 percent for Interstate highways. In addition, individual segment level LOTTR values were nearly identical, with an average difference of less than 1 percent for all of the segments evaluated. The assessment showed the greatest difference for the PHED measure, which was likely due to the prevalence of missing data at the 5-minute interval. The FHWA recognizes that larger time intervals reduce the level of specificity and granularity, but believes that the benefits of a more complete data set will allow for more accurate measure calculations. The FHWA does encourage the use of more granular time intervals (1 to 5 minutes) to carry out segment level analysis to better identify strategies to address issues impacting roadway reliability and congestion, but this information is not required to be reported to FHWA.

11. Alternative Data Sets

The AASHTO expressed support for FHWA's intent to make the NPMRDS available to State DOTs and MPOs for use in calculating performance measures and to allow States to use an alternate data set. Several State DOTs questioned FHWA's ability to continue to provide the NPRMDS data free of charge in the future raising concerns with the burden on State DOTs to acquire this data on their own if this

were to happen. Commenters also expressed concerns with the costs associated with the development of alternate data sets that would comply with the proposed travel time data requirements.

The NJTPA asked if equivalent travel time data sets can include data from different vendors or sources or both, as long as it satisfies FHWA requirements. For example, the commenter recommended that FHWA consider a "hybrid" or "fused" data set (such as the TRANSCOM "Data Fusion Engine" travel time data set) that includes travel times from various agency sensors (e.g., BlueTOAD sensors, toll transponder readers, Sensys pucks) as well as commercial probe data. Iowa DOT asked if the requirement that data "be populated with actual measured vehicle times and shall not be populated with travel times derived from imputed methods" eliminates any specific alternative data sources (e.g., INRIX) from consideration.

Several commenters requested detailed guidance on the approval process for using equivalent data sources in place of, or in conjunction with, the NPRMDS. In particular, the commenters asked what the approval process will look like, who will have the authority to grant the approval, how quickly the approval will be granted after a formal request is made, what information will be required for approval, what happens if FHWA does not approve the data set, and how frequently requests can be made by each State. The commenters also recommended that FHWA include in the final rule a time limit for such requests, stating that approval will be granted if no action is taken once the time limit expires. Rather than requiring State DOTs to get approval for alternate data sets, the Great Lakes Regional Transportation Operations Coalition and the University of Wisconsin-Madison Traffic Operations and Safety Laboratory suggested that it would be more efficient for a central entity (e.g., CATT Lab or TTI) to house and process travel time data, produce the metrics, and provide results to State DOTs and MPOs for use in target setting and reporting.

The Delaware Valley Regional Planning Commission, on behalf of the Partners Using Archived Operations Data, recommended that FHWA streamline the process to approve alternate data sets. Hampton Roads Transportation Planning Organization and the State DOTs of Virginia and Minnesota suggested that FHWA approve specific alternate data sets (such as INRIX and TomTom) rather

than requiring each State to request approval for these sources.

The FHWA believes that the use of the NPMRDS data set by all States and MPOs will promote national consistency among all of the measures. However, FHWA is willing to review commercially available travel time data sets to pre-approve those that are determined to be "equivalent" to the NPMRDS. The FHWA is not currently aware of any commercial data set that is "equivalent," but requests that if a State DOT or MPO believes that an alternative data set is "equivalent," then that State DOT or MPO should submit a request to FHWA. The FHWA appreciates that State DOTs and MPOs will need to know if a commercially available data set will be considered equivalent to the NPMRDS before financial resources are used to acquire data. Therefore, FHWA will consider alternative data set providers, on request by a State DOT or MPO, before their decision to use the data to meet the requirements of this final rule. If FHWA reviews a request and determines that the alternative data set is not "equivalent," then the State DOT or MPO must use the NPMRDS data set. Finally, FHWA retained the proposed regulation to use a single travel time data set (NPMRDS or equivalent) for all travel time derived metrics in this final rule. The FHWA believes that, as the metrics apply to the same roadway segments with the same traffic, it is important to use the same data set to calculate the metrics.

The FHWA intends to approve requests for alternate data sets in a timely manner such that the requested data set can be used by the State DOT beginning on January 1st of the year following the request. State DOTs should contact FHWA as soon as practical when considering alternate data sets to provide for sufficient time for the State DOT to acquire the data for use. The October 1st deadline is included in the final rule as the latest date the FHWA believes an alternate data set can be approved for use by the next calendar year. For clarification, in response to questioned raised by commenters, the final rule allows for alternate data sets to be combined with the NPMRDS in whole or in part to meet the travel time data requirements of this rule.

12. Corridors

Several commenters expressed a preference for a corridor-based approach to evaluate system performance instead of a segment-based approach and system-wide performance measures. The New York State DOT requested that the final rule to focus on corridors,

particularly in urban areas where congestion is likely to occur, that are defined by States and MPOs in ways that are meaningful for State and regional planning. The Washington and Oregon DOTs use a corridor-based approach that they assert allows the State to manage systems based on important functions and characteristics that will be missed by simply having urban/non-urban measures system-wide.

As part of an internal evaluation of the performance measures, Purdue University compared segment-based results with a corridor-based approach. According to this commenter, the corridor-based results were consistent with the segment-based analysis in that Interstate routes tended to be more reliable, but the routes for which there were numerous individual segments with a number of high LOTTR or PHTTR values did not exhibit these high values in a corridor-based analysis.

Oregon Metro Council and the Joint Policy Advisory Committee on Transportation urged FHWA to develop an integrated multimodal corridor approach to measuring person throughput and congestion that includes HOV lanes, public transit, and biking and walking facilities.

The California Association of Councils of Government (CALCOG) and others commented that freight measures specifically should be focused at the corridor level.

The FHWA recognizes that many State DOTs and MPOs use “trips” as the basis for reliability determination and fully supports that approach. However, that approach requires a working knowledge of how the system operates at a corridor level. Determining the length of analysis for these trips is not something that can easily be done in a nationally-consistent way. Instead, FHWA determined that looking at segment level performance was a satisfactory way to provide a consistent approach to measure system performance and traffic congestion in this rule. While State DOTs and MPOs are only required to assess progress on full system performance in this rule, State DOTs and MPOs may use the metrics to assess corridor-specific performance and use corridor-specific information to monitor progress, analyze trends, and establish targets.

13. Weather and Construction Impacts

Several commenters expressed concern that extraordinary events such as non-recurring inclement weather, prolonged construction, large gatherings, and insufficient funding will make target setting difficult and will

impede agencies’ ability to achieve successful performance. Commenters requested FHWA take these events into account in the final rule.

The AASHTO recommended that FHWA allow State DOTs and MPOs the flexibility to exclude from calculation and targets roadway segments for periods of inclement weather conditions using a consistent approach and data (e.g., National Weather Service reports and data archives).

The Illinois DOT suggested reports should be based on the number of days and/or center-line miles of facilities that are under construction or impacted by weather in order to keep the data set whole. The NARC suggested that there should be an opportunity for MPOs and States to explain targets and results as part of the reporting protocol to address unique circumstances.

The Mid-Ohio Planning Commission suggested including all extraordinary events, as all entities will undertake construction, and this measure would remain consistent with the bridge and pavement rule, which does not change factors for areas with more inclement weather. The Great Lakes Regional Transportation Operations Coalition and the University of Wisconsin-Madison Traffic Operations and Safety Laboratory reasoned that extraordinary events are in the far “right tail” of travel time distributions and would not affect the 80th percentile travel time.

The FHWA believes that reliability measures should include travel times during weather- and construction-related events to ensure that the measure reflects the efforts by transportation agencies to maintain and improve roadway operations. The FHWA further believes that the 80th percentile travel time used in the calculation of the NHPP reliability metric will exclude a majority of the longest travel times that occur as a result of extreme congestion events. The variability in travel time resulting from construction operations and other events that impact traffic flow are expected to be included in the measure as operational improvements and management should be able to help alleviate impacts from these events. The FHWA modified the NHFP reliability measure to remove the threshold that would determine if a segment is providing for reliable travel. The FHWA believes that this change will minimize the impact that extreme weather events could have on the metric and measure outcome. The FHWA has also added a provision for all the travel time derived measures that allows removal of travel times from the metric calculations when the roadway is closed.

The FHWA has retained the proposed provisions in section 490.109(e)(5) that consider extenuating circumstances, allowing State DOTs to explain the factors they considered when establishing targets and the circumstances that may have impacted their ability to make progress in achieving those targets. The FHWA believes that these provisions will allow State DOTs to document the impact of extreme weather events on performance expectations and their ability to manage system performance.

14. Holidays

The FHWA received several comments on whether holidays should be excluded from the travel time-based measures and requested that these exclusions be consistent across all travel time-based measures.

The AMPO pointed out that there are issues with consistency in calendar coverage in the proposed rule; holidays were excluded in the PHTTR metric, but not in the LOTTR metric. The commenter expressed concern that these inconsistencies, if not clearly justified, have the potential to add confusion and increase the burden in implementing these measures. A consistent set of time periods would be easier to understand.

Puget Sound Regional Council proposed that a consistent set of weekday time periods that excludes holidays would be easiest to understand.

The AASHTO, echoed by New Jersey, Missouri, Washington DOTs and others, requested days to be grouped similarly (non-holiday weekdays, weekends, and holidays) and for any excluded holidays to be specified in the final rule. They also asked for guidance on how to manage holidays that fall on weekends and are observed on a weekday.

The FHWA agrees with commenters that the burden required to identify and exclude holidays from the metric calculations is not warranted. The FHWA compared measure results with the inclusion and exclusion of holidays in the calculation. The analysis indicates that the inclusion of holidays in the travel time-based measures did not have a statistically significant effect on the annual metric and measure calculations. For this reason, the rule now requires that holidays be included when determining the metric.

15. Annual Reporting of Travel Time Metrics

The Oregon and Washington State DOTs commented that annual reporting of LOTTR and PHTTR metrics is too burdensome.

The FHWA recognizes the burden associated with the calculation of travel time based metrics, particularly in the first years of implementation. However, FHWA believes that through the development of standard processing routines the metrics can be calculated with a reduced burden. The proposed pooled fund effort should help alleviate the burden of annual reporting while providing consistent performance monitoring data for use in all performance management activities.

16. Establishing Performance Targets

The Atlanta Regional Commission and the Florida Metropolitan Planning Advisory Council stated that they appreciate the flexibility provided to State DOTs and MPOs regarding the establishment of improving, constant, or declining targets and they asked that this implementation philosophy be carried forward to the final rule. Several commenters⁹ recommended that specific regulatory language be included in the final rule to confirm that State DOTs and MPOs are allowed to establish improving, constant, or declining targets.

The FHWA believes that State DOTs and MPOs have the discretion to establish their targets. The MAP-21 does not provide FHWA the authority to approve or reject State DOT or MPO established targets. The FHWA believes that this rule does not impair the ability of State DOTs and MPOs to establish constant or declining targets. Thus, FHWA believes that specific language describing potential target level scenarios in the regulatory language is unnecessary.

17. Target Establishment Frequency

Several commenters¹⁰ stated that 2-year and 4-year timeframe will not reveal any meaningful progress toward targets or strategies implemented in that those timeframes. Others¹¹ expressed concerns that “over-emphasis on short-term over longer term targets may present an unintended obstacle to developing innovative, sustainable, and comprehensive solutions or to undertaking larger projects that can take many years to plan and implement.” The New York State Association of MPOs stated that the biennial reporting would give a snapshot of performance, but would also not reflect the results of

projects that have not been in place long enough for their impact to be measured. This commenter suggested that it may be useful to include in the report a list of projects implemented since the previous reports. The Pennsylvania DOT, COMPASS, and DVRPC recommended a broader time-horizon in the final rule. The AASHTO and several State DOTs¹² recommended providing State DOTs and MPOs the opportunity to voluntarily set long-term targets, not just 2- and 4-year targets, and to do so completely outside of the Federal regulatory framework. The Mid-Ohio Regional Planning Commission (MORPC), CMAP, and Portland Metropolitan Area MPO commented that targets should be established as part of each MPO’s Metropolitan Transportation Plan development or update cycle.

As stated in the NPRM, established targets (2-year and 4-year) would need to be considered as interim conditions/performance levels that lead toward the accomplishment of longer-term performance expectations in State DOT long-range statewide transportation plans and NHS asset management plans. In order to avoid confusion, FHWA used the term “longer-term performance expectations” in the NPRM to distinguish between longer-term targets and the interim anticipated condition/performance (*i.e.*, 2-year and 4-year targets) toward those longer-term performance expectations. The FHWA recognizes the importance of using a longer time horizon for planning and programming projects that considers and evaluates temporal tradeoffs between feasible improvements for more efficient and effective investment decisions. The FHWA strongly recommends that State DOTs and MPOs consider longer time horizons, which look beyond 4 years (*i.e.*, multiple performance periods), for planning and programming of projects, so identification and selection of those projects is guided by the longer term performance expectations. The purpose of the performance period is to measure and evaluate condition/performance, which should not be assumed to be a “planning, programming, project delivery, data collection, data reporting” cycle of individual improvement projects or a program of projects. Thus, the performance period and long-range planning (LRP) cycles look at different time periods and do not have to be aligned to be effective. Therefore, FHWA retains the proposed language in § 490.105(e)(4) and (5) in this final rule.

18. Target Adjustment Schedule

The Washington State and Oregon DOTs, AMPO, and Fairbanks Metro Area Transit System supported the proposed approach for allowing State DOTs to adjust an established 4-year target in the Mid Performance Period Progress Report. On the other hand, New York State Association of MPOs, State DOTs of South Dakota, Connecticut, Utah, and Alaska, and AASHTO recommended the flexibility to be able to adjust targets annually, if critical assumptions underlying performance targets have changed sufficiently to affect target values.

The FHWA believes that MAP-21 gives FHWA the discretion to establish requirements for targets. The FHWA has determined that State DOTs or MPOs may establish any target to satisfy the requirements for the performance management measures. The FHWA believes State DOTs have the authority and flexibility to establish targets for the performance measures. However, FHWA does not believe MAP-21 provides State DOTs and MPOs the authority to adjust or revise targets at any time at their discretion. The FHWA believes that 23 U.S.C. 150 provides FHWA the authority to establish requirements for targets, and that some requirements must be established so that accountability and transparency are instilled in the performance management process. As discussed in the NPRM, the FAST Act amended the number of determinations¹³ in MAP-21 from “two consecutive determinations” to each determination, that FHWA will make on a State DOT target (determined that State DOT has not made significant progress towards achieving its target) before that State DOT is required to take action.¹⁴ In response to this change, FHWA felt that an approach is necessary to provide State DOTs the same opportunity to make significant progress for 4-year targets as for the 2-year targets. The FHWA believes that 4-year target adjustment through the Mid Performance Period Progress Report will provide that opportunity because the actual time horizon (the duration between the target reporting date and the date which a target is established for) for State DOTs to consider in establishing 2-year targets and adjusting 4-year targets will be the same. For example, the duration between 2-year target reporting (via Baseline Performance Period Report) and the

⁹ AASHTO, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Montana, Missouri, North Dakota, South Dakota, Wyoming DOTs, and National Association of Regional Councils.

¹⁰ COMPASS, New York State, Pennsylvania DOT, DVRPC, and New York State Association of MPOs.

¹¹ AMPO, New Jersey DOT, and NJTPA.

¹² Alaska, Connecticut, and Illinois.

¹³ 23 U.S.C. 119(f)(7).

¹⁴ 23 U.S.C. 119(f)(7)—Require to provide a description of the actions the State will undertake to achieve the targets in its biennial performance report.

midpoint of a performance period (*i.e.*, the date which 2-year targets are established for) will be the same as the duration between adjusted 4-year target reporting (via Mid Performance Period Progress Report) and the end of a performance period (*i.e.*, the date which 4-year targets are established for). In response to the comments suggesting annual target adjustment, the State Biennial Performance Reports has the appearance that State DOTs would consider 2-year time horizon for establishing a 2-year target or adjusting a 4-year target, as the biennial reporting frequency may suggest. However, as discussed above, the actual time horizon for establishing 2-year targets and adjusting 4-year targets that State DOTs have to consider is much shorter than 2 years. The FHWA feels that this frequency of adjustment allows a State DOT to address changes they could not have foreseen in the initial establishment of 4-year targets while still maintaining a sufficient level of control in the administrative procedure necessary to carry out these program requirements in an equitable manner. For this reason, FHWA retains the language in section 490.105(e)(6), as proposed in the NPRM.

19. Ownership & Applicability of Measures/Targets

The South Jersey Transportation Planning Organization, Coalition of Great Lakes Regional Transportation Operations, COMPASS, and AMPO stated that State DOTs and the MPOs do not have any direct control over the NHS.

The statutory language in MAP-21 and the FAST Act apply the performance management requirements (23 U.S.C. 150), NHPP (23 U.S.C. 119), and CMAQ (23 U.S.C. 149) to the NHS/ Interstate System and not to “State DOT owned or operated” Interstate System or “State DOT owned or operated NHS.” The MAP-21 does not provide unique definitions to the terms “State” or “MPO” for purposes of 23 U.S.C. 150, 119, 167, and 149, and thus these terms have the same meaning as defined elsewhere in Title 23 U.S.C. Accordingly, FHWA retains the language in section 490.105(d) which requires State DOTs and MPOs to establish targets for the entire NHS and Interstate System for the entire geographical area within the State or metropolitan planning area, regardless of ownership.

20. Fiscal or Calendar Year Based Performance Periods

The Georgia DOT commented that some reporting requirements are based

on the Federal fiscal year and others on a calendar year. The commenter said that this difference would create additional work for State DOTs and suggested one consistent reporting date, or that FHWA provide flexibility to align the Federal fiscal year or calendar year reporting dates. The Portland Metropolitan Area MPO and the Denver Regional Council of Governments commented that Federal fiscal year or calendar year reporting dates for different measures are inconsistent and confusing. On the other hand, State DOTs of Washington State, Connecticut, and Oregon, AASHTO, and Puget Sound Regional Council MPO supported the metric data requirements for CMAQ on-road mobile source emissions measures based on Federal fiscal year and all travel time related measures based on calendar years. The Puget Sound Regional Council added that utilizing the existing reporting framework for CMAQ projects simplifies the process for MPOs.

In the NPRM, FHWA stated that the CMAQ on-road mobile source emissions measure establishment would rely on the existing processes State DOTs use to manage, track, and report projects as part of the CMAQ program. For this reason, FHWA elected to base the performance period for the on-road mobile source emissions measure on the Federal fiscal year to align with Federal fiscal year based reporting of the estimated emission reductions by State DOTs for CMAQ-funded projects through the CMAQ Public Access System. The FHWA believes that this approach provides the simplest and most effective means to implement the MAP-21 performance requirements for on-road mobile source emissions. As for all other measures (including the CMAQ traffic condition measures), calendar year-based data collection and reporting requirements specified in subparts E, F, and G are aligned with Calendar Year-based performance period. For these reasons, FHWA retains the language in section 490.105(e)(4)(i) unchanged. Although the performance period for the on-road mobile source emissions measure is different from all other measures, the reporting dates for condition/performance, targets, progress, etc. required in section 490.107 for the on-road mobile source emissions measure are the same as all other measures in this rule.

21. Boundaries

The Denver Regional Council of Governments commented that the geographic area application for each measure is confusing (urbanized area vs. transportation management area vs.

metropolitan planning area) particularly in light of DOT’s NPRM on “MPO Coordination.”¹⁵ The Connecticut and Arkansas DOTs commented that a greater consistency in boundaries is needed throughout this rule. The Arkansas DOT recommended a simpler, consistent boundary source be adopted in conjunction with State DOTs and MPOs, particularly given the uncertainty surrounding the definition of Metropolitan Planning Area in the context of the Metropolitan Planning Organization Coordination NPRM. The DOTs of Connecticut, Arkansas, and Maryland and AASHTO stated that, “the urbanized area geography is not well understood and the specific use of it in calculating the congestion metric involves a significant learning curve that will take time to better understand.” The National Capital Region Planning Commission stated that the urbanized area boundary determination process of the Census Bureau is not well understood and importantly does not appear to be based on transportation and mobility considerations within the urbanized area. The commenter added that the Census urbanized area does not align with jurisdictional boundaries, which in most places is where preliminary transportation project planning and programming decisions are made. Finally, this commenter said that the basic unit used for developing urbanized areas, census blocks, differs from the basic unit used by MPOs, Transportation Analysis Zones.

The NJTPA requested a clarification on the treatment of segments that cross MPO and/or urbanized area boundaries. The commenter said that the proposed rule is unclear as to how reporting segments that cross MPO and/or urbanized area boundaries are to be handled. Moreover, the commenter said that none of the measures that MPOs need to report at the MPO level mention how to handle reporting segments that cross an MPO boundary.

The FHWA clarifies that only the CMAQ traffic congestion measures in subpart G are applied to applicable¹⁶ urbanized areas for State DOTs and MPOs. All measures in other subparts in this rule are applied to State geographic

¹⁵ NPRM on “Metropolitan Planning Organization Coordination and Planning Area Reform”, 81 FR 41473 (June 27, 2016).

¹⁶ Urbanized areas with a population over one million for the first performance period and over 200,000 for the second and all other performance periods, that are, in all or part, designated as nonattainment or maintenance areas for ozone (O₃), carbon monoxide (CO), or particulate matter (PM₁₀ and PM_{2.5}) National Ambient Air Quality Standards (NAAQS) discussed in more detail under Section V Subpart G.

boundaries for State DOTs and metropolitan planning area boundaries for MPOs. The FHWA made the exceptions for traffic congestion measures because traffic congestion is more relevant in urbanized areas. Because the State geographic boundaries and the metropolitan planning area boundaries may include both urban and rural areas (and in different proportions), FHWA believes that the varying proportions of rural area (or road network in rural areas) would impact the statewide or metropolitan planning area -wide measures differently across the States and metropolitan planning areas.

As a result, FHWA is applying the CMAQ traffic congestion measures to the areas selected based on uniform and consistent criteria, such as the U.S. Census Bureau in designating urbanized areas. The FHWA understands that urbanized areas may not be the unit of area for transportation project planning and programming decisions for some agencies. However, focusing on traffic congestion in urbanized areas will allow for the opportunity to significantly reduce traffic congestion on the NHS across the nation while reducing the burden for the State DOTs and MPOs to implement the traffic congestion measures in non-urbanized areas. The FHWA disagrees with the comments from DOTs of Connecticut, Arkansas, and Maryland and AASHTO stating that “the urbanized area geography is not well understood.” The FHWA believes that State DOTs are well aware of a need for consistency or geographic continuity in urbanized area boundaries for transportation planning purposes through FHWA issued guidance.¹⁷ The FHWA believes that State DOTs’ detailed understanding of urbanized areas in planning is exhibited through State DOT reported data to HPMS.¹⁸ For this reason, FHWA retains sections 490.105(d)(2) and 490.703 for the urbanized areas as the scope of traffic congestion measures and their performance targets.

22. Unified Targets

The AMPO commented that coordination across MPO boundaries is an important facet of the MPO planning process, but it is unclear that requiring single values and targets for entire (large) urbanized areas adds value. The commenter added that the proposed

unified target for an urbanized area adds significantly to the reporting complexity and may confuse interpretation of results. The AMPO and Kentucky DOT expressed concern that State DOTs and MPOs may be reluctant to adopt targets for areas outside of their control. The Oregon, Washington State, and Delaware DOTs expressed concerns about potential “time-intensive coordination requirements” and the complexity of multi-agency coordination associated with establishing a unified urbanized target, a concern echoed by the Connecticut DOT and the DVRPC. The Chicago Metropolitan Agency for Planning (CMAP) commented that, “it is an inappropriate enlargement of the Federal role to require the establishment of identical performance targets in separate States . . . nor is the mechanism by which the States would coordinate to establish identical targets explained in the NPRM.” The commenter added that the regulation would lead to a lowest common denominator approach to target setting. Other commenters agreed that the NPRM did not address how to resolve differences in target setting.

The Mid-America Regional Council suggested that FHWA give this particular issue additional consideration to determine how to best facilitate agreement between parties where such agreement is required and integrate this thinking into the final rule. Several commenters recommended that measure applicability be limited to “Metropolitan Planning Organization boundaries, or limit the reporting areas and targets to urbanized areas that fall within an MPO and/or a State.”

The FHWA believes that closer coordination among all entities in an urbanized area is necessary because traffic congestion within each entity’s geographic boundary urbanized area impacts the performance of the surrounding entities. A single, unified urbanized area target will foster a shared vision among State DOTs and MPOs of expectations for future condition/performance of the entire urbanized area and will ensure a jointly-owned target establishment process. More importantly, because the driving public does not concern itself with State or metropolitan planning area boundaries when it comes to traffic congestion, unified targets are crucial to communicate regarding traffic congestion for the entire urbanized area. The FHWA disagrees with CMAP’s comment that this requirement is “an inappropriate enlargement of the Federal role.” A single, unified urbanized area target aligns with 23

U.S.C. 134(h)(2)(B)(i)(II) and 23 U.S.C. 135(d)(2)(B)(i)(II), which require State DOTs and MPOs to coordinate in establishing consistent targets, to the maximum extent practicable.

Because of the reasons above, FHWA retains the language proposed in NPRM § 490.105(d)(2), (e)(8)(iii)(B), and (f)(5)(iii)(B). The FHWA recognizes that State DOTs and MPOs will need more time to coordinate in the target establishment process, so FHWA provides a phase-in of this requirement in § 490.105(e)(8)(vi) and (f)(5)(vi), in the final rule, for the PHED measure in section 490.707(a).

23. CMAQ Measure Applicability

The Florida Metropolitan Planning Advisory Council commented that those States in attainment need to remain exempt from traffic congestion measures and targets. The NJTPA commented that the traffic congestion measure applicability determination approach described in § 490.105(e)(8)(i), (e)(8)(ii), (f)(5)(i), and (f)(5)(ii) may cause problems for a State DOT or MPO with a small amount of urbanized area NHS roadways within their boundaries. The commenter recommended that FHWA consider a minimum length of urbanized area NHS roadway for the measure applicability.

The FHWA has emphasized a need for close coordination among all entities in an urbanized area because the traffic congestion within each entity’s geographic urbanized area boundary impacts the performance of the surrounding entities in that urbanized area. The absence of any one of the surrounding entities in implementing traffic congestion measures will hinder establishing an effective and meaningful performance target for that urbanized area. For this reason, FHWA retains the language, as proposed in the NPRM, on the criteria for State DOT traffic congestion measure applicability in § 490.105(e)(8)(i) and (ii).

The FHWA concluded that regardless of the NHS miles within an entity’s geographic urbanized area boundary, the traffic congestion on those miles of NHS could impact the traffic congestion in the broader area. The FHWA considered a minimum length of NHS within an entity’s geographic urbanized area boundary as a threshold in the applicability determination, but concluded that such an approach would be arbitrary. The FHWA thus retains the methodology and approach proposed in the NPRM for the traffic congestion measure applicability determination described in § 490.105(e)(8)(i), (e)(8)(ii), (f)(5)(i), and (f)(5)(ii).

¹⁷ Highway Functional Classification Concepts, Criteria and Procedures (FHWA): https://www.fhwa.dot.gov/planning/processes/statewide/related/highway_functional_classifications/section06.cfm.

¹⁸ “Urban Code” Data Item in HPMS sections data.

Commenters also requested flexibility to revise applicability if nonattainment or maintenance designations change during the 4-year performance period. The Georgia DOT recommended making the determination of which State DOT and MPOs are subject to CMAQ measures 1 year in advance of the State DOT Baseline Performance Period Report to provide some assurance and to avoid unnecessary resource expenditure based on assumptions.

The FHWA agrees with the comment from Georgia DOT that applicability determination should be made earlier. The FHWA revises in the final rule¹⁹ the timing of determining which State DOTs and MPOs are required to implement CMAQ traffic congestion measures in § 490.707(a) and (b) and CMAQ on-road mobile source emissions measure in section 490.807. The applicability determination for all CMAQ measures will be made 1 year before when the State DOT Baseline Performance Period Report.

The FHWA also agrees with the commenters on the flexibility to revise applicability if nonattainment or maintenance designations change during the 4-year performance period. As a result, FHWA has revised the rule to make section 490.809(c) inapplicable if U.S. Environmental Protection Agency changes to the designations become effective 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA. To be consistent with this change, FHWA revised § 490.105(e)(8)(iii)(F), (e)(8)(v), (f)(5)(iii)(F), and (f)(5)(v) for the traffic congestion measures, and § 490.105(e)(9)(v), (e)(9)(viii), and (f)(6)(v) for the on-road mobile source emissions measure.

24. Due Date for Initial Performance Reports

Many commenters explained that they would not have adequate time to complete a comprehensive Initial State Performance Report by the October 2016 deadline and urged FHWA to delay or change the due date.

The FHWA issued guidance²⁰ on the Initial State Performance Report on August 31, 2016, to provide State DOTs the opportunity to comply with the statutory deadline for the first performance reporting under 23 U.S.C. 150(e). In this guidance, FHWA

recognized that State DOTs would not have established targets for the measures in this rule. The FHWA simplified the reporting requirement by only requiring a description of the planned processes for target establishment and coordination with relevant MPOs and other agencies that will occur in the selection of targets. Therefore, FHWA removes the Initial State Performance Report requirement in this final rule.

25. MPO Reporting

The AASHTO and Connecticut DOT requested that individual MPOs submit their plans directly to FHWA, and the Denver Regional Council of Governments suggested that, “it may be simpler for State DOTs to compile one statewide version . . . with input from the State’s MPOs.”

The FHWA maintained that the MPO is responsible for creating the plan and submitting it to the State DOT in a timely manner. The rule does not require more than one State DOT to attach CMAQ Performance Plans for MPOs whose metropolitan planning area crosses a State boundary. The FHWA believes that this minimizes the reporting burden for both State DOTs and MPOs, since a State DOT simply needs to receive the plan from the MPO and attach it to its biennial report; the State DOT is not required to create or modify the plan. Adding a requirement for MPOs to report to FHWA would be more burdensome, as most MPOs do not currently report to FHWA; under the CMAQ program, State DOTs report on projects for MPOs. For these reasons, FHWA retained the requirement in section 490.107(c)(3) for MPOs to submit their CMAQ performance plans to FHWA through the State DOT.

26. Optional Target Reporting

The AASHTO and several State DOTs opposed to the requirement for State DOTs to report optional (additional—urbanized/non-urbanized area) targets to FHWA in FHWA-approved formats. They said that this requirement would force State DOTs to find a way to conduct additional planning without using words such as “target,” “measure,” or “performance management” to avoid FHWA’s reporting, recordkeeping, and other regulatory requirements. These commenters urged FHWA to remove the language requiring State DOTs to report boundaries, progress, etc. in section 490.105(e)(3).

The FHWA proposed that targets established pursuant to 23 U.S.C. 150(d)(2) (authorizing State DOTs to establish different performance targets

for urbanized and rural areas) be considered “optional” or voluntary targets for State DOTs. The proposal would allow State DOTs to establish a target for any combination of urbanized areas and provided that FHWA would not assess the progress achieved for any such additional or optional targets. The FHWA interprets 23 U.S.C. 150(e)(3) to require that State DOTs report the additional targets and their progress in achieving these targets in their Biennial Performance Reports. As a result, FHWA did not modify §§ 490.105(e)(3) and 490.107(b)(1)(ii)(A), (b)(2)(ii)(B), and (b)(3)(ii)(B).

27. Significant Progress Determination

The Oregon DOT suggested adding “planned transportation corridor improvements” to the list of extenuating circumstances for not achieving significant progress in section 490.109(e)(5)(i). Several commenters suggested that “insufficient funding” be added to the list. The Michigan DOT suggested adding the impact of economy on VMT because they said that transportation agencies have limited ability to influence the VMT changes due to economy on traffic congestion.

The FHWA understands that there are many external factors that could impact the condition/performance and the State DOT’s ability to make significant progress, including lack of funding. However, FHWA believes that the frequency of target establishment and State DOTs’ ability to adjust 4-year targets at the mid-point of a performance period creates a relatively short forecast window that should allow State DOTs to consider the impacts of funding shortfalls and uncertainty (*e.g.*, lack of funding for investment, cost escalation) in initial targets and any subsequent adjustments. Additionally, State DOTs must consider uncertainties 2 years in advance in the State Biennial Performance Report. As discussed in section 490.105(e)(6), the actual duration that State DOTs have to consider uncertainties is shorter than 2 years.

The FHWA does not intend to use the significant progress determination process to be punitive or to encourage State DOTs to establish easy-to-achieve targets. Establishing targets and assessing progress is intended to encourage State DOTs and MPOs to establish data-supported targets that consider anticipated resources and potential uncertainties and to provide data-supported explanations of condition/performance changes. If a State DOT does not make significant progress because of lack of funding or other reasons, FHWA expects that State

¹⁹ Section 490.105(e)(8)(iii)(D) through (F), (e)(8)(iv), (f)(5)(iii)(D) through (F) and (f)(5)(iv) for traffic congestion measures and § 490.105(e)(9)(v) and (f)(5)(v) for on-road mobile source emissions measure.

²⁰ FHWA Guidance: Initial State Performance Report: <http://www.fhwa.dot.gov/tpm/guidance/160831.cfm>.

DOT will provide data-supported explanations for not achieving significant progress. Transportation performance management is not just about making significant progress. It is about effectively communicating to Congress and the public how the “planned transportation corridor improvements,” how the absence of “sufficient funding” and other circumstances are impacting the condition/performance of the transportation network. Moreover, FHWA believes the determination process must be meaningful and bring accountability to the program as MAP-21 and FAST Act intended. For these reasons, FHWA retains the language in section 490.105(e)(5)(i), as proposed in the NPRM.

C. Subpart E—National Performance Management Measures for the NHPP System Performance

1. Establishment of Greenhouse Gas (GHG) Emissions Measure

In the preamble to the NPRM, FHWA sought public comment on whether and how to establish a CO₂ emissions performance measure in the final rule. The FHWA asked a series of questions regarding the design and implementation of a GHG emissions measure and whether one should be established. The FHWA stated that if GHG emissions were to be measured, FHWA believed the best measure would be the total annual tons of CO₂ emissions from all on-road mobile sources. Finally, FHWA cited relevant research, including the FHWA publication, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, published in December 2013 (available in the docket for this rulemaking).

The FHWA received thousands of comments on whether or not to establish such a measure and how a measure should be designed and implemented. Supporting comments came from 91,695 citizens, 9 State DOTs, 24 MPOs, 19 U.S. Senators, 48 Members of the U.S. House of Representatives, over 100 cities, numerous local officials, over 100 businesses, and over 100 public interest, non-profit and advocacy organizations. Some State DOTs and MPOs already use GHG emissions as a performance measure.

Comments against a GHG emissions performance measure were submitted by 10 State DOTs, 2 MPOs, 5 U.S. Senators, 31 Members of the U.S. House of Representatives, and 27 transportation and infrastructure industry associations.

Additionally, nine State DOTs and three industry associations requested that FHWA not establish any performance measures not explicitly stated in legislation.

A number of the commenters in both groups addressed whether FHWA has the legal authority to establish a GHG measure and whether such measure could be established in this rulemaking.

After careful consideration of the comments received, FHWA decided to establish a GHG emissions performance measure in this rule to measure environmental performance in accordance with 23 U.S.C. 150(c)(3). Doing so will incorporate an important environmental aspect of system performance into the set of national performance measures, be responsive to public comments, improve transparency, and support the national transportation goal of environmental sustainability in the Federal-aid Highway Program and the national performance management program established in 23 U.S.C. 150. As highlighted in FHWA’s 2013 Conditions and Performance Report²¹ and its publication, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*,²² there are two main types of climate change risk affecting transportation infrastructure: Continued emissions of GHGs, such as CO₂, that adversely affect the atmosphere, leading to climate change effects, and threats to the transportation system posed by climate change impacts (e.g., damaged or flooded facilities).²³ In other words,

²¹ FHWA 2013 Conditions and Performance Report (PDF Version), “Advancing Environmental Sustainability” at 5–6 through 5–7. <https://www.fhwa.dot.gov/policy/2013cpr/pdfs.cfm>.

²² *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, FHWA (December 2013) at iii–iv. https://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_planning/index.cfm.

²³ Extreme weather and other impacts related to GHG emissions, such as sea level rise, can harm, disrupt, and damage transportation systems, particularly through flooding, resulting in costly disruptions. For discussions of the potential disruptive effects of climate change on the transportation system, see also *Impacts of Climate Change and Variability on Transportation Systems and Infrastructure: The Gulf Coast Phase 2, Task 3.2 Engineering Assessments of Climate Change Impacts and Adaptation Measures* (FHWA and U.S. DOT Climate Change Center) (August 2014) at 273 (available as of September 14, 2016, at http://www.fhwa.dot.gov/environment/climate_change/adaptation/ongoing_and_current_research/gulf_coast_study/phase2_task3/task_3.2/task2phase3.pdf); and *Hampton Roads Climate Impact Quantification Initiative, Baseline Assessment of the Transportation Assets and Overview of Economic Analyses Useful in Quantifying Impacts*, U.S. DOT (September 13, 2016) (available as of November 1, 2016 at http://ntl.bts.gov/lib/60000/60100/60161/Hampton_Roads_Climate_Impact_Initiative.pdf).

the transportation system both contributes to climate change and suffers from the impacts of climate change (e.g., flooding, sea level rise). Reducing GHG emissions from the U.S. transportation sector will reduce the sector’s impact on climate change, promote environmental sustainability, and help to protect the NHS from damage caused by climate change.²⁴

The GHG performance measure established in this rule is the same measure discussed in the NPRM: Total annual tons of CO₂ emissions from all on-road mobile sources. The FHWA designed the measure in a manner that uses existing data sources and minimizes burden on transportation agencies. Because FHWA is establishing the measure under 23 U.S.C. 150(c)(3), it applies to the NHS in all States and metropolitan planning areas. State DOTs will calculate the measure by multiplying motor fuel sales volumes already reported to FHWA by FHWA-supplied emissions factors of CO₂ per gallon of fuel and percentage VMT on the NHS.

A discussion of legal comments received and a synopsis of the comments and responses on questions FHWA posed in the NPRM follow.

Legal Questions

Authority To Establish a GHG Measure

A number of commenters supported FHWA’s legal authority to adopt a GHG performance measure in this rulemaking. Commenters pointed to the language in 23 U.S.C. 150(a) as evidence that performance management is not limited to the performance measures listed in 23 U.S.C. 150(c), but rather is intended to focus on achieving the national goals in 23 U.S.C. 150(b). Commenters cited the national goal of environmental sustainability in 23 U.S.C. 150(b)(6) in supporting FHWA’s legal authority. That provision states “[i]t is in the interest of the United States to focus the Federal-aid highway program on the following national goals:

* * * (6) Environmental sustainability.—To enhance the performance of the transportation system while protecting and enhancing the natural environment.” Several commenters stated a GHG performance measure is within the statutory authorization of MAP-21, including the performance measure provision for on-

²⁴ See, e.g., discussion in Section III(A) of CEQ’s *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* (August 1, 2016). Available as of September 14, 2016, at <https://www.fhwa.dot.gov/map21/guidance/guidecmaq.cfm>.

road mobile source emissions under the CMAQ program (23 U.S.C. 150(c)(5)(B)). The commenters did not view the language as limited to the three pollutants specified in the CMAQ statute (*i.e.*, ozone, PM, and CO).

Some commenters pointed out that establishing a GHG performance measure would be consistent with other MAP-21 rulemakings. In particular, six members of the Senate Committee on Environment and Public Works pointed to the consistency between a GHG performance measure and provisions in FHWA's 23 U.S.C. 119(e) asset management rulemaking relating to current and future environmental conditions, including extreme weather events and climate change.

Commenters supporting FHWA's legal authority for a GHG performance measure also cited a number of provisions in title 23 of the United States Code as authority for the GHG measure. These included 23 U.S.C. 134(a)(1), 23 U.S.C. 134(c)(1), 23 U.S.C. 134(h), 23 U.S.C. 135(d)(1), and 23 U.S.C. 101(b)(3)(G).

Some commenters encouraged FHWA to interpret "air pollution" in 23 U.S.C. 134(a)(1) in a manner consistent with the definition of "air pollution" under the Clean Air Act,²⁵ which commenters felt would clearly bring GHG within the scope of 23 U.S.C. 134(a)(1) and under FHWA's authority. Commenters pointed to the CMAQ program as evidence of congressional intent to integrate the Clean Air Act into transportation planning. One commenter cited the Supreme Court decision in *Massachusetts v. EPA*, 547 U.S. 497, 528–29 (2007), for the principle that a GHG performance measure would not impermissibly conflict with the jurisdiction of other agencies, such as EPA.

One commenter stated that the authorizing language in 23 U.S.C. 150(c)(1) mandates that FHWA promulgate rules establishing performance measures and standards and in adopting that provision, Congress granted FHWA authority to promulgate rules establishing standards for performance management that apply to programs and objectives beyond those programs listed in 23 U.S.C. 150(c)(3)–(6). According to the commenter, the 23 U.S.C. 150(c)(2)(C) language limiting subsection 150(c) performance measures to those described in that subsection does not apply to performance standards adopted pursuant to the authorizing language in subsection 150(c)(1). The commenter concluded that 23 U.S.C. 150(c)(1) and 23 U.S.C.

135(d)(2) together give FHWA authority to establish standards for performance-based decisionmaking related to the national goals and planning objectives, including a GHG-related performance standard.

A number of commenters stated FHWA has no authority to adopt a GHG performance measure because they interpreted language in 23 U.S.C. 150(c)(2)(C) as barring the adoption of any measure not expressly listed in the statute. According to those commenters, the absence of a direct mention of GHG or climate change in the statute forecloses adoption of a GHG performance measure because 23 U.S.C. 150(c)(2)(C) states that in carrying out rulemaking for performance measures and standards, the Secretary shall limit performance measures "to those described in this subsection." One commenter also took the position a GHG performance measure would not be related to any of the measures expressly listed in 23 U.S.C. 150(c). One commenter stated that, because a GHG measure would not be among the types of measures allowed by 23 U.S.C. 150(c), and because there is no ambiguity in the statute, adoption of a GHG measure would violate the separation of powers doctrine in the U.S. Constitution.

Several commenters focused on the possibility of legal authority for promulgating a GHG performance measure stemming from the CMAQ provision in 23 U.S.C. 150(c)(5). Those commenters viewed the term "on-road mobile source emissions" in 23 U.S.C. 150(c)(5) as limited in scope to actions that further the purposes of the CMAQ statute, 23 U.S.C. 149. In their view, any performance measure under 23 U.S.C. 150(c)(5) would have to relate to one or more of the three pollutants listed in the CMAQ statute, 23 U.S.C. 149. Those commenters pointed out that none of the three listed pollutants is a GHG. A few pointed to an FHWA response in its recent final rule for metropolitan and statewide planning as being an admission no authority exists for a GHG measure, citing 81 FR 34050, 34077 (May 27, 2016).

Finally, some commenters suggested FHWA should not issue a GHG performance measure because other Federal offices and agencies have authority over such emissions and already are taking action in this area. They pointed to regulations adopted by the National Highway Traffic Safety Administration and EPA, as well as the recent issuance by the President's Council on Environmental Quality (CEQ) of National Environmental Policy

Act (NEPA) guidance on addressing GHGs.²⁶

In response to the comments on FHWA's legal authority for a GHG performance measure, FHWA first acknowledges the concerns and views expressed by commenters on both sides of the question. Commenters' responses to the NPRM's request for comments on a GHG measure provided important information for FHWA to consider when developing the final rule. After reviewing and fully evaluating all of the comments, FHWA confirmed that it has legal authority to adopt the GHG performance measure contained in this rule. The FHWA disagrees with commenters who stated there is no legal authority under 23 U.S.C. 150 for a GHG performance measure. In 23 U.S.C. 150(c)(3)–(6), the statute defines the general topics of statutory concern to be addressed by performance measures and the related program statutes (*e.g.*, condition of pavements on the Interstate and non-Interstate NHS for the purpose of carrying out 23 U.S.C. 119). While FHWA agrees performance measures adopted under 23 U.S.C. 150 must relate to the measures described in 23 U.S.C. 150(c), the statute gives FHWA the discretion to determine the nature and scope of specific performance measures that will fulfill the statutory mandates in 23 U.S.C. 150(c). Contrary to the interpretation of some commenters, FHWA's response in the final planning rule, stating 23 U.S.C. 150(c)(2)(C) "precludes FHWA from establishing any national performance measures *outside those areas identified in 23 U.S.C. 150*" (87 FR 34050, 34077) (emphasis added), conveyed this same point. Accordingly, in the three rulemakings to implement 23 U.S.C. 150, FHWA has adopted performance measures it determined were related to the 23 U.S.C. 150(c)(3)–(6) areas of concern and the cited program statutes. The FHWA has not adopted any performance measure that falls outside of those statutory parameters. The GHG performance measure established in this rule is no exception.

The FHWA is adopting the GHG performance measure under 23 U.S.C. 150(c)(3), which calls for performance measures that the States can use to assess performance of the Interstate and non-Interstate NHS for the purpose of carrying out 23 U.S.C. 119. 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V). Section

²⁵ 42 U.S.C. 7602(g),

²⁶ *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Review*, CEQ (August 1, 2016). Available as of September 14, 2016 at <https://www.fhwa.dot.gov/map21/guidance/guidecmq.cfm>.

150(c)(3) does not impose any limitation on what type of NHS performance may be measured in rules promulgated under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V). Consistent with its long-standing practice, FHWA interprets “performance” of the Interstate and non-Interstate NHS in those provisions to include environmental performance. This interpretation is supported by the many title 23 provisions that make the environment an integral part of the Federal-aid Highway Program, such as the national goal of environmental sustainability in 23 U.S.C. 150(b)(6), transportation planning provisions in 23 U.S.C. 134–135, and environmental provisions in 23 U.S.C. 109(c),(g),(h),(i), and (j).²⁷ The FHWA interpretation also is supported by the many FHWA actions to treat the environment, and specifically sustainability and climate change, as part of system performance. Examples include:

- The FHWA Strategic Plan, which embodies this view in its national system performance strategic goal: “The Nation’s Highway system provides safe, reliable, effective and sustainable mobility for all users.”²⁸
- The FHWA 2013 Conditions and Performance Report, which noted the transportation system is best able to reach peak performance when it can support economic competitiveness by providing adequate capacity and reliability while meeting sustainability goals.²⁹ For those reasons, FHWA stated, transportation agencies are being held accountable for how well they address these issues along with safety and state of good repair. The Report discussed the need to address climate change as part of promoting sustainability. The report described sustainability as requiring action to address climate change effects both through the reduction of GHG emissions and by ensuring the transportation system can adapt to future conditions caused by climate change.³⁰
- FHWA’s July 2013 guidance, *Handbook for Estimating Transportation Greenhouse*

Gases for Integration into the Planning Process.³¹

- FHWA’s December 2013 guidance, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*.³²
- FHWA Order 5520, *Transportation System Preparedness and Resilience to Climate Change and Extreme Weather Effects* (December 15, 2014),³³ which states climate change and extreme weather events are a significant and increasing risk to the safety, reliability, effectiveness, and sustainability of transportation infrastructure and operations. The Order points to the costly and sometimes recurring damage to infrastructure from such climate change effects as sea level rise, resulting in a need to address potential effects of climate change in order to protect the integrity of the transportation system and to ensure the sound investment of taxpayer dollars.³⁴
- The Long Term Bridge Performance Program (enacted under SAFETEA-LU, Pub. L. 109–59, 119 Stat. 1144 (August 10, 2005)). The program defines bridge performance, in part, as a multifaceted issue that involves multiple components and depends on multiple factors, including varying conditions of climate, air quality, and soil properties.³⁵
- The FHWA guidance on environmental performance in infrastructure development, construction, and maintenance.³⁶

Thus, as described in the NPRM for this rulemaking, FHWA already has taken steps to “integrate climate analysis into the transportation planning process” and to “encourage[] transportation agencies to consider GHG

emissions as part of their performance-based decisionmaking . . .” 81 FR at 23830.

Additional statutory support for a GHG measure may be found in 23 U.S.C. 119, which is the program statute referenced in 23 U.S.C. 150(c)(3). Section 119, enacted by MAP–21, sets forth the purposes of the NHPP, eligibilities for NHPP funding, purposes and requirements for State performance management (including asset management, significant progress and reporting requirements for performance measures), Interstate and bridge condition penalty provisions for falling below minimum conditions established by the Secretary, and environmental mitigation. Under the statute, the purposes of the NHPP include “to provide support for the condition and performance of the [NHS].” 23 U.S.C. 119(b). The performance management provisions in 23 U.S.C. 119(e) call for a performance-driven asset management plan that would “support progress toward the achievement of the national goals identified in section 150(b).” The national goals in 23 U.S.C. 150(b) include environmental sustainability. The environmental sustainability goal is to be achieved by “enhancing the performance of the transportation system while protecting and enhancing the natural environment.” 23 U.S.C. 150(b)(6). By incorporating the environmental sustainability goal into 23 U.S.C. 119, the statute affirms environmental sustainability as part of the performance of the NHS addressed by 23 U.S.C. 150(c)(3). Measures for assessing the performance of the NHS for the purpose of carrying out 23 U.S.C. 119 may include measures furthering the environmental sustainability national goal. The GHG performance measure falls within these parameters.³⁷

The FHWA agrees with commenters who cited several provisions in title 23 (23 U.S.C. 101(b)(3)(G), 134(a)(1), 134(c)(1), 134(h), 135(d)(1), and 135(d)(2)) in support of FHWA’s authority to address GHG emissions in this rulemaking. Those provisions identify interrelationships among, and in some cases call for action related to, environment, energy conservation, infrastructure performance, resiliency, and performance-based decisionmaking:

³⁷ Another national goal is congestion reduction (23 U.S.C. 150(b)(3)). In some cases, reduction in GHGs and congestion reduction are linked. For a discussion of the relationship between GHG emissions and congestion, see *Transportation’s Role in Reducing U.S. Greenhouse Gas Emissions, Volume 1, Synthesis Report*, USDOT Report to Congress (April 2010) (available as of September 14, 2016), at <http://www.reconnectingamerica.org/assets/Uploads/DOTClimateChangeReport-April2010-Volume1and2.pdf>.

²⁷ In addition, a number of statutes outside title 23, such as NEPA (42 U.S.C. 4321 *et seq.*), require consideration of the environment as part of developing and implementing infrastructure projects.

²⁸ *FHWA Strategic Plan* (2008–2016). The FHWA first adopted the plan in 2008 (available as of September 14, 2016 at <http://www.fhwa.dot.gov/strategicplan.pdf>). Since then, FHWA has updated the plan periodically, but the strategic goals and objectives have not changed. The FHWA did remove the sections outlining national strategies for achieving the agency’s strategic goals. This was done because the national strategies may change from year-to-year. The current version of the *FHWA Strategic Plan* (2016) is available at <http://www.fhwa.dot.gov/policy/fhplan.cfm> (as of September 14, 2016).

²⁹ *FHWA 2013 Conditions and Performance Report* (PDF Version) at 5–2. Available as of September 14, 2016, at <https://www.fhwa.dot.gov/policy/2013cpr/>.

³⁰ *Id.* at 5–6 through 5–7.

³¹ Available as of September 14, 2016, at http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_handbook/ghghandbook.pdf.

³² Available as of September 14, 2016, at http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_planning/ghg_planning.pdf.

³³ Available as of September 14, 2016, at <http://www.fhwa.dot.gov/legregs/directives/orders/5520.cfm>.

³⁴ See Section 3 of FHWA Order 5520 (December 15, 2014).

³⁵ See Long-Term Bridge Performance Program Web site (available as of September 14, 2016, at <https://www.fhwa.dot.gov/research/tfhrcc/programs/infrastructure/structures/tltp/about.cfm>).

³⁶ See, e.g., “Improving Environmental Performance in Construction and Maintenance, FHWA Successes in Stewardship Newsletter (March 2005, available as of September 14, 2016, at <https://www.environment.fhwa.dot.gov/strmlng/newsletters/mar05nl.asp>); “Highways in the Coastal Environmental: Assessing Extreme Federal Highway Administration, Hydraulic Engineering”, FHWA Hydraulic Engineering Circular No. 1 25–Vol. 2, Publication No. FHWA–NHI–14 (October 2014, available as of September 14, 2016, at <http://www.fhwa.dot.gov/engineering/hydraulics/pubs/nhi14006/nhi14006.pdf>); “Eco-Logical: An Ecosystem Approach to Developing Infrastructure Projects”, FHWA Environmental Review Toolkit (available as of September 14, 2016, at https://www.environment.fhwa.dot.gov/ecological/eco_5.asp); Office of Infrastructure Research and Development Web page (available as of September 14, 2016, at <https://www.fhwa.dot.gov/research/tfhrcc/offices/infrastructure/>).

• 23 U.S.C. 101(b)(3)(G) is a transportation policy declaration that “. . . transportation should play a significant role in promoting economic growth, improving the environment, and sustaining the quality of life . . .”.

• 23 U.S.C. 134(a)(1) is a congressional statement of transportation planning policy that it is in the national interest “. . . to encourage and promote the safe and efficient management, operation, and development of surface transportation systems . . . while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter . . .”.

• 23 U.S.C. 134(c)(1) requires metropolitan planning organizations to develop long range plans and transportation improvement programs to achieve the objectives in section 134(a)(1) through a performance-driven, outcome-based approach to planning.

• 23 U.S.C. 134(h) defines the scope of the metropolitan planning process. Paragraphs (h)(1)(E) and (I), respectively, require consideration of projects and strategies that will “. . . protect and enhance the environment, promote energy conservation, improve the quality of life . . .” and “. . . improve the resiliency and reliability of the transportation system . . .”.

• 23 U.S.C. 135(d)(1) defines the scope of the statewide planning process. Paragraphs (d)(1)(E) and (I) respectively, require consideration of projects, strategies, and services that will “. . . protect and enhance the environment, promote energy conservation, improve the quality of life . . .”, and “. . . improve the resiliency and reliability of the transportation system . . .”.

• 23 U.S.C. 135(d)(2) requires the statewide transportation planning process to “. . . provide for the establishment and use of a performance-based approach to transportation decisionmaking to support the national goals described in section 150(b) of this title . . .”.

In addition to the provisions listed above, the performance-based planning requirements in 23 U.S.C. 134(h)(2)(A) mirror the statewide provision in 23 U.S.C. 135(d)(2), stating the “. . . planning process shall provide for the establishment and use of a performance-based approach to transportation decisionmaking to support the national goals described in section 150(b) of this title . . .”.

Read together, these title 23 provisions make it clear that assessing infrastructure performance under 23 U.S.C. 150(c)(3) may properly encompass assessment of environmental performance, including GHG emissions and other climate-related matters. The fact that other Federal agencies have jurisdiction to act on those matters (in this case, climate change and GHGs) does not preclude FHWA from taking actions to help ensure the Federal-aid Highway Program fulfills its statutory objectives in title 23.

With respect to comments regarding FHWA's authority to establish a GHG performance measure pursuant to 23 U.S.C. 150(c)(5) (CMAQ), FHWA agrees such authority exists, but FHWA has chosen to adopt the measure under 23 U.S.C. 150(c)(3) (NHPP) because it is more consistent with FHWA's view that environmental performance is a key indicator of the success of the highway system, and because 23 U.S.C. 150(c)(3) permits the application of the measure to the entire NHS. The FHWA also agrees with commenters that FHWA has authority to establish performance standards pursuant to 23 U.S.C. 150(c)(1) and that the performance standard authority is not subject to the limiting language in 23 U.S.C. 150(c)(2)(C). However, this rulemaking is for performance measures, and FHWA does not believe it would be appropriate to use this rulemaking to establish a GHG emissions performance standard for States and MPOs.

Establishing a GHG Performance Measure in This Rulemaking

Several commenters argued that, should FHWA decide to establish a GHG performance measure, it should do so through a separate rulemaking. They claimed that the NPRM did not provide sufficient detail about the type of measure FHWA might adopt for them to comment on the issue meaningfully. The FHWA disagrees. The NPRM clearly signaled that FHWA was considering a GHG performance measure, pointed out the substantial body of research and guidance that FHWA and others have developed on ways to incorporate GHGs into performance-based transportation planning and programs, requested comment on a series of questions about whether and how to establish a GHG performance measure, and identified a preferred approach if a measure was to be adopted. The FHWA received many substantive comments in response to these questions, including from those who claimed the need for another round of rulemaking. These comments included numerous suggestions on how to structure (and not structure) a GHG measure. The FHWA relied on these comments to refine the measure included in the final rule. The CO₂ performance measure established in this rule is the same as that described in the NPRM and is consistent with elements recommended in several of the comments received. The detail and substance of information and suggestions received in response to the questions FHWA posed clearly show that interested parties were capable of providing, and in fact did provide,

informed comments regarding the establishment of a GHG performance measure.

Discussion of Comments Received in Response to NPRM Questions

a. Should FHWA include a measure that measures Greenhouse Gases (GHG)?

The FHWA's decision to establish a GHG measure is responsive to three major categories of comments:

(1) Numerous commenters claimed that the set of performance measures proposed in the NPRM was too narrowly focused on the speed of vehicles moving through the system, to the detriment of other key aspects of system performance such as environmental performance, and the ability of people to reach a variety of destinations conveniently and affordably by multiple modes.³⁸ The FHWA agrees that as sound policy, the set of national performance measures must cover multiple key aspects of performance, otherwise decisionmaking may not properly take into account important aspects of performance. In response, this final rule includes measures on GHG emissions and modal share and consolidates NPRM measures stakeholders perceived as duplicative.

(2) Multiple commenters noted that a GHG measure would provide decisionmakers with better information about the transportation system's GHG emissions and a means for measuring progress. The State DOTs from California, Colorado, Delaware, Minnesota, Oregon, Pennsylvania, Vermont, Virginia, and Washington submitted a joint letter supporting the creation of a measure specific to GHG emissions from the transportation sector. The National Association for Clean Air Agencies noted that performance measures create transparency and help policy makers to determine how their goals are most likely to be achieved. The FHWA agrees with these comments.

(3) Numerous commenters³⁹ argued that a GHG measure should be implemented because policies to reduce GHG pollution from transportation are essential to minimize the impacts from climate change, which include sea level rise and increased frequency and

³⁸ See comments from New York State DOT, Nelson Nygaard, Sierra Club, Utah DOT, Association of Metropolitan Planning Organizations (AMPO), and the National Association of Regional Councils (NARC), as well as citizen letter campaigns sponsored by Transportation for America and Smart Growth America.

³⁹ See for instance comments from Center for Neighborhood Technology, Natural Resources Defense Council, U.S. Public Interest Research Group.

severity of heat waves and heavy downpours that threaten human health, agriculture, the economy, and transportation.⁴⁰ Reports from FHWA and the National Academy of Sciences detail negative impacts of climate change on the NHS.⁴¹

The FHWA agrees with these comments. Greenhouse gas emissions from the transportation sector recently surpassed those from electricity generation, making transportation the largest source of GHG emissions in the U.S.⁴² After decades of rapid increases, U.S. transportation carbon emissions are projected to remain relatively flat in the future, as future increases in freight and passenger travel are counterbalanced by stricter fuel economy standards for light-duty vehicles and new standards for medium- and heavy-duty vehicles.⁴³ Significantly greater reductions in transportation GHG emissions are needed to meet the near-term target of 26 to 28 percent below 2005 levels by 2025 and long-term trajectories of 80 percent or more by 2050 which would be consistent with the U.S. Midcentury Strategy for Deep Decarbonization and consistent with the long-term goals of the Paris Agreement.⁴⁴ Achieving CO₂

reductions of this magnitude will require actions such as reducing the growth in future travel activity and improving system efficiency, which are influenced by the planning activities and investment decisions of State DOTs and MPOs. A GHG measure emerged as a leading candidate for measuring the environmental aspect of the performance of the highway system during FHWA and stakeholder discussions in 2009.⁴⁵ Subsequently, FHWA initiated a research project to investigate GHG measures that would align with performance-based planning and programming, as well as how State DOTs and MPOs could go about implementing such a measure. A number of FHWA stakeholders served on the expert panel that provided input into the development of the resulting research report, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*.⁴⁶

The FHWA disagrees with commenters that argued that FHWA should not include a GHG measure because they felt that State DOTs and MPOs have insufficient ability to impact GHG emissions. State DOTs and MPO recipients of Federal transportation funds have control or influence over many strategies that impact transportation GHG emissions. These strategies can be divided into four major groups:⁴⁷

(1) *System efficiency*. These strategies optimize the operation, use, and maintenance of transportation networks, which in turn reduce GHG emissions per unit of travel. Relevant strategies include speed harmonization, speed limit reduction and enforcement, ramp metering, incident management, traveler information, traffic signal timing optimization, bottleneck relief, anti-idling ordinances, congestion pricing, and the improvement in freight intermodal connections.

(2) *Reducing the growth in VMT*. These strategies reduce the need to travel, increase vehicle occupancies,

and shift travel to more energy efficient options. Relevant strategies include integrated transportation and land use planning in coordination with local governments, public transportation and non-motorized transportation improvements and incentives, car sharing, employer-based strategies (such as telework), parking management and pricing, road pricing, and pay-as-you drive insurance.

(3) *Promoting alternative fuel vehicles*. State DOTs and MPOs can help plan for the siting and deployment of electric vehicle charging stations, designate and promote alternative fuel corridors, promote workplace charging initiatives, and promote adoption of alternative vehicles within agency and private fleets.

(4) *Increasing vehicle fuel efficiency*. State DOTs and MPOs can help bring to market higher efficiency vehicles and improve the performance of in-use vehicles. Relevant strategies include scrappage programs for low-mileage vehicles, feebates, heavy-duty vehicle retrofits, truck stop electrification, and eco-driver education and training.

The FHWA disagrees with the American Petroleum Institute, which suggested that FHWA should not include a performance measure on GHG because transportation GHG emissions are regulated by fuel economy standards. Continued growth in VMT is expected to counterbalance improvements in fuel economy, and as such, fuel economy standards alone are insufficient to reach GHG goals.

To allay some of the burden concerns raised by those arguing against a GHG emissions measure, FHWA has chosen a measure that relies on existing data and is straightforward to calculate. Limiting the measure to CO₂ simplifies calculations (since unlike the other GHGs, it is emitted in direct proportion to the amount of fuel burned), while still capturing 95 percent of transportation GHGs.⁴⁸ Limiting the measure to on-road emissions rather than full life cycle also simplifies analysis. The overall burden on State DOTs and MPOs is further reduced in the final rule by the elimination of the two NHPP peak hour performance measures and the truck congestion measure.

⁴⁸ U.S. Department of Transportation, *Report to Congress: Transportation's Role in Reducing U.S. Greenhouse Gas Emissions*, 2010. The other greenhouse gases from transportation are hydrofluorocarbons (HFCs), methane (CH₄) and nitrous oxide (N₂O).

⁴⁰ United States Government, *National Climate Assessment*, 2014. <http://nca2014.globalchange.gov/>.

⁴¹ U.S. Department of Transportation, *Gulf Coast Study Phases I and II*, 2008 and 2015. http://www.fhwa.dot.gov/environment/climate_change/adaptation/ongoing_and_current_research/gulf_coast_study/.

Federal Highway Administration, *Climate Resilience Pilot Program: Outcomes, Lessons Learned, and Recommendations*, 2016. http://www.fhwa.dot.gov/environment/climate_change/adaptation/resilience_pilots/2013-2015_pilots/final_report/.

The Transportation Research Board of the National Academy of Sciences, *The Potential Impacts of Climate Change on US Transportation*, 2008. <http://www.trb.org/Main/Blurbs/156825.aspx>.

Impacts include increases in flooding damaging roadways and disrupting travel, increases in heat waves degrading materials and impacting worker health and productivity, permafrost melt destabilizing roadways, changes in precipitation patterns leading to more landslides, drought conditions causing soil shrinkage and pavement cracking, as well as increased susceptibility to wildfires, causing road closures. Climate change increases the frequency and/or intensity of many extreme weather events that damage or disrupt transportation. Scenarios with lower greenhouse gas emissions in the future show lower negative impacts on the transportation system.

⁴² U.S. Department of Energy, Energy Information Agency (EIA), <http://www.eia.gov/totalenergy/data/monthly/>.

⁴³ U.S. Department of Energy, Energy Information Agency (EIA), *Annual Energy Outlook*, 2016. http://www.eia.gov/forecasts/aeo/tables_ref.cfm.

⁴⁴ U.S. Government, "Fact Sheet: U.S. Reports its 2025 Emissions Target to the UNFCCC," March 2015. <https://www.whitehouse.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc>.

U.S. Government, "U.S. Mid-Century Strategy for Deep Decarbonization," November 4, 2016. <https://www.whitehouse.gov/the-press-office/2016/11/04/us-mid-century-strategy-for-deep-decarbonization>.

www.whitehouse.gov/sites/default/files/docs/mid_century_strategy_report-final.pdf.

⁴⁵ American Association of State Highway and Transportation Officials (AASHTO) Standing Committee on Performance Management (SCOPM), "Meeting Minutes," October 23, 2009. <http://scopm.transportation.org/Documents/Minutesof10.09SCOPMMeeting.doc>.

⁴⁶ FHWA, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, December 2013, Acknowledgements section of report front matter. http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_planning/ghg_planning.pdf.

⁴⁷ U.S. Department of Transportation, *Report to Congress: Transportation's Role in Reducing U.S. Greenhouse Gas Emissions*, 2010.

Should the measure address all on-road mobile sources or focus only on a particular vehicle type?

All of the commenters who responded to this question favored a measure that addressed all on-road mobile sources. The FHWA agrees. This approach allows for a more comprehensive picture of the transportation system's contribution to emissions, from passenger vehicles to freight movement.

b. Should the measure be normalized by changes in population, economic activity, or other factors (e.g., per capita or per unit of gross state product)?

Multiple commenters suggested that the measure examine both total emissions and be normalized by changes in population. Total emissions will need to be reduced to achieve GHG reduction goals; normalizing on a per capita basis acknowledges the fact that many States and regions are experiencing significant population growth. In addition to normalizing by population, the Texas DOT suggested normalizing by gross State product, port activity, State land mass, and consideration of the current built environment. Another commenter noted that a GHG performance measure indexed to gross State product or other economic indicators could rise or fall quickly based on economic trends that are difficult to predict, limiting its value in decisionmaking.

The FHWA decided a total on-road CO₂ measure (limited to travel on the NHS) is the best option. It makes assessment of progress toward performance management targets and national U.S. goals relatively easy. In contrast, CO₂ per capita could be decreasing while total on-road CO₂ is still increasing, failing to provide the total emissions data needed to understand and measure the performance goal of environmental sustainability.

The FHWA notes that State DOTs and MPOs have discretion to use additional performance measures and may wish to normalize CO₂ by total population as an additional useful indicator in their analyses. An FHWA research project identified light-duty vehicle CO₂ emissions per capita as a helpful additional measure to combine with the total on-road emissions measure. The research project report also includes information on data sources and methodologies.⁴⁹

c. Should the measure be limited to emissions coming from the tailpipe, or should it consider emissions generated upstream in the life cycle of the vehicle operations (e.g., emissions from the extraction/refining of petroleum products and the emissions from power plants to provide power for electric vehicles)?

Some commenters, including most of the MPO and State DOT commenters, recommended that the measure focus solely on tailpipe emissions, noting that tailpipes are the largest source of transportation emissions. These commenters noted that upstream fuel cycle emissions are more difficult to calculate and are largely outside the control of the transportation agency.

Others, including the Center for Neighborhood Technology, Natural Resource Defense Council, the National Association for City Transportation Officials, and the New York City DOT recommended that the performance measure include emissions generated upstream.

Several commenters, including the Sabin Center for Climate Change Law and the CMAP, recommended an intermediate approach to account for the electricity used to power electric vehicles.

After considering these comments and balancing the factors, FHWA decided to limit the measure to on-road CO₂ emissions for reasons of focus and simplicity.

One difficulty with upstream emissions from petroleum extraction and refining is they vary by where and how the fuel is extracted. An option is to use the national average adjustment factor of 27 percent to account for the upstream fuel-cycle emissions.^{50 51 52} This methodology can be helpful for understanding transportation's overall contribution to GHG emissions, but does not add value as a measure of State or MPO performance. Adjustments based on the national average fail to provide the type of differentiated information needed to capture the outcomes of State and MPO actions. A measure focused on tailpipe emissions simplifies the calculations and provides the type of specific information helpful to States and MPOs as they determine what measures to adopt to influence GHG outcomes.

The FHWA considered the comments supporting a measure that captures upstream emissions from electric cars,

but declines to do so at this time because of the complexity it would add to the measure. Upstream emissions from electricity are more difficult to calculate because one must estimate the level of electricity consumed by electric vehicles. These data are not tracked separately and generally are estimated based on electric vehicle registration data. In addition, excluding upstream electricity emissions will preserve the rule's focus on on-road emissions. While FHWA has decided to exclude upstream emissions from the GHG measure in this rule, research indicates electric vehicles typically produce lower lifecycle GHG emissions than the average gasoline-based vehicle, even when using electricity from the highest carbon U.S. electricity grids.^{51 thnsp;52} Transportation agency actions to encourage electric vehicle use (such as deployment of charging infrastructure, preferred use of High Occupancy Vehicle/express lanes for electric vehicles, etc.) will result in reduced overall CO₂ emissions as well as reduced CO₂ emissions in the tailpipe measure.

State DOTs may voluntarily report additional measures of CO₂ performance, in addition to their baseline requirement. These additional measures, or variations, could include metrics for electric vehicle emissions, VMT-based estimates, and/or per capita emissions, among other options to test innovative reporting options. The FHWA's online reporting portal allows the State to attach supplemental information at their discretion.

d. Should the measure include non-road sources, such as construction and maintenance activities associated with Title 23 projects?

Several commenters, including the Georgia and Minnesota DOTs, Denver Regional Council of Governments, and the San Francisco Municipal Transportation Agency, recommended that the measure be limited to tailpipe emissions. These commenters said that tailpipe emissions make up the majority of transportation emissions and that construction and maintenance emissions are more difficult to calculate. Other commenters recommended that tracking emissions from construction and maintenance of highway projects is desirable, but that emissions from

⁵¹ Union of Concerned Scientists, *Cleaner Cars from Cradle to Grave*, 2015. http://www.ucsusa.org/clean-vehicles/electric-vehicles/life-cycle-ev-emissions#.V_Ug2E2V_ct.

⁵² Department of Energy, *Emissions from Hybrid and Plug-in Vehicles*, 2016. http://www.afdc.energy.gov/vehicles/electric_emissions.php.

⁴⁹ FHWA, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, December 2013.

⁵⁰ The U.S. EPA published estimates of fuel-cycle greenhouse gas emissions in "Greenhouse Gas Emissions from the U.S. Transportation Sector, 1990–2003." ¹ The U.S. EPA calculated a national average adjustment factor of 1.27 (or 27 percent).

facility use (*i.e.*, tailpipe emissions) warrant the largest share of attention and analysis.

The FHWA agrees with commenters that the measure should be limited to tailpipe emissions. Accordingly, construction and maintenance emissions are not included in the CO₂ emissions measure because of the complexity and burden it would add to the measure. The level of construction and maintenance emissions varies year to year based on project cycles. This means that grouping them with on-road vehicle emissions in a single performance measure would make it more difficult to analyze trends and ascertain progress. A separate measure for construction and maintenance CO₂ emissions may be helpful, but FHWA is not adopting such additional measure in this rulemaking. The FHWA wishes to limit the performance management burden on State DOTs and MPOs by, in part, limiting the number of performance measures adopted in this rulemaking.

However, FHWA encourages State DOTs and MPOs efforts to track and reduce construction and maintenance CO₂ emissions. One tool for this is FHWA's Infrastructure Carbon Estimator (ICE)⁵³ tool. These emissions can be included in other CO₂ emissions analyses that agencies may be conducting during the transportation planning process.

e. Should State-level CO₂ emissions be estimated based on gasoline and diesel fuel sales, system use (vehicle miles traveled [VMT]), or other surrogates?

Several commenters, including the DOTs of California, Colorado, Delaware, Virginia, Oregon, Pennsylvania, Vermont, Wisconsin, and Minnesota, recommended that, at least in the short term, the measure should use fuel sales data to calculate CO₂ emissions. They noted that CO₂ is emitted in direct proportion to the amount of fuel burned and that States already report fuel sales data to FHWA. However, commenters noted some disadvantages of using fuel sales data: It is not available at finer geographic scales, such as the metropolitan level, and there are boundary issues with fuel purchased in one State but combusted in another State or region.

Other commenters, including the Georgia DOT, Denver Regional Council of Governments, Southwest Energy Efficiency Project, and the Center for Neighborhood Technology,

recommended that the measure should use VMT as the basis for estimating CO₂ emissions. They stated that using VMT data from travel demand models combined with the EPA MOVES⁵⁴ model to estimate CO₂ emissions based on travel distances, speeds, and operating conditions provide an accurate picture of on-road CO₂ emissions in a State or region. In addition to calculating current emissions, this type of analysis is also helpful in understanding how State DOT and MPO investment decisions and policies, such as adding proposed new lane miles, can influence future CO₂ emissions by altering inputs to the travel demand model. The commenters acknowledged, however, that many State DOTs and MPOs lack the modeling expertise and quality data needed to use a method that relies on a travel demand model in combination with MOVES.

The FHWA decided that for calculating the CO₂ emissions performance measure, States will use a methodology that relies on fuel sales volumes. This method is simple, accurate, and relies on data that States already report to the agency. Commenters pointed out a fuel-based measure would have minimal implementation costs as compared to a VMT-based measure, which would require transportation agencies to dedicate staff to the effort and incur new ongoing costs.

Fuel-based methods typically rely on estimates of fuel sales and directly convert fuel use estimates into CO₂ emissions estimates based on the carbon content of each fuel. The basic equation for estimating CO₂ emissions using fuel sales is:

$$\text{Fuel Consumed} \times \text{CO}_2 \text{ emissions per unit of fuel} = \text{CO}_2 \text{ Emissions}$$

The CO₂ emissions factor depends on the fuel type (*e.g.*, motor gasoline, diesel).

The VMT-based methods rely on quantifying the amount of vehicle travel and then connecting this information to an estimate of CO₂ emissions using emission factors or an emissions model. The basic equation for estimating emissions using VMT is:

$$\text{VMT} \times \text{CO}_2 \text{ per VMT} = \text{CO}_2 \text{ Emissions}$$

However, to achieve an accurate picture and assess improvements, the process would have to use different emissions factors (typically presented in grams of CO₂ per mile) for different vehicle types,

classes within vehicle types, technology/fuels types, speeds, and operating conditions.

For the GHG performance measure, State DOTs must use the fuel sales methodology for calculating State on-road CO₂ on the NHS. However, in addition to the baseline requirement for State DOTs to report on-road CO₂ on the NHS using a fuel sales methodology, State DOTs may voluntarily report CO₂ emissions using alternative methods, such as VMT based methods. State DOTs would attach this as supplemental information in FHWA's online reporting portal.

For metropolitan planning areas, MPOs and State DOTs are granted flexibility in how they calculate the required CO₂ performance measure. The FHWA adopted these different approaches because of: (1) The lack of data available on fuels sales at the metropolitan planning area level and (2) the need to ensure one consistent method for State DOT measures in order to understand national performance trends and to allow for a consistent approach to progress determinations.

Methodologies available for calculating on-road NHS CO₂ emissions for metropolitan planning area include (in order of level of effort):

Fuel-based Methods:

If fuel sales volumes are available at the metropolitan planning area level, MPOs may use the same fuel-based method as outlined for the State DOTs (fuel volumes multiplied by emissions factors). The strengths of this method are that it is simple and consistent with the State method. There are limitations to this method. Fuel sales data are not usually available at the metropolitan planning area level. Also, fuel sales may not match well with actual travel activity in smaller geographic areas, as drivers may purchase fuel in one area and use it in another area. This is much more of a concern at the metropolitan planning area level than the State level since the metropolitan planning area is a smaller geographic unit.

Another option is for MPOs to allocate GHG emissions based on metropolitan planning area share of NHS VMT. This is done by multiplying the statewide NHS on-road CO₂ emissions by the percent of the State's NHS travel that occurs within the MPA. The strengths of this method are that it is simple, providing a rough estimate of the metropolitan planning area share of CO₂ emissions. However, this method does not account for differences between metropolitan areas and between metropolitan and rural areas in vehicle fleets, speeds, and operating

⁵³ FHWA, *Infrastructure Carbon Estimator*, http://www.fhwa.dot.gov/environment/climate_change/mitigation/tools/carbon_estimator/.

⁵⁴ The Motor Vehicle Emissions Simulator (MOVES) is EPA's official model for estimating emissions from cars, trucks and motorcycles. <http://www.epa.gov/otaq/models/moves/index.htm>.

conditions. It will not accurately capture some types of strategies that the MPO may use to reduce CO₂ emissions, such as traffic smoothing with roundabouts or advanced signal timing.

VMT-based Methods:

The MPOs may use VMT from HPMS and national average emissions factors per mile of travel. The strengths of this method are that it is simple and well-gearred toward areas without network travel models. In addition, FHWA will provide emissions look-up tables by types of facilities and speed ranges reflecting national averages. The main limitation is that it does not account for the range of factors that vary in different locations and impact fuel consumption per mile of travel (and consequently CO₂ emissions per mile of travel), such as vehicle fleet composition, and operating conditions.

The MPOs also may use VMT from travel demand models combined with MOVES.⁵⁵ The strengths of this method include that MPOs in air quality nonattainment and maintenance areas are already conducting this analysis and can include CO₂ emissions in the MOVES output without additional effort. It provides robust and granular information on emissions. In addition to estimating current emissions, it is also well suited to support target-setting and analyze impacts of different transportation investment strategies on future emissions. However, some travel demand models are not sensitive to some CO₂ emissions reduction strategies such as the implementation of intelligent transportation system (ITS) strategies and operational improvements, the provision of pedestrian and bicycling infrastructure, and mixed use development. For areas not already using MOVES, MPOs will need to assemble local data or rely on default data, (relying on default data reduces accuracy). Areas not already using MOVES will need to become familiar with how to use the tool. Information on MOVES training is available on EPA's MOVES Web page: <https://www.epa.gov/moves/moves-training-sessions>.

A third option is FHWA's Energy and Emissions Reduction Policy Analysis Tool (EERPAT). The EERPAT is an integrated modeling system designed specifically to evaluate strategies for reducing surface transportation GHG emissions. It uses emissions factors from MOVES. There are several strengths to this method. In addition to estimating current emissions, EERPAT is also well suited to target-setting and analyzing impacts of different transportation

investment strategies on future emissions. It is sensitive to a number of strategies that are difficult to analyze using travel demand models, such as mixed use development, car sharing and provision of non-motorized infrastructure. The EERPAT can evaluate future changes in land use and is sensitive to external changes in the price of fuel. It can incorporate changes in vehicle technology, including the rebound effect from lower per-mile travel costs. It can be used to assess the overlapping effects of strategies applied in combination. The limitations of this method include the large number of model inputs required, some of which may be difficult to obtain. The EERPAT does not include a detailed representation of the transportation network, and has limited sensitivity to the impact of additional roadway and transit capacity.

The FHWA's *Handbook for Estimating Transportation Greenhouse Gases for Integration into the Planning Process* provides step-by-step instructions on how to use these methods, as well as information on strengths and limitations of each. If MPOs have the technical capacity to use MOVES or EERPAT, FHWA encourages them to do so since they are more accurate.

f. Due to the nature of CO₂ emissions (e.g., geographic scope and cumulative effects) and their relationship to climate change effects across all parts of the country, should the measure apply to all States and MPOs? Are there any criteria that would limit the applicability to only a portion of the States or MPOs?

Nearly all commenters agreed that if a GHG measure were established, it should apply nationwide to all State DOTs and MPOs since all GHG emissions have the same impact on climate no matter where they are generated. The Air Pollution Control Division of the Colorado Department of Public Health and Environment recommended measuring performance on a statewide basis, not locally or regionally. The California DOT recommended that the measure apply and be reported by all States and that MPOs be encouraged to participate in target-setting discussions. Similarly, the North Front Range MPO suggested that the role of MPOs be limited to participating with State DOTs in target setting and development of reduction strategies.

A building materials firm, CEMEX, suggested that efforts should focus on the roads with the most traffic and trucks, namely the NHS.

After considering the comments received, FHWA decided that the measure should apply to the NHS in all States and MPOs. The measure is limited to CO₂ emissions on the NHS since the measure is to assess the performance of the NHS, per 23 U.S.C. 150(c)(3)(A)(ii)(IV) and (V). Existing data do not differentiate the exact volumes of fuel burned on the NHS versus the volume of fuels burned on other roads. Therefore, States will use VMT data to calculate the portion of travel that occurs on the NHS versus other roads and use that proportion to estimate the proportion of CO₂ emissions on the NHS.⁵⁶ Table VM-3 Federal-Aid Highway Travel (Annual Vehicle-Miles), found in FHWA's *Highway Statistics*, supplies the needed VMT information.⁵⁷

g. Would a performance measure on CO₂ emissions help to improve transparency and to realign incentives such that State DOTs and MPOs are better positioned to meet national climate change goals?

Several commenters noted that a CO₂ performance measure would help transportation agencies examine trends and analyze the effectiveness of strategies in achieving their goals. They also noted that it would create transparency, allowing stakeholders and the public to see what goals are being set, how they are being pursued, and the results the measure produced. The State DOTs of California, Colorado, Delaware, Minnesota, Oregon, Pennsylvania, Virginia, Vermont, and Washington recommended that FHWA work with States to develop a national climate change goal for transportation that aligns with the Paris Climate Change Agreement. These DOTs suggested that States should use a CO₂ performance measure to drive decisions that help to meet or exceed the national goals under that agreement.

The Georgia DOT noted that the performance measure's effect on transparency would depend on the transparency and complexity of the measure itself and the associated reporting requirements. A GHG measure could help align incentives with national climate change goals, but would be an additional factor to

⁵⁶ The FHWA recognizes that this is not a perfect proxy, as speeds, operating conditions, and vehicle types on the NHS differ from those on other roads and differ between States. However, in balancing the competing goals of simplicity and precision, FHWA believes that this approach provides actionable information that DOTs and MPOs can use in evaluating system performance and making decisions, without significantly increasing workloads.

⁵⁷ Available at <https://www.fhwa.dot.gov/policyinformation/statistics.cfm>.

⁵⁵ Or EMFAC in California.

consider in the tradeoff analysis conducted under a performance-based planning and programming approach.

The FHWA agrees with these comments. The CO₂ performance measure adopted in this rule can serve to advance the environmental performance of the NHS as well as to drive decisions that contribute to national GHG reduction goals, such as those described in the President's Climate Action Plan.⁵⁸ The simplicity of the GHG performance measure and the reporting requirements will make it easier for States and MPOs to administer the measure and their targets, and to incorporate reduction strategies into their planning process and investment decisions.

The Texas DOT suggested that any GHG emission reduction that State DOTs or MPOs could achieve would be small compared to the overall level of emissions. The FHWA notes that climate change results from the incremental addition of GHG emissions from millions of individual sources, which collectively have a large impact on a global scale. The totality of climate change impacts is not attributable to any single action, but is exacerbated by a series of actions, including actions taken under the Federal-aid Highway Program. Therefore, a statement that emissions from a proposed action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge⁵⁹ and is not an appropriate basis for deciding whether or to what extent to consider CO₂ emissions from transportation in the performance management framework.

Publicly-available FHWA reports provide detailed guidance on how State DOTs and MPOs can include GHG emissions measures in performance management and how to estimate emissions levels.⁶⁰

h. The target establishment framework proposed in this rulemaking requires that State DOTs and MPOs would establish 2 and 4 year targets that lead to longer term performance expectations documented in longer range plans. Is this framework appropriate for a CO₂ emissions measure?

Several commenters, including the California, Minnesota, and Washington DOTs, and the North Front Range MPO, recommended that the measure have 4- and 20-year targets. These commenters suggested that a 2-year target may be too short to demonstrate significant changes to statewide CO₂ emissions. They said that a 4-year, short-term target would align the CO₂ measure with other national system performance measures and the 20-year long-term CO₂ performance target would align with the long-range planning timeline.

Some commenters suggested targets align with other processes, such as the timing cycles for transportation improvement programs (TIPs) (4 years), long range transportation plans (20 years), and air quality conformity analyses.

The FHWA decided that making the CO₂ measure consistent with the other NHPP performance measures would ease and streamline implementation. Even though a 2-year target is a very short timeframe, it can indicate progress toward a longer term goal and can reflect short-term actions such as operational improvements. Consistent with the other performance measures, for the CO₂ measure, State DOTs must establish both 2- and 4-year targets. The MPOs are subject only to a 4-year target-setting requirement for CO₂ emissions and MPOs must either:

- Agree to plan and program projects so that the projects contribute toward the accomplishment of the relevant State DOT target for the performance measure; or
- Commit to a quantifiable 4-year target for the performance measure for their metropolitan planning area.

In making this decision, FHWA does not discount the role of statewide and metropolitan long range transportation plans in performance management. These long range plans (20 years or more) include long-term expectations for the performance measures. The longer-term performance expectations are particularly important for CO₂ emissions as many reduction strategies, such as integrated land use and transportation planning or provision of new public transit systems, take years to implement or show impacts.

The FHWA also notes that the planning regulations relate directly to the performance management

regulations. The long range (20-year) transportation plans must include the required performance measures and targets (including for CO₂) and a system performance report that evaluates the condition and performance of the transportation system with respect to the performance targets. The short term (4-year) programming STIPs and TIPs must include a discussion of the anticipated effect of the STIP and TIP toward achieving the performance targets in the long range transportation plans. And for MPOs, the TIP must be designed such that once implemented, it makes progress toward achieving the performance targets in the long range plan.

The relevant regulatory sections are:

- 23 CFR 450.216(f)(1) and (2) and 450.324(f)(3) and (4) require that the long-range statewide transportation plan and the metropolitan transportation plans include a description of the performance measures and performance targets used in assessing the performance of the transportation system and that they also include a system performance report evaluating the condition and performance of the transportation system with respect to the performance targets.

- 23 CFR 450.218(q) and 450.326(d) require that the STIP and TIP shall include, to the maximum extent practicable, a discussion of the anticipated effect of the STIP and the TIP toward achieving the performance targets in the long-range statewide transportation plan and the metropolitan transportation plans. Also, § 450.326(c) requires that the TIP shall be designed such that once implemented, it makes progress toward achieving the performance targets in the metropolitan transportation plan.

State DOTs and MPOs both have substantial flexibility in choosing targets. As with other performance targets for the performance management measures, targets are generally established based both on policy aspirations and on analysis indicating what is believed to be attainable. As such, when establishing their CO₂ emissions targets, State DOT and MPO considerations likely would include these three factors:

(1) Projections of business-as-usual future CO₂ emissions. The U.S. Department of Energy, Energy Information Agency (EIA) provides projections taking into account Federal fuel economy standards and current VMT projections. Some States have revenue forecasting models that project future fuel sales that can be used to project future emissions levels.

(2) Policy goals. Twenty States have State-specific GHG emission reduction targets from statewide climate action

⁵⁸ Executive Office of the President, *The President's Climate Action Plan*, June 2013. <https://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf>.

⁵⁹ Council on Environmental Quality, *Final Guidance for Federal Department and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 2016. https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

⁶⁰ FHWA, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, December 2013. Acknowledgements section of report front matter. http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_planning/ghg_planning.pdf.

FHWA, *Handbook for Estimating Transportation Greenhouse Gases for Integration into the Planning Process*, 2013. http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/ghg_handbook/ghghandbook.pdf.

plans and/or State legislation.⁶¹ The U.S. has committed to reduce GHG emissions 26 to 28 percent below 2005 levels by 2025 and 80 percent or more by 2050.⁶²

(3) Analysis of what is attainable. For the purposes of target-setting, analyses of the potential effectiveness of various strategies may vary in level of effort and technical capabilities required. Options for analysis include:

- Using published information on the approximate magnitude of emissions reduction that can be expected from different strategies. The FHWA's *Reference Sourcebook for Reducing GHG Emissions from Transportation Sources*⁶³ provides ranges of emission reductions as well as costs, barriers to implementation, example projects, and co-benefits.
- Using sketch planning or scenario planning tools.
- Using VMT from travel demand models and MOVES.
- Using EERPAT, FHWA's integrated modeling system designed specifically to evaluate strategies for reducing surface transportation GHG emissions.

Note that while the rule requires State DOTs to use the fuel sales-based method for calculating past year CO₂ for national consistency reasons, they may use any variety of analytical methods for target-establishment. In fact, while fuel-sales methods are simpler and more accurate for calculating past CO₂, VMT-based methods will generally be more helpful in projecting future emissions and analyzing reduction strategies. This is because VMT-based forecasting methods can model changes in transportation demand resulting from various strategies.

i. Should short term targets be a reflection of improvements from a baseline (e.g., percent reduction in CO₂ emissions) or an absolute value?

Many commenters recommended that targets be expressed as a percent change from a certain year. They indicated it may be difficult to grasp the meaning of an absolute number of metric tons of CO₂. In contrast, decisionmakers and the public can more easily interpret a percent change and understand how it relates to existing State, national, and international GHG goals. It is common practice to express GHG goals as a percent reduction. The State DOTs of

California, Colorado, Delaware, Minnesota, Oregon, Pennsylvania, Virginia, Vermont, and Washington recommended expressing the targets as percent reduction below a 2005 reference year to be consistent with the U.S. GHG reduction goals established under the Paris Climate Change Agreement. The Atlanta Regional Council suggested that CO₂ targets be expressed as percent reductions below what would be achieved from fuel economy standards alone.

The FHWA decided that the measure will be expressed as a percent change from 2017 NHS on-road CO₂ levels. The FHWA agreed with commenters that a percent change provides more meaning and context to decisionmakers and the public than a certain number of metric tons of CO₂. The FHWA agreed with commenters that a 2005 baseline would be in line with national goals. However, the size of the NHS materially changed after 2005 due to reclassification of roadways under MAP-21. The changes to the NHS, which began in 2012 and have continued in some States, are expected to stabilize by 2017. Using the 2017 reference date avoids the type of significant data adjustment that would be needed if 2005 were used as the reference date. Using 2017 as the reference date for the GHG measure also makes the starting point for the GHG measure more compatible with the first baseline year used in other measures.

j. What data sources and tools are readily available or are needed to track and report CO₂ emissions from on-road sources? What tools are needed to help transportation agencies establish targets for a CO₂ emission measure?

Commenters noted several data sources and tools are readily available:

- Annual fuel sales volumes by State;
- EIA data on CO₂ emissions per gallon of fuel;
- VMT data in HPMS;
- CO₂ emissions per mile of travel based on vehicle type, speed, and operating conditions available in EPA MOVES model⁶⁴;
- Fleet composition from vehicle registration records; and
- Argonne National Laboratory's national Vision model and California's Vision model, which allow States to evaluate vehicle technology, fuel, and efficiency scenarios for meeting air quality and climate goals.

Commenters also noted that the following tools and resources would be helpful:

- Tools and procedures to estimate GHG emissions and establish targets that are aligned with existing tools States and MPOs use in the planning process.
- Tools pre-populated with emissions factors.

- Tools to determine CO₂ targets and understand the probable efficacy of potential emission reduction strategies.

- New air quality calculators that incorporate GHG emissions or revised existing calculators that include GHG emissions.

- Tools that would enable agencies to measure tailpipe CO₂ emissions based on system use, including:

- Enhanced travel demand models for areas not sufficiently covered by existing models and new models that show the synergistic relationship between transportation and land use.

- Assistance developing MOVES inputs and running MOVES.

- Estimates of "business as usual" emissions in target years.

The FHWA has developed a series of tools and resources to assist State DOTs and MPOs in developing and evaluating effective GHG emissions reduction strategies. More information is available at: www.fhwa.dot.gov/environment/climate_change/mitigation/. The FHWA will continue to update tools and provide technical assistance. To minimize workloads, FHWA will provide on its Web site the CO₂ per gallon of fuel for all of the common motor fuels. In addition, FHWA will provide look-up tables with national averages of grams of CO₂ per VMT for different speeds for the national average vehicle fleet.

The FHWA recognizes that the measure of CO₂ emissions chosen here—the percent change in tailpipe CO₂ emissions on the NHS compared to the Calendar Year 2017 level—is imperfect. Data is not available to directly measure this, so we have chosen to measure this indirectly by calculating fuel sales and multiplying the associated CO₂ emissions by the proportion of VMT that takes place on the NHS. This method results in a measure that is only partially affected by projects that reduce emissions on the NHS. For example, if there is a significant downturn in the economy and people choose to drive less, this would result in a reduction in the measure. If people choose to drive the same amount, but shift some of their driving to non-NHS roads, this would also result in a reduction in the measure. If gas prices fall temporarily and people drive more, this would result in an increase in the measure. In addition, the measure does not take account of upstream emissions, so if people shift to EVs, the higher upstream emissions associated with this would not be captured. For these reasons, FHWA will, in the future, re-evaluate this measure and consider whether data are available to more directly measure emissions effects of NHS projects

⁶¹ FHWA, *Handbook for Estimating Transportation Greenhouse Gases for Integration into the Planning Process*, 2013.

⁶² U.S. Government, "Fact Sheet: U.S. Reports its 2025 Emissions Target to the UNFCCC," March 2015. <https://www.whitehouse.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc>.

⁶³ Available at http://www.fhwa.dot.gov/environment/climate_change/mitigation/publications/reference_sourcebook/index.cfm.

⁶⁴ Or EMFAC in California.

undertaken by States or MPOs. If more direct data sources are developed, FHWA may consider revising this measure.

k. How long would it take for transportation agencies to implement such a measure?

Several commenters, including the State DOTs of California, Colorado, Delaware, Minnesota, Oregon, Pennsylvania, Virginia, Vermont, and Washington, suggested that transportation agencies could implement a fuel-based GHG measure in 1 to 2 years and that a VMT-based measure would take 3 to 5 years.

The FHWA has chosen a fuel-based measure that can be implemented within the 1- to 2-year time frame cited by commenters. This is consistent with the timeframes established in this rule (first performance period starts on January 1, 2018, and targets are due in October 2018).

1. The FHWA Requests Data About the Potential Agency Implementation Costs and Public Benefits Associated With Establishing a CO₂ Emissions Measure

Some commenters noted that a fuel-based measure would have minimal implementation costs, but that a VMT-based measure would require transportation agencies to dedicate staff to the effort and incur new ongoing costs. Commenters noted that the benefits of the rule would depend on the ambition of State DOTs and MPOs in setting targets and implementing strategies.

The FHWA appreciates the responses submitted on this question and has considered these comments in preparing the rule. Please see the regulatory impact analysis for detailed information on economic costs.

2. Removal of Peak Hour Travel Time Reliability Measure

Several commenters expressed concern that the proposed measures based on vehicle travel times are redundant and overly burdensome. Some suggested reducing the number of measures that rely on travel time in order to reduce the burden on transportation agencies, arguing that having seven metrics based on travel time data is redundant and provides little additional benefit. There were commenters in favor of removing the LOTTR, PHTTR, TTTR, freight congestion, and Excessive Delay measures, respectively. Several commenters suggested replacing the PHTTR measure with the Excessive Delay measure and vice versa.

The measures proposed in the NPRM represented different aspects, but similar types, of performance. The FHWA based the proposed measures on the availability of existing data and feedback from stakeholder sessions early in the rulemaking process. After reviewing the comments, FHWA agreed that the number of measures should be reduced to minimize the burden to analyze data and establish targets and to simplify the method to determine metrics and measures. In this final rule, FHWA has reduced the number of measures that rely on travel time from seven to four. The four measures will be used to assess reliability (both for all vehicles and trucks) and delay experienced by all travelers during peak hours.

Commenters were most critical of the PHTTR measure. Many questioned the usefulness of this measure and raised concerns about the many aspects of the measure. Commenters also discussed the similarities between the PHTTR and Excessive Delay measures, which many felt created an unnecessary complication and added burden. In response to these comments, FHWA consolidated the proposed NHPP PHTTR measures and the CMAQ Excessive Delay measure into one measure under the CMAQ program: Peak Hour Excessive Delay (PHED). Discussion of these changes to the Excessive Delay measure can be found in the Response to Comments Section for subpart G. The rule now weights all but one of the four travel time derived measures (*i.e.*, truck reliability) to reflect the impact of performance on all travelers. Reducing the number of travel time derived measures will still allow for the assessment of reliability and congestion at the State, urbanized area, and national levels.

3. NHPP Reliability

a. Reliability—Use of Traffic Volumes Versus People Traveling

Many commenters supported using volume data to weight the LOTTR measure. The NACTO suggested modifying the LOTTR to include transit movement weighted by ridership. The Oregon Metro Council and the Joint Policy Advisory Committee on Transportation suggested including hourly volumes (the same used for the proposed CMAQ Traffic Congestion delay measure) in the calculation for LOTTR. The NJTPA also suggested volumes for LOTTR modifications and proposed using occupancy estimates to weight by person volumes, not just vehicle volumes. Many commenters felt that the proposed measures were too

focused on vehicle delay and wrongly ignore person throughput. The Washington State House of Representatives commented that congestion should be measured on reliability, or whether or not a trip takes the same amount of time from day to day, rather than delay. Focusing on driver delays creates a one dimensional vision of congestion and ignores alternative modes of transportation that people use to travel through a corridor, and reliability would be a better measure to ensure that people can count on a consistent commute day to day, no matter what mode of transportation they use.

Commenters also stated that the NPRM required traffic volumes to be used in the calculation of the CMAQ Excessive Delay measure, but not the NHPP Reliability Measure. The NJTPA states the incorporation of person and goods volumes in the reliability and delay metrics would improve their perspective. The FHWA agrees with these comments and believes that the NHPP Reliability measures would be improved by weighting the metrics with volumes. This change will put a greater emphasis on roadway segments where reliability deficiencies are impacting the greatest number of people using the system. The final rule requires the measure to be weighted by annual traffic volumes, which puts the focus on the most heavily travelled roads.

In the NPRM, FHWA was concerned about the absence of data regarding actual traffic volumes for the level of roadway coverage and granularity needed (entire NHS and 5-minute temporal granularity). The FHWA believed including volume would require actual volume counts every 5 minutes for every NHS road segment, data which do not currently exist. In the final rule, FHWA has decided to use annual average daily traffic (AADT) to weight segments in the calculation of the measure, rather than use them in the metric calculation, the approach rejected in the NPRM. The FHWA maintained that the CMAQ Excessive Delay measure (new Peak Hour Excessive Delay), which applies to fewer entities, apply hourly traffic volumes for each segment.

To account for the movement of people rather than just vehicles in these measures, the measure will also be weighted by area wide/statewide occupancy factors. The FHWA will develop occupancy factors for both metropolitan and statewide areas based on national survey results, such as NHTS. Using both traffic volume and occupancy factors as weights in the calculation of the reliability measure

will allow the measure to reflect the percentage of all people experiencing reliable conditions. The measure will be more sensitive to congestion in areas where there are more person-miles traveled, which FHWA believes is an appropriate way to measure reliability for investment decisionmaking. In addition, in recognition of the evolving ability to accurately measure person throughput and the impact of multimodal travel, FHWA plans to revisit the measures related to reliability and congestion after Fall 2018 when FHWA's multimodal research study is expected to be completed.

b. Applicability of the Non-Interstate NHS NHPP Reliability Measure

The FHWA received several comments regarding the applicability of the NHPP non-Interstate NHS reliability measure, including restricting the measure to urbanized areas or to areas with populations of at least 1 million. These commenters argued that narrower applicability would reduce the cost and burden of data analysis on smaller, rural States.

The Oregon Metro Council and the Joint Policy Advisory Committee on Transportation commented that FHWA should apply the travel time reliability measures to the entire NHS.

The FHWA acknowledges that rural roadways may only have limited reliability issues, but such problems can and do occur as a result of weather events, special events, tourist attractions, etc. The FHWA believes it is important to understand when and where reliability problems on both urban and rural segments of the non-Interstate NHS occur. The FHWA analyzed the burden on State DOTs and MPOs with rural and urban NHS networks and found that the level of change needed to justify the cost of compliance is achievable. The FHWA is committed to provide technical assistance and support to State DOTs. In addition, FHWA is interested in working with State DOTs and MPOs to lead a pooled fund effort to acquire resources to provide services and tools to minimize the resource demands to process and analyze data.

c. Excluding Weekends From LOTTR Calculations

Several commenters questioned the inclusion or exclusion of weekends in the LOTTR measure, arguing that exclusion of certain days should be consistent across all travel time-based measures. The Delaware DOT commented that in resort areas, Fridays should be considered weekends and

should not be included in LOTTR calculations.

The FHWA evaluated the impact of including weekends in the calculation of the reliability metric, finding that for Interstate roadways, the maximum LOTTR value typically occurred during the weekday or was similar during both weekdays and weekends. However, for non-Interstate NHS roadways, including weekend travel times resulted in reliability measures that were 5 percent to 7 percent worse than measures derived solely from weekday travel times. These data indicate that weekend travel impacts reliability for a sufficient portion of the system to warrant the inclusion of weekends in the metric calculation. System performance should be assessed during times of most use of the NHS system, which in many cases includes the weekend daytime periods. In many urban areas and areas with special events, there can be reliability issues even on the weekends. Including weekends will allow DOTs and MPOs to more fully monitor segments with reliability issues and monitor how they change year-to-year.

d. Time Periods for LOTTR Calculation

The FHWA received eight comments on the use of shorter time periods for the LOTTR calculation (e.g., individual hours rather than 6 a.m. to 10 a.m.). The AASHTO and others noted that the time period proposed in the NPRM highlights inconsistency in travel times within the time period bins rather than from day to day. This methodology could lead to segments reported as unreliable according to the LOTTR measure, while they may be considered reliable when using trip based reliability. The NYSAMPO noted that the longer peak periods mask the occurrence of reliability problems. The New Jersey DOT and NJTPA stated that the large time periods for analysis would be appropriate if people could shift their commute times within the period, but since most people cannot, the time periods are too long. The Southeast Michigan Council of Governments requested flexibility to report the highest values for each individual hour within the peak periods rather than a ratio accounting for all 4 hours. The Oregon Metro Council proposed a formula-based method to determine each agency's time periods to avoid mixing peak and off-peak travel time observations in the denominators of key metrics, which would obscure cross-regional comparison.

The FHWA recognizes that there are many approaches to measuring reliability and related congestion measures. The FHWA carried out a

number of analysis runs using travel time data for a mix of States and urbanized areas to evaluate the impact of reducing the number of time periods below the four that were proposed and shortening the duration of time periods to eliminate the "tails" where traffic tends to build up and reduce. The results from these runs showed that a sufficient number of roadway segments exhibited unreliable travel times during the midday and weekend time periods. In addition, FHWA found that shortening the time periods (to reduce "tails") resulted in similar outcomes as compared to the proposed time periods (less than 1 percent difference). The FHWA retained the four proposed time periods (AM peak, midday, PM peak, and weekend) and the duration of each time period. In this final rule, the 14 hours are broken down into four time periods: (1) Weekday mornings (6 a.m. to 10 a.m.); (2) weekday afternoons (4 p.m. to 8 p.m.); (3) midday (10 a.m. to 4 p.m.); and (4) weekends (6 a.m. to 8 p.m.). The FHWA believes that evaluating the hours when the system is most frequently in use, defined as 6 a.m. to 8 p.m. daily, is the best approach to assess reliability problems. The FHWA analyzed suggestions from commenters that showed there are reliability problems on certain sections of roadways during all of those time periods (with more occurring during peak periods). The FHWA also assessed if the longer time blocks (4 to 14 hours) proposed in the NPRM measured variability across the time period instead of variability from day-to-day at the time period throughout the year. Commenters were concerned that the variability in travel times at the "tails" of the longer time periods would control the reliability metric. The FHWA found no significant difference (results within 1 percent) between using the proposed time blocks to using 1-hour time blocks over the same time period (i.e., comparing one block of 6:00 a.m. to 10:00 a.m. to 4 time blocks each 1 hour in length from 6:00 a.m. to 10:00 a.m.). For this reason, FHWA decided to maintain the time blocks proposed in the NPRM in the final rule.

e. Use of 1.50 Threshold To Determine Reliable Segments

Several commenters expressed a desire to establish different thresholds for urban and rural roadways and based on segment length. These commenters explained that travelers tend to view the reliability of their travel based on a full trip and not the individual short segments that make up the trip. They suggested that the final rule include different thresholds for different TMC

lengths, since they could vary by more than 10 miles in length.

The NJTPA, TRANSCOM, AMPO and others expressed concern about the use of pass/fail threshold noting that incremental improvements in reliability would not be recognized until the LOTTR dropped below 1.50. These commenters argued that the use of a “sharp” cutoff threshold could bias investment decisions, encouraging State DOTs and MPOs to focus only on those segments that are close to the 1.50 threshold, even though optimal improvement may be on segments with much higher LOTTR values.

The FHWA appreciates and acknowledges these comments and considered alternative approaches to the proposed method. The FHWA ultimately elected to retain the approach to utilize a 1.50 threshold to reduce complexity in the calculation method. An alternative approach would have required varying threshold levels for different segments and the inclusion of more graduated levels of reliability, which FHWA felt would unnecessarily complicate the measure calculation and reporting process. The FHWA encourages State DOTs to discuss how investment strategies have resulted in incremental improvements to the reliability of the system in their Biennial Performance Report. In addition, FHWA has revised the Truck Reliability measure so that it is a weighted average of all segment level reliability ratios that will reflect all changes in reliability levels.

D. Subpart F—National Performance Management Measures for Freight Movement on the Interstate

1. Removal of Truck Congestion Measure

In the NPRM, FHWA proposed two measures of freight movement on the Interstate under 23 U.S.C. 150(c)(6): Truck Travel Time Reliability (TTTR) and Truck Congestion. Many commenters felt that the 50 mph speed threshold to define congestion for the Percent of the Interstate System Mileage Uncongested proposed in the NPRM is unreasonable and should be eliminated. Suggestions included:

- Making the threshold more flexible for each reporting entity
- Using some other variable such as population density
- Changing to a lower value such as 35 mph
- Changing to a percentage of the posted speed limit
- Making the threshold a function of population density, lanes, or ADT
- Rather than using thresholds, providing credit for incremental improvements.

The FHWA eliminated the performance measure for Percent of the Interstate System Mileage Uncongested; the TTTR Index is the only freight-specific performance measure adopted in this rule. The FHWA recognizes that the use of a single speed threshold as compared to an annual average of speed would not be an effective measure to assess uncongested conditions. Changing the measure to consider the factors expressed through comments would be complicated and overly burdensome to implement.

2. Consistency Between All-Vehicle and Freight Reliability Measures

Many commenters provided suggestions to better align the proposed reliability measure for the NHPP that reflects the travel of all vehicles and the proposed freight reliability measure that reflects the travel of trucks. The suggestions raised by commenters are discussed below and, in general, addressed a desire to: Remove the freight reliability measure, better align time periods with the two reliability measures, reconsider the longest travel time considered in the metric, and reconsider the threshold to define reliable travel time.

Many State DOTs and MPOs commented that all-vehicle and freight reliability measures should be consistent since trucks and cars are travelling on the same roads and improving reliability on a roadway benefits all vehicle types. Commenters noted that the NPRM uses data from the all vehicle travel time dataset to complete missing truck data in NPMRDS. Several State DOTs and MPOs also commented that separate measures created a perception that freight was being prioritized over passenger vehicles. Several commenters suggested that the proposed freight performance measures focus on peak period travel times or peak period congestion, with some suggesting focusing on corridors or bottlenecks and aggregating the data into 15-minute intervals and longer segments. If the intent is to show the off-peak freight flows, then FHWA should provide further guidance or focus the measure only on off-peak periods. If this is not the intent then there should not be two separate reliability measures. In addition, some commenters suggested that the measure evaluate peak seasonal performance rather than annual averages for freight facilities serving agricultural regions. Other commenters suggested that the final rule consider the use of peak periods and adding a fifth time period from 8 p.m.–6 a.m. daily. As with the LOTTR, commenters suggested

that the TTTR measure be computed separately for each single hour within the proposed time period and the measure should be the hour with the lowest percent reliable for the time period of interest.

The AASHTO and several State DOTs and MPOs commented that they do not agree with using the 95th percentile travel time for freight. Many questioned the justification for use of the 95th percentile, with some noting that it is too stringent. In response, some commenters, including AASHTO, AMPO, TRANSCOM, and several State DOTs suggested using the 80th percentile to be consistent with the LOTTR measure for all vehicles. The NARC and others suggested allowing State DOTs and MPOs flexibility to set the threshold. Other commenters did not specify the percentile, but requested that the percentile chosen be consistent with the all vehicles measure or that FHWA provide a rationale for why the thresholds are different. The AASHTO, along with Washington, Oregon, and Connecticut DOTs and Nebraska Department of Roads agreed with using the 50th percentile travel time as the normal truck travel time for the reliability measure. The FHWA considered commenters' suggestions, and in particular, FHWA assessed the need for separate:

- Travel times—all vehicles and trucks;
- time periods—6 a.m. to 8 p.m. and 24 hours a day; and
- percentile to represent the longest travel times—80th, 95th, or other percentile.

In addition, FHWA considered the utility of using a 1.50 threshold as an indicator of reliable travel time performance, an issue that was raised for both freight and all vehicle measures.

As a result of this assessment, FHWA concluded that a separate reliability measure is needed to assess freight movement on the Interstate, but revised the measure to address comments about the 1.50 threshold and periods of analysis. A separate freight reliability measure will more accurately reflect the performance of the Interstate system as perceived by shippers and suppliers as the measure considers factors that are unique to this industry such as the use of the system during all hours of the day and the need to consider more extreme impacts to the system in planning for on-time arrivals. The FHWA believes that these changes simplify the calculation and addresses the concerns regarding the higher standard of performance proposed for truck reliability.

In addition to the data requirement changes discussed previously (*i.e.*, the use of 15 minute time periods and longer allowable segment lengths), FHWA simplified the truck reliability calculation by simplifying the method to utilize all-vehicle travel times when truck travel times are missing and using consistent time periods to those used for the all vehicle reliability measure. The FHWA retained the requirement to use truck travel times as the basis for the metric calculation to more accurately depict how freight is moving on the Interstate system as FHWA has consistently found the truck travel times to be slower than all vehicle travel times in the NPMRDS data set. The FHWA revised the truck reliability measure to use 5 time periods, 4 of which are used in the all vehicle reliability measure. These time periods cover 24-hours, broken into AM peak (6 a.m. to 10 a.m.), mid-day (10 a.m. to 4 p.m.), and PM peak (4 p.m. to 8 p.m.) periods for Mondays through Fridays, weekends (6 a.m. to 8 p.m.), and overnights for all days (8 p.m. to 6 a.m.). Aligning the time periods to the all vehicle time periods simplifies the analysis. Including all times recognizes the flow of freight during all hours of the day and also considers freight shippers that attempt to plan routes that optimize travel time and, when possible, attempt to avoid peak hours in major congested areas. The FHWA believes that the 5th time period is needed to consider travel times during overnight hours as shippers and suppliers rely on the system to support on time delivery needs 24-hours a day.

In response to comments, FHWA compared metric and measure results using the 80th percentile and the 95th percentile travel times. This analysis showed minimal differences in the reliability measure for the Interstate System using the 80th and 95th percentiles; however, metric results were considerably different at the roadway segment level. The FHWA believes that the 95th percentile travel time needs to be considered in the freight measure to account for the events that could impact on time delivery as shippers, carriers, and receivers desire on-time/just-in-time delivery of goods and plan their trips by building in enough time to meet delivery requirements. For these reasons, FHWA elected to maintain the 95th percentile in the truck reliability calculation.

The FHWA appreciates the concerns raised by commenters regarding the different standard used for freight and all vehicles measure and agree that, as proposed, this difference would put a priority on the freight metric in

decisionmaking. To address this concern, FHWA removed the 1.50 reliability threshold. As in the NPRM State DOTs will still report a reliability ratio (comparison of the 95th and 50th percentile travel times) for individual segments of roadway. However, as a result of the removal of the 1.50 threshold, FHWA will not assess if the roadway segment (as expressed by the reliability ratio) is providing for “reliable” travel times. The new measure is designed to use the reliability ratio of each segment, using the worst reliability ratio of all 5 time periods, to calculate an overall average truck reliability of the entire Interstate system. The Interstate system will be represented with one reliability ratio for trucks that will be used by State DOTs and MPOs to establish targets. State DOTs and MPOs will use the roadway segment level reliability ratios, considering the time periods where reliability problems are exhibited, to identify strategies that can be implemented to improve the overall reliability ratio for the Interstate system. The new measure can be used as an indicator of the travel time variability considered by shippers and suppliers. The change also allows for incremental improvements to be recognized in the measure outcome, which was a concern raised by many commenters in the design of the proposed reliability measures.

3. Relationship Between the Freight Measure Provisions and the National Freight Program and State Freight Planning

The California Association of Councils of Government requested that the rulemaking clarify the relationship between the freight measures and the FAST Act rulemaking on Interim National Multimodal Freight Network, particularly with regard to FAST Act freight funding programs, including FASTLANE.

The Connecticut and Texas DOTs noted that the rule does not outline how the proposed critical urban and critical rural freight corridors, required to be developed under FAST Act, will be integrated into the NPMRDS dataset. There is concern that this integration will require substantial effort and resources by State DOTs.

The Nebraska and Texas State DOTs commented that there is no need to establish additional reporting requirements for freight bottlenecks because bottlenecks and performance measures will be addressed in the State’s freight plan required in 49 U.S.C. 70202 and thus a separate report seems redundant. The Texas DOT suggested

that reporting on multimodal bottlenecks can be done by including a section in a State freight plan.

The FHWA recognizes that the FAST Act made a number of substantive changes in the freight area, including establishing two new funding programs. These new programs did not change the requirement under 23 U.S.C. 150(c) to assess freight movement on the Interstate System. One of the new funding programs is the National Highway Freight Program to improve the efficient movement of freight on the National Highway Freight Network (NHFN). The statute requires FHWA to establish the NHFN, which consists of the following components: The Primary Highway Freight System (PHFS), Critical Rural Freight Corridors (CRFC), Critical Urban Freight Corridors (CUFC), and those portions of the Interstate System that are not part of the PHFS. Therefore, the NHFN includes the entirety of the Interstate system—the same system used to assess freight movement in this rule. Although NHFP funding eligibility is limited to projects on the PHFS, CRFC, and CUFC (which may not include the full Interstate System in a State), FHWA does not believe that this should limit the applicability of the measure in the rule to assess freight movement. Other program funding, such as the National Highway Performance Program, may be used for projects to improve both freight performance on the entire Interstate System.

The NPMRDS includes travel times for the full Interstate System. State DOTs and MPOs will have the data they need in the NPMRDS to meet the freight measure requirements in this rule. There is no requirement for State DOTs and MPOs to supplement the NPMRDS with travel time data to represent roadways on the NHFN that are not on the Interstate System.

The performance management statute requires State DOTs to biennially submit performance reports (*i.e.*, State Biennial Performance Reports in § 490.107) that include freight bottleneck analyses. A good source for these analyses is the State freight plan under 49 U.S.C. 70202, which is required by the FAST Act in order to obligate NHFP funding after December 4, 2017. There can be coordination between the bottleneck reporting for performance measures and freight plans; however, the timing for the State Biennial Performance Reports and 5-year updates to State freight plan is different. In recognition of this similar requirements, FHWA will allow State DOTs to refer to the State freight plan bottleneck analysis in their State Freight

Plan to meet the freight bottleneck reporting requirements of 23 U.S.C. 150(e) if the freight plan has been updated since the previous State Biennial Performance Report.

4. Weighting by Truck Volume

The Virginia and Minnesota DOTs, Oregon Metro Council, Metropolitan Council, and the Joint Policy Advisory Committee on Transportation recommended weighting the reliability measures by applicable vehicle volumes. The Oregon Metro Council and Joint Policy Advisory Committee on Transportation also provided details in their comment on how to weight the reliability measure by volume and recommended FHWA support and fund a better means of obtaining vehicle classification volume data.

The AASHTO and several State DOTs opposed weighting the measures by truck volumes, because it would create additional work to calculate the measure.

The FHWA considered the comments suggesting that the freight reliability measure be weighted by truck volumes. Putting a lesser weight on a segment of the Interstate that is avoided by freight shippers due to poor performance would be contrary to the intent for the performance measure.

The reasoning for weighting, as noted by several commenters, is that it would more strongly emphasize sections of roadway that carry higher truck volumes. The FHWA evaluated the impact of weighting by truck volumes and concluded that for the Interstate System, to which this measure only applies, providing for reliable travel times is equally important across the full system, regardless of the level of use by trucks. If the freight performance measure is applied to a range of roadway functional classifications other than the Interstate System, then weighting the measure for truck volume would be more important in determining which roadways serve as major freight routes.

The FHWA further concluded that some shippers monitor the performance of the roadway system and avoid segments of the Interstate when conditions could impact on time delivery. The FHWA's analysis of Interstate corridors showed that, in some cases, areas with poor reliability tended to have lower truck volumes, indicating that the practice of avoiding segments to achieve on time delivery could impact the effectiveness of the measure if it were weighted by truck volumes.

For these reasons, the freight performance measure will not be weighted by truck volumes.

5. Vehicle Classes

The AASHTO and New York State Association of Metropolitan Planning Organizations recommended that FHWA define freight as combination trucks (FHWA classes 8–13). The AASHTO mentioned that this group of vehicles is representative of most significant freight activity on Interstates. The AASHTO also recommended that the NPMRDS only include the data for those classes. The Connecticut DOT recommended that FHWA define freight as combination trucks (FHWA classes 8–13) and require that NPMRDS dataset only include those classes. The Delaware DOT noted that NPMRDS only includes certain classes of trucks and questioned whether this is accurate.

The FHWA concluded the comments do not require a change to the rule. The data set includes a sample of fleet vehicles. A range of trucks is included, but data are more heavily sampled toward Interstate truck traffic, which would include FHWA vehicle classes 8–13. The FHWA will provide additional guidance on what vehicle classes are included in the NPMRDS dataset.

6. Definition of Freight Bottlenecks

Many commenters noted that the 50 mph speed threshold to define congested conditions for freight movement was not an effective indicator of “freight bottleneck.” A freight bottleneck can result from a combination of features, including capacity constraints, highway interchanges, locations with geometric constraints, bridges with clearance or weight limitations, or steep grades. Also, significant bottlenecks to freight movement are often off the Interstate and the NHS, such as arterial streets, intermodal connectors, and first and last miles to freight origins and destinations. The AASHTO and a number of agencies suggested the term “freight bottleneck” be changed to “truck freight bottleneck” for clarification since it only applies to truck traffic, and not to other modes such as rail or waterway.

The definition of “freight bottleneck” has been changed to “truck freight bottleneck” and revised to provide a general description that allows State DOTs to determine where truck freight bottlenecks are occurring based upon individual context. The definition also does not limit the location to the Interstate. Each State DOT will need to define what constitutes bottlenecks based upon the specific context of the State and the local impediments that

each State experiences with regard to freight movement.

E. Subpart G—National Performance Measures for CMAQ Program—Traffic Congestion

1. Excessive Delay Measure

a. Applying Peak Hours to Excessive Delay Measure To Create Peak Hour Excessive Delay

The Response to Comments section for subpart E describes FHWA's rationale for consolidating the PHTTR measure and Excessive Delay measure from the NPRM into a new CMAQ Traffic Congestion measure: Peak Hour Excessive Delay (PHED). The PHED measure applies peak hours to the original Excessive Delay measure in order to focus on traffic congestion experienced during peak hours in applicable urbanized areas. Other aspects of the original Excessive Delay measure were also changed in response to comments, as explain in the following sections.

b. Peak Hour Time Periods

Originally, these comments related to the peak hours defined in the PHTTR measure. The FHWA has included this discussion of peak hour comments under the CMAQ Traffic Congestion section because the peak hour designation now applies to the Excessive Delay measure. The AASHTO requested the inclusion of 9:00 to 10:00 a.m. and the Hampton Roads Transportation Planning Organization requested 3:00 to 4:00 p.m. Other commenters requested that FHWA maintain consistency between the hours used in the LOTTR and PHTTR measure.

The FHWA agrees that consistency in the time periods for all travel time measures would simplify the approach to calculate the measures and reduce the amount of data needed for the calculation of all measures. The FHWA also recognizes that different areas experience peak periods at different times of the day. For this reason, FHWA has adjusted and provided flexibility in defining the time periods for the PHED measure to be more consistent with the reliability measures. The FHWA felt that it was important to keep the time periods within 6 a.m. and 8 p.m. to ensure for consistency in the all of the measures at a national level. The adjustments in the final rule added a 4th hour to both the morning and afternoon peak periods. The morning period has been extended to 10 a.m. and to provide flexibility to State DOTs and MPOs, two options have been provided to expand the afternoon period—starting earlier to

begin at 3 p.m. or extending later to end at 8 p.m.

c. Traffic Volume Profiles

In the NPRM, FHWA required State DOTs and MPOs to develop hourly volumes based on actual vehicle counts or AADT. Several commenters were concerned that traffic volume data may not be accurate at the granularity required in the NPRM and suggested FHWA fund better volume data collection if data collected by State DOTs and others are not adequate.

The commenters also requested more information about developing hourly volume profiles from actual vehicle counts or AADT. Some commenters suggested FHWA take AADT information from each State's HPMS submittal and develop traffic volume profiles by time of day and day of the year at a 5-minute bin level⁶⁵ for each reporting segment or make traffic volumes available in the NPMRDS data set so State DOTs and MPOs could calculate average daily vehicle hours of delay.

The FHWA has reduced the number of hourly volumes that need to be estimated to just the peak hours (*i.e.*, 8 hours daily), requiring only peak hour factors to be used to estimate volumes. The FHWA will provide guidance on appropriate methodologies for estimating the hourly volumes for use in this measure.

d. Person Throughput Versus Vehicle Throughput

The FHWA received thousands of comments in favor of making the PHTR more person-focused. The Southwest Energy Efficiency Project, Conservation Colorado, and the National League of Cities suggested using average vehicle occupancy and transit ridership to measure person-hours of excessive delay. The Virginia DOT suggested that the National Transit Database (NTD) could provide data on transit vehicle/bus occupancy, while default values could be used for vehicle occupancy where no data is available. The COMPASS stated that a road mileage-based measure can be counterproductive and encouraged FHWA to measure impacts in terms of people instead. The AASHTO and the Maryland DOT cited both the National Household Travel Survey (NHTS) data as a good representation of actual vehicle occupancy and the Census Transportation Planning Products program that develops robust work-

based trip data. With these data sources, the highway delay metric could be normalized by the number of workers commuting by car.

As with the NHPP reliability measures, FHWA agrees with these comments and believes that the PHED measure would be improved if it represents the cumulative delay of all people using the NHS and not just the delay experienced by vehicles. The FHWA believes that this approach will encourage the improvement of corridors that have higher person throughput. For this reason, the PHED metric in the final rule requires the use of average vehicle occupancy (AVO) factors for cars, buses, and trucks and hourly traffic volumes to calculate person-hours of excessive delay. The FHWA recognizes the variations in AVO among and within urbanized areas and the challenges in obtaining segment-level AVOs. Therefore, to support this approach, FHWA will establish AVO factors for State DOTs and MPOs to use for each applicable urbanized area using the National Transit Database for buses and national surveys, such as the American Community Survey, for cars. The FHWA also recognizes that urbanized areas may have more specific AVO data, and the final rule provides flexibility for State DOTs and MPOs to substitute these data.

e. Thresholds

The FHWA received many comments disagreeing with the selection of the 35 mph threshold for freeways and 15 mph threshold for other NHS roadways. Commenters noted that these thresholds do not adequately reflect different circumstances across the country and, in particular, urban areas. Additionally, AASHTO and the Connecticut and Washington DOTs warned that States may have an incentive to focus a project on a reporting segment that is just slightly over the set thresholds instead of the areas that need it the most in order to impact the final number of hours of excessive delay.

Commenters were also concerned that information about the Functional Class of each segment may not be available in HPMS or NPMRDS, and that this could make assigning speed thresholds to different roads challenging. Commenters requested various changes, including using 50 or 60 percent of the posted speed limit (PSL) and leaving the speed threshold to be set by the State DOTs or MPOs.

The FHWA agrees that the use of absolute thresholds may not be appropriate for all areas and that it would be more appropriate to use a threshold based PSL provided this

threshold does not exclude speeds that have been demonstrated to generate emissions that adversely impact air quality. The Washington State DOT conducted analysis on the optimal travel speed to maximize throughput for its State highways and determined that the optimal flow speed was roughly 70–85 percent of PSL. Speeds in this range would have optimal spacing between vehicles while speeds less than 70 percent of the posted speed limit are considered congestion. Speeds less than 60 percent of the posted speed limit are considered to be severe congestion by Washington State DOT. Additionally, FHWA found in previous analysis that emissions rates in grams per mile for criteria pollutants are typically higher at lower speeds (*i.e.*, 0–20 mph).⁶⁶ The FHWA believes that a 20 mph speed threshold connects traffic congestion to criteria pollutants. At speeds higher than 20 mph, emissions are significantly lower.

As a result, FHWA has revised the excessive delay threshold in the final rule to be 60 percent of PSL, with a minimum limit of 20 mph. The 60 percent of PSL threshold was selected based on comment suggestions, and the limit of 20 mph was selected based on speed levels that have been associated with emission impacts on air quality. This speed threshold applies to all Functional Classes of roadways, removing the need to identify the Functional Class of each segment. The FHWA recognizes that PSLs are not provided in the NPMRDS dataset. The FHWA will make provisions within the HPMS to capture PSL as a field that can be populated for the full extent of the NHS. The FHWA encourages State DOTs to report PSLs for all NHS segments in the HPMS. The FHWA believes it is important for State DOTs and MPOs to collect and report posted speed limit to understand operating expectations of the NHS.

f. Use of Population for Normalization

The AASHTO and several State DOTs expressed concern over the per capita denominator in the Excessive Delay Per Capita measure, stating that it inaccurately assigns excessive delay to all people in all urbanized areas, rather than just the highway drivers who are impacted. The commenters further argued that urbanized areas with high levels of Interstate through traffic will have misleadingly high values because the delay is being experienced by

⁶⁵ The FHWA has changed the time bins to 15 minutes for the final rule, but the comments reflected the 5 minute bins proposed in the NPRM.

⁶⁶ ICF for FHWA, *Multi-Pollutant Emissions Benefits of Transportation Strategies*, 2006. https://www.fhwa.dot.gov/environment/air_quality/conformity/research/mpeb.pdf.

travelers from outside the urbanized area. The commenters suggested that the measure be normalized by commuters using a personal vehicle on the roadway network. Furthermore, the Connecticut and Texas DOTs, and AASHTO commented that the proposed excessive delay measure would produce misleading measure trends when using incomplete data and when no imputation is used. The AASHTO and WSDOT recommended that FHWA divide annual excessive delay by the estimated commuter population rather than overall population to get a more realistic idea of how the people experiencing the delay are affected.

The Atlanta Regional Commission suggested that the congestion measure should be scaled on observed or estimated travel demand (*e.g.*, peak period person throughput, number of peak period trips, peak period VMT). The travel demand also could be gauged in multiple levels: NHS travel demand only, total vehicle travel demand (beyond the NHS), or even total travel demand (*e.g.*, number of peak period trips occurring across all modes). The commenter recommended that HPMS data on annual VMT by functional class could be used. The Delaware DOT urged that FHWA use an estimate of how far people travel to work, while the Delaware Valley Regional Planning Commission recommended that the annual hours of excessive delay per capita should not be based upon total population, but rather should be limited to commuters using a personal vehicle on the NHS roadway network during the time periods it is being measured (*i.e.*, morning and evening peak periods). The Georgia DOT suggested FHWA use Annual Hours of Excessive Delay per thousands or millions.

In response, FHWA compared different methods to normalize the measure in areas that rely heavily on highways and others that provide several modes of transportation. The FHWA found that population was as effective as other methods to normalize the measure and found that, in areas where travelers tend to use non-highway transportation modes, the measure did not unfairly bias the outcome in the area's favor. In addition, population data are readily available in national data sources. For these reasons, FHWA retained the use of population in the final rule to normalize the measure. The FHWA feels that other approaches to normalize the measure would add unnecessary complication to the method. The FHWA plans to revisit this measure after the completion of its multimodal research study in Fall 2018.

g. Census Annual Population Estimates in Lieu of Decennial Values

Several commenters commented on the proposed methodology for the traffic congestion performance measure, which uses the population in the area to develop a "per capita" estimate. The Illinois DOT claimed that using the per capita denominator for the Total Excessive Delay per Capita overestimates the users of the NHS System. The North Jersey Transportation Planning Authority recommended using the most recent population estimate for the urbanized area instead of the decennial values. The Texas DOT stated that using the most recent U.S. Decennial Census (*i.e.*, 2010 population numbers that are already 6 years old) for reporting until 2022 or 2023 when the 2020 Census is available will have a negative impact on the urbanized areas of Texas with regard to "per capita" metrics.

The T4A requested discussion in the final rule of how State DOTs and MPOs could use population estimates from 5-year ACS estimates for each-year reporting cycles. The commenter also stated the importance of normalizing the excessive delay measure by dividing the calculation by the total population for the State or MPO, allowing all transportation users to be accounted.

The FHWA agrees with the use of annual population estimates as opposed to the decennial census populations to normalize the excessive delay measure. Using annual estimates will more accurately account for population shifts in large urban areas that are not captured through the decennial census. For this reason, FHWA has revised the approach to determining the population in the final rule for both the PHED per capita measure and to determine urbanized areas that are applicable to the CMAQ Traffic Congestion measures (both PHED and non-SOV Travel). As suggested in the comments, FHWA is requiring annual population estimates to be determined using U.S. Census estimates (*i.e.*, most recent ACS 5-year estimate). The most recent annual population estimate as of one year before the Baseline Performance Report is due is to be used to determine urbanized areas that are applicable to the CMAQ Traffic Congestion PHED measure. These areas will remain applicable for the full duration of the performance period, regardless of population changes that may occur within the period (4-year time period). The FHWA feels that keeping the applicable areas for the duration of the performance period is important to simplify the implementation of the

requirements. The most recent annual population estimate will be used each time the PHED per capita measure is calculated. The FHWA believes that this approach responds to the concerns regarding population shifts in large areas.

The FHWA does not agree that the populations should be determined for specific times of the day or days of the week as suggested by some commenters due to the complexity of implementing such a method.

h. Outliers in Speed Data

The Oregon and Washington State DOTs commented that since the null and outlier procedure for the excessive delay measure was not the same as the system performance or freight measures, they assumed that for the excessive delay measure, 5-minute bins with no recorded travel times as well as those data points over 300 seconds will be excluded. The State DOTs recommended that the procedures for all outlier and null data be consistent in the final rule. The AASHTO expressed concern over the excessive delay calculation, which is compounded by outliers in the dataset. The AASHTO argued that the proposed descriptions of equations can create the opportunity for unstable calculations; that is, that the delay may be grossly overestimated on the interplay of the length of each segment, the evaluation period, and the speeds. This could lead to overestimates of delay during periods of very low speeds or road closures if volume limiting is not used. The AASHTO stated that this instability can be addressed with maximums of delay that relate to the length of reporting period. The AASHTO further stated that the outliers in NPMRDS further compound this issue; however, a gapless or imputed data set would not be immune to the volume problems.

The FHWA evaluated the impact of applying an outlier threshold to the final travel time derived measures and found that the effect of excluding very slow and very fast speeds on the outcome measures did not warrant the burden that would be required to remove outliers. Although the removal of outliers had the greatest effect on the excessive delay measure (as this measure cumulates all excessive travel times), the use of allowable techniques, such as path processing, to smooth out point probe sources will reduce the occurrence of outliers in the data set. For this reason, FHWA removed the requirement to exclude outliers from the travel time data set.

In the NPRM, FHWA limited the travel time for a given segment to 300

seconds, equivalent to 5 minutes. This ensured that excessive delay could not exceed the length of the time period. Since 15 minute bins are now used instead of 5 minute bins, FHWA changed this maximum to 900 seconds. Since there is no outlier removal, all 15 minute bins with travel times will be used and subject to the 900 second limitation. The FHWA encourages State DOTs and MPOs to share their strategies using volume limiting techniques to address concerns when extremely slow speeds exist. The FHWA in the final rule allows removal of any travel time data in the calculation that could have been recorded with the roadway was closed.

2. Decision To Include a Multimodal Measure

Tens of thousands of commenters, through campaigns from T4A, American Heart Association, and others, raised concerns about the vehicle-focused nature of the 8 measures proposed in the NPRM. Many asserted that determining the performance of the NHS and the impact of congestion relies on an understanding of the entire surface transportation system, including all available modes of travel. Commenters explained that considering pedestrians, bicyclists, public transit riders, and other travelers in transportation decisions, provides a fuller picture of system performance, encourages policies that reduce traffic congestion, and helps meet the goal of efficient investment of Federal transportation funds. They asserted that these transportation modes, while often local in implementation and reach, deserve recognition in a national performance measure because they contribute to transportation efficiency and reliability, promote public safety and health, improve the livability and walkability of urban neighborhoods, improve environmental sustainability, and reduce costs for the travelling public. One commenter noted that the vehicle-focused approach in the NPRM disadvantages low-income communities where vehicle ownership rates are often lower compared to suburban and rural areas.

Commenters discussed multimodal benefits generally, but also specifically in the context of traffic congestion. Many argued that non-SOV modes should be explicitly included in a measure to reflect emissions avoided by these modes. Commenters suggested making the NHPP Reliability and CMAQ Excessive Delay measures more multimodal by including buses in average vehicle occupancy. Many commenters expressed support for a

new, separate multimodal congestion performance measure. Many commenters provided suggestions for the design of such a multimodal measure, including:

- Non-single occupancy vehicle mode share
- Percent of NHS mileage with a transit alternative to driving
- Ratio of transit passenger miles traveled to vehicle miles travelled
- Shorter multimodal journey-to-work travel time than average
- Number of jobs accessible within a given time budget
- Avoided delay provided by public transportation

Commenters suggested many possible data sources that could be used to calculate a measure, including the American Community Survey (ACS), National Household Travel Survey (NHTS), National Transit Database (NTD), General Transit Feed Specification (GTFS), regional vehicle capacity, and pedestrian and bicycle counts (e.g., from the Travel Monitoring Analysis System (TMAS)). One commenter identified planning tools State DOTs could use to determine the impact of multimodal transportation, including the TDM Effectiveness Evaluation Model (TEEM), TDM Assessment Procedure (TDMAP), Trip Reduction Impacts of Mobility Management Strategies (TRIMMSTM), and Project Evaluation Toolkit (PEToolkit). Commenters suggested FHWA leverage existing datasets and data collection efforts and work with partners such as the Transportation Research Board, the U.S. Census Bureau, and FTA to enhance existing datasets or develop a multimodal dataset.

In the NPRM, FHWA noted the data limitations that constrain creating and requiring a multimodal performance measure and presented specific questions to better understand what could be implemented in this final rule. A number of the measures suggested by commenters still present significant challenges in national data collection and analysis. The FHWA recognizes that robust multi-modal system performance measurement requires additional research and development, and is engaged in a significant research project, Multimodal System Performance Measure Research and Application, to identify more ideal multi-modal system performance measure(s) and the data required to calculate them. However, commenters also provided more information to FHWA to better understand how some State DOTs and MPOs may have other data available to measure modal share more accurately at

a local level. The FHWA now believes that nationally consistent data, as well as these more detailed local sources, make it possible to create a basic assessment of multimodal system performance through the measure of the portion of non-SOV travel. A more detailed discussion of the data elements of this measure is available in the next section. The FHWA will revisit the measures related to multimodal travel following the completion of its research study in the Fall of 2018.

After reviewing these comments, FHWA has decided to include a new multimodal measure, the portion of non-SOV travel, as a CMAQ Traffic Congestion measure. The FHWA believes non-vehicular modes play an important role in reducing levels of criteria pollutants in urbanized areas, and because transportation in urbanized areas is inherently multimodal, it is important to account as much as possible for the options that are available to travelers in those urbanized areas. This measure will help carry out the CMAQ program, as the program recognizes investments that increase multimodal solutions and vehicle occupancy levels as strategies to reduce both criteria pollutant emissions and congestion. The measure adopted in this rule is the percent of non-SOV travel. The measure includes modes that are included in the ACS Journey to Work data, which generally includes all modes that are not SOV and include travel avoided by teleworking.

Based on the comments, FHWA provides three options for State DOTs and MPOs to calculate modal share. The first option is use of the American Community Survey Journey to Work mode share data (updated annually to every 3 years depending on size of urbanized area). These data are nationally consistent, but have limitations in creating a comprehensive picture of multimodal travel. The second option is for State DOTs and MPOs to use locally specific surveys, which may be more accurate than the ACS. The third option is for State DOTs and MPOs to use volume counts for each mode to determine the percent non-SOV travel. While use of the second or third options may result in reporting that is not nationally consistent, FHWA believes that any of these data sources (national or local) can be used to create a meaningful non-SOV mode share measure. Including these options also encourages States and MPOs to develop and use the local measurement methods to help build a more accurate national picture of mode use in the United States.

Non-SOV travel may include travel via carpool, van, public transportation, commuter rail, walking, or bicycling, as well as telecommuting.

The applicability of the CMAQ Modal Share measure is the same as for the CMAQ Peak Hour Excessive Delay measure. The FHWA decided to use the same geographic applicability because FHWA views these two CMAQ Traffic Congestion measures as complimentary, yet different, as both yield important information useful to understanding traffic congestion and the methods available to address it.

3. Data for Multimodal Measure

The Oregon and Washington State DOTs suggested that FHWA use the American Community Survey (ACS) for transit or multimodal-related data. Other commenters suggested using ACS data to gain a baseline of regional average vehicle occupancy and then coupling that with technology-based methods to measure AVO and per-person throughput along roadways. The Oregon Metro Council and the Joint Policy Advisory Committee on Transportation suggested adding journey-to-work mode share data from the ACS as a measure under subpart G to complement the annual per-capita VMT measure. The T4A suggested that FHWA should work with the U.S. Census Bureau to improve the ACS so that it reflects trip purpose and multimodal trips, which work could in turn inform improvements to the NHTS.

Some commenters explained that they do not have robust, reliable data for surface modes other than highways, transit, commuter rail, and passenger rail. In Maryland, for example, these data are available only in the urbanized areas affected by the congestion performance measures. The Delaware Valley Regional Planning Commission stated that FHWA should improve the hourly volume estimation as proposed for the excessive delay measure calculation, because accounting for volumes would be very helpful for project prioritization and would also set the stage for bringing in transit passenger volumes and eventually bicyclist and pedestrian volumes. The Florida DOT described its approach for analysis of volumes from continuous traffic count stations. The New York State DOT cited the challenges of developing hourly traffic volume data for use in the proposed performance measures and noted that their State's program is on a 3-year cycle (as required by HPMS) and not the 2-year cycle described in this rulemaking. The FHWA agrees with the many commenters that suggested using the

ACS data to measure modal share because the data are readily accessible to all potential users and is nationally consistent. The FHWA adopted this approach because it agrees that some State DOTs and MPOs do have the capability today to count different modes of travel. The FHWA also recognizes the limitations of using a survey-based data set and has provided additional options for State DOTs and MPOs to calculate this measure. State DOTs and MPOs are not required to use mode counts, nor are they required to submit them to FHWA. The FHWA acknowledges the importance of a nationally consistent data to compare urbanized areas, but also recognizes that mode count data is an area of ongoing development and could help spur the development of improved measures in the future. The FHWA also believes that increasing the quality and quantity of non-vehicular mode observations is useful in developing a complete perspective on the entire transportation system. As a result, State DOTs and MPOs have the option of using survey-based or count data to calculate this measure. For State DOTs and MPOs that choose to use count data, FHWA encourages but does not require that these data are voluntarily submitted to FHWA via national sources or databases (such as TMAS, NTD, and/or GTFS-RT).

4. Applicability of the CMAQ Traffic Congestion Measures

In the NRPM, FHWA requested comments on whether the CMAQ Traffic Congestion measure should apply to smaller urbanized areas, including those with populations over 200,000. In response, most commenters—including AASHTO, 9 State DOTs, National Association of Regional Councils (NARC), NYSAMPO, and the Association of General Contractors—supported applying the CMAQ Traffic Congestion measures to urbanized areas in nonattainment or maintenance areas with a population of more than 1 million. Some commenters in support of a population threshold of 1 million argued this is consistent with congressional intent to require only those MPOs serving areas with more than 1 million people to prepare a CMAQ performance plan (see 49 U.S.C. 149(1)). They also argue it would limit the burden of compliance to those areas most likely to experience congestion.

Two commenters supported population thresholds below 1 million. The T4A supported a population threshold of 200,000, noting that 23 U.S.C. 149(l) requires a performance plan for mega-regions with more than 1

million people, but does not supersede 23 U.S.C. 150(c). The commenter added that title 23 makes a distinction between areas above and below a population of 200,000, which could be applied to this measure. The Natural Resources Defense Council stated that the restriction on congestion measurement to areas with a population over 1 million is arbitrary and unwarranted and should be removed.

The NARC and NYSAMPO also expressed concern about the applicability of urbanized area as the appropriate geography. The NYSAMPO further expressed concern about the relationship of this requirement to the separate NPRM on MPO Coordination.

The final rule revised the applicability of the CMAQ Traffic Congestion measures to urbanized areas in nonattainment or maintenance areas with a population of more than one million, before expanding to areas with a population over 200,000 for the second and all subsequent performance periods. First, FHWA believes there is public benefit to expanding over time the applicability of the CMAQ measures to additional cities and will help to contribute to achieving the national goal of congestion reduction. The FHWA believes Congress's special emphasis on MPOs located in transportation management areas, which are urbanized areas with over 200,000 in population, is informative in this regard. Congress determined these areas need to address congestion issues, and, under 23 U.S.C. 134(k) Congress has required these MPOs to address congestion management through a process that provides for effective management and operation of new and existing transportation facilities, including development of congestion management plans. The FHWA expects that expanding the applicability of these measures will lead to better planning and operational decisionmaking, especially with respect to congestion management. Applying these measures to this broader group of urbanized areas will contribute valuable information to the congestion management process under 23 U.S.C. 134(k)(3)(A) and is consistent with the DOT Beyond Traffic initiative to address congestion, including in metropolitan areas.

Expanding the applicability of these measures in subsequent performance periods to urbanized areas of 200,000 people or more will yield a larger pool of potential benefits from evaluations of mode share and reductions in peak hour excessive delay as States MPOs and Cities respond to the CMAQ performance measures. Additionally, sharing best practices among a larger

pool of urbanized areas may lead to innovative strategies to reduce peak hour excessive delay and to estimate or count transportation trips on all modes. As part of the Modal Share measure, State DOTs and MPOs are encouraged to report data not currently available in national sources (e.g., pedestrian or bike counts) to FHWA, and expanding the applicability of these measures will improve the quality and quantity of these data nationwide.

Recognizing that these smaller urbanized areas may need more time to implement this requirement because many may not have the same level of experience or resources to consider these issues as do larger urbanized areas, FHWA decided to provide these smaller urbanized areas more time to implement the measure. The phase-in period will give smaller MPOs time to understand the measure, what is necessary to calculate the measure, and how setting targets will work. The phase-in period will reduce the overall burden for State/MPO coordination with respect to target setting for both of the CMAQ Traffic Congestion measures. The PHED measure has also been simplified to require less coordination and less data (i.e., only requiring data during peak hours) than the proposed excessive delay measure in the NPRM. Although the Modal Share measure is new, one option uses widely available ACS data and is simple to calculate.

The FHWA believes that urbanized areas should be the boundary used to define applicable areas, as these areas are used in practice today to define the minimum planning scope of metropolitan areas. The FHWA acknowledges the comment regarding deferring a decision on the area of applicability of these measures until completion of the NPRM on MPO Coordination and Planning Area Reform. The FHWA declines to defer the decision in this rule. This rule provides sufficient lead time to accommodate any coordination or decisionmaking requirements regarding the applicability of the CMAQ PHED measure that may arise out of a final MPO rule.

F. Subpart H—National Performance Measure for the CMAQ Program—On Road Mobile Source Emissions

1. General Comments

Several commenters expressed support for the proposed on-road mobile source emissions performance measure. Other commenters expressed support for FHWA's overall approach of using emission reductions by pollutant for the performance measure for on-road

mobile source emissions. One commenter argued that the nation's transportation system is responsible for roughly 23 percent of the country's emissions and any regulations that require State DOTs to monitor emissions released by automobiles will help reduce emissions drastically, and another recommended that FHWA develop a measure of emissions per person trip for non-freeway NHS roads. Several commenters urged FHWA to incorporate GHG emissions reduction reporting into the on-road mobile source emissions performance measure.

After careful consideration of these comments, FHWA retained the CMAQ on-road mobile source emissions measure, with some modifications as explained in response to specific comments. The FHWA decided after reviewing all the comments regarding a GHG measure to apply it to performance of the NHS in all States and MPOs under NHPP.

2. Concerns About MPO Targets and Reporting

Because the proposed on-road mobile source emissions measure did not include a provision for State DOTs to approve MPO emission reduction targets, the Kentucky Transportation Cabinet expressed concern that the rule would allow an MPO to attempt to force a disproportionate amount of CMAQ funds to be awarded to its area by setting an overly aggressive target and recommended that targets for the on-road mobile source emissions measure should only be required for State DOTs and not MPOs, with a provision for State DOTs to concur with MPO targets. The Oregon DOT suggested that States have flexibility in determining the appropriate target setting entity, whether it is a State DOT or the MPOs.

The FHWA believes that State DOTs and MPOs have the authority to establish their targets at their discretion. Moreover, MAP-21 does not provide FHWA the authority to approve or reject State DOT or MPO established targets. No changes were made in response to these comments.

3. Applicability

Several commenters, including AASHTO and several State DOTs, recommended that FHWA revise the proposed on-road mobile source emissions performance measure so that it only applies to urban areas with populations of over 1 million. The AASHTO expressed concern that smaller urban areas may not have the capacity (resources and staffing) to address the on-road mobile source emissions measure. Further, AASHTO,

Connecticut DOT, and Washington DOT commented that limiting the on-road mobile source emissions measure to urban areas with over 1 million populations would be consistent with congressional intent, because the requirement to prepare a CMAQ performance plan is limited by statute to MPOs serving areas of over 1 million in population. The Washington State DOT and Oregon DOT also reasoned that because smaller urban areas do not receive large amounts of CMAQ funding, those MPOs may use multiple years' allocations to fund a single project, which would result in such MPOs having no reportable benefits for certain years and give a false impression that an MPO failed to meet a target. Further, these commenters expressed concern that setting realistic targets may prove challenging for smaller MPOs that have a limited sample size of past projects. The North Central Texas Council of Governments and several State DOTs recommended that reporting areas be consistent between CMAQ congestion and on-road mobile source emissions performance measures in order to make reporting simpler. Specifically, the State DOTs recommended that the on-road mobile source emissions measure be modified so that it would apply to the same areas as the CMAQ congestion measure in the NPRM, only in urbanized areas with a population of over one million in nonattainment or maintenance areas for criteria pollutants under the CMAQ program. The commenters argued that this approach would allow for consistency with Congress's decision to limit the requirement for the preparation of a CMAQ performance plan to areas of over one million in population.

In contrast, Oregon Metro Council and the Joint Policy Advisory Committee on Transportation urged FHWA to apply the on-road mobile source emissions performance measure to all CMAQ program recipients, regardless of size of population.

Several State DOTs and AASHTO argued that tying emissions reduction to expenditures for apportionments for the entire CMAQ program will result in a negative effect on a State's statutorily given right to utilize flexible funding, which would contradict the purpose of the flexibility provision of 23 U.S.C. 149. As a result, they stated that 490.803 should apply only to non-flexible CMAQ funds. The AASHTO, Connecticut DOT, and Montana DOT urged FHWA not to require emissions data reporting as to flexible CMAQ funds, because requiring such reporting could indirectly pressure States to

forego the flexibility provided by Congress. The Mississippi DOT urged FHWA to make concessions for rural areas and reduce or eliminate CMAQ reporting requirements for non-urban areas, and Oregon DOT asked that rural areas be exempt from the on-road mobile source emissions measure as the major contributors to the pollutions in such areas tend to be from road dust and topographical effects.

Since all ozone, carbon monoxide, or particulate matter nonattainment and maintenance areas, regardless of size, are eligible to receive CMAQ funds and all CMAQ funded projects must demonstrate an emissions reduction, FHWA has concluded that the emissions measure should apply to all such areas regardless of population. In contrast to the CMAQ PHED and Modal Share measures, the emissions measure does not raise significant challenges to achieve a fair balance between the benefits of the measure and the burden of applying it. The burden for reporting on this measure is easier than for the CMAQ traffic congestion measures, since the emissions measure data come from an existing database used since 1992. The FHWA has not made any changes in the final rule based on these comments.

Additionally, States with rural areas designated nonattainment or maintenance may obligate CMAQ funds in those areas. Therefore, they should also be subject to this measure. The FHWA has not made any changes in the final rule based on this comment. Finally, FHWA agrees that Congress provided the areas with flexible funds the ability to use those CMAQ dollars on CMAQ or Surface Transportation Block Grant (STBG) eligible projects. The FHWA does not agree, however, that this measure should be limited only to mandatory CMAQ projects. There is enough flexibility in how a State DOT or MPO establishes its target that it can account for any flexible funds it plans to spend on STBG eligible projects at that time. Therefore, FHWA has not made any changes in the final rule based on this comment.

4. Applicability of New Standards

One commenter encouraged FHWA to acknowledge the importance of good air quality in borderline nonattainment areas in the air quality performance measure, and another expressed concern that as the NAAQS become more stringent over time, the workload for State DOTs and MPOs to comply with the performance measure will increase because more nonattainment areas will be designated. Others suggested the rule build in a later deadline for such cases

and provide specific authority for a waiver to be granted to affected States and MPOs in terms of deadlines—when an area is newly designated as nonattainment, so that it can have more time in setting targets relevant to the affected area. Alternatively, GDOT recommended that nonattainment and maintenance designation for the baseline performance period be as of October 1, 2017 (one year in advance of first baseline report). The GDOT noted that given significant uncertainty over designation and revocation timeframes experienced over many years, this baseline would provide some assurances and, hopefully, avoid unnecessary resource expenditure based on assumed designations before October 2018.

The FHWA does not agree that special consideration or a waiver is needed for newly designated nonattainment areas. Potential areas have sufficient notice that they may be designated nonattainment. Therefore, States do not need more time to meet the performance measure requirements than afforded the other areas to establish targets. In addition, FHWA has clarified in the final rule that the baseline nonattainment and maintenance area designations should be based on area status as of October 1, 2017.

5. Reporting

Several commenters requested clarity on the timeframe for reporting emissions reductions. Several commenters suggested that emission reduction benefits for CMAQ-funded projects should be reported after the project has been completed and is open for use, rather than the first time CMAQ funding is obligated for the project. Others argued that the proposed on-road mobile source emissions measure reporting timing would be disadvantageous for smaller urban areas, because such MPOs sometimes use multiple years' allocations to fund a single project, which could give the false impression that an MPO failed to meet a target if there were no reportable emissions reductions for certain years. These commenters also asked FHWA to clarify the year to which the first March 1 and July 1 due dates apply.

Some commenters suggested that limiting emissions reductions benefits to a single year would understate the actual benefits realized because the life of the benefits last as long as the project, which can be from 1 year (e.g., operations) to decades (e.g., built facilities, locomotive repower projects). For this reason, they recommended that FHWA add two fields to the CMAQ Public Access System—one for year

open to service (or completion year) and one for expected service life, which would allow the benefits for a given project to count beginning in the year open to service and continue to be counted as long as the service life has not been exceeded. They said this approach would avoid the complication that would result from the use of advance construction to initiate projects if the rule relied on the first year of obligation as the emissions reduction benefits trigger. The commenters also suggested that FHWA consider a moving average for emissions reductions to smooth out the uneven implementation of projects, arguing that in some years a target would be exceeded while no benefits may be realized in other years. The Association of Metropolitan Planning Organizations and Fairbanks Metropolitan Area Transport System suggested that it may be better to report benefits on a project specific basis.

The California Association of Councils of Government et al. requested guidance regarding how States and MPOs should reconcile variations in emissions model outputs over time solely due to emissions model updates. Regarding the first performance report, AASHTO and Connecticut DOT asked if the emission reduction assigned at the time the project was entered would be the target value or if the projects need to be recalculated using current emissions modeling, emission factors, etc. to determine whether the target was met.

To keep this measure simple and consistent with the current CMAQ reporting requirements, a project's estimated emissions reductions are only for the first year of full operation. The information is entered in the CMAQ Public Access system only for the first year the project has funds obligated to avoid double counting benefits. The FHWA understands this approach may result in taking credit for a project in a performance period before it becomes operational, but believes the simplicity of this process is appropriate. The March 1 deadline for State DOTs to enter their CMAQ project information in the CMAQ Public Access System is not a new deadline. The CMAQ Program Guidance includes this same date for entering project information for the previous fiscal year. Therefore, this date applies now and will continue to apply with this final rule. The July 1 date is a new deadline for FHWA to ensure all information is in the CMAQ Public Access System. This due date will apply on July 1 after this final rule is effective.

The FHWA clarifies that there is no requirement to recalculate the emissions entered into the CMAQ Public Access

System or to make adjustments to emissions estimates previously entered into the Public Access System when U.S. EPA approves new models. States or MPOs that believe they would not be able to meet a target due to a change in the models can adjust the target at the performance period's mid-point or explain in their final performance report why they were unable to meet their targets due to model-based emissions estimate. The FHWA has not made any changes in the final rule based on these comments.

6. Concerns Related to Quantification of Emissions

Some commenters expressed concerns relating to quantifying emissions for certain projects such as fiber installation and traffic monitoring. Another commenter stated that transit projects may not demonstrate as much emissions reduction as heavy-duty engine replacement projects, even though additional transit service may be necessary to address regional and corridor congestion.

Several commenters asked that FHWA continue to give State DOTs discretion to determine if quantitative CMAQ reporting is required, or expressed support for not being required to quantify emissions benefits in every situation, or argued in favor of States having the ability to update information in the CMAQ database. However, several others commented that they do not want to have to update their emissions because it would not be a good use of resources.

The Oregon DOT and Washington State DOT disagreed with requiring CMAQ projects that fund operations improvements or are aimed at increasing person throughput to show a reduction in emissions, reasoning that latent demand often replaces any capacity made available by operational improvements. The Georgia DOT requested that FHWA provide guidance for establishing targets, because targets could be different by project types and limit/extent, and asked if the single target would reflect the total emission reductions of all projects in the nonattainment area during the 2- and/or 4-year timeframe. Expressing concern that 2- and 4-year targets will be difficult to set based on current information in the CMAQ Public Access System, Oregon DOT recommended that FHWA carry out additional research to determine how to successfully implement the on-road mobile source emissions measure.

Under the CMAQ program, State DOTs and MPOs have the discretion to fund projects where it is not possible or

easy to quantify the emissions benefit. However, these projects will not be accounted for in this performance measure since by the nature of the project, it is not possible to quantify the emissions benefit. Further, FHWA appreciates the concerns raised with respect to lifecycle benefits, but in order to keep the CMAQ reporting system simple and easy to use, it does not require the calculation of life cycle emissions benefits.

States and MPOs must use projects in the 4 years prior to the first performance year as a basis for establishing a target for the first performance period. The projects entered into the System during the 2- and 4-year performance period will be taken as is to calculate the measure. If a State or MPO felt they would not be able to meet a target, they could adjust the target at the mid-point of the performance period or explain in their final performance report why they were unable to meet their targets. The FHWA has not made any changes in the final rule based on these comments.

7. Application Beyond CMAQ Projects

The majority of commenters on this topic expressed concern over limiting the on-road mobile source emissions measure to only those projects that receive CMAQ funding. One argued it would be inefficient, another that emissions reductions from all recipients of CMAQ dollars should be assessed, and another that the best opportunity to reduce emissions comes from operations and capital projects. The Nashville Area MPO and T4A recommended that total emissions reductions be measured for areas designated as nonattainment or maintenance for ozone, carbon monoxide, or particulate matter and that targets under this measure should be set to consider all capital and operational opportunities to reduce emissions, not just those that receive CMAQ funding. Another noted that projects tend to have multiple funding sources. Other commenters recommended that the targets under the on-road mobile source emissions performance measure consider all transportation projects and not just CMAQ-funded projects, or that as emission reductions become more easily estimated, the measure could be expanded to all projects. One commenter encouraged FHWA to focus on successful actions States are taking rather than from where funding is coming. Another recommended that emission reductions should be assessed at the State or region scale.

In contrast, AASHTO and others expressed support for the proposal that the on-road mobile source emissions performance measure not apply to

States and MPOs that do not contain any portions of a nonattainment area. The Virginia DOT further recommended that FHWA consider a region-wide air quality measure, as CMAQ projects are generally a small subset of transportation projects. The AASHTO, Connecticut DOT, and Montana DOT urged FHWA not to require emissions data reporting as to flexible CMAQ funds, because requiring such reporting could indirectly pressure States to forego the flexibility provided by Congress.

The FHWA does not agree this measure should extend beyond the CMAQ program since the performance measure, as defined in 23 U.S.C. 150(c)(5), is specifically tied to the CMAQ program. The FHWA also does not agree that the measure should apply to all States or regions that receive CMAQ funds or that the emissions benefits included should extend beyond the CMAQ program. As noted in the NPRM, attainment areas are allowed flexibility in spending their CMAQ funds whereby projects are not required to adhere to specific CMAQ eligibility requirements. While there are many projects funded with monies beyond the CMAQ program that result in an emissions benefit, the performance measure, as defined in 23 U.S.C. 150(c)(5), is specifically tied to CMAQ program. The purpose of the CMAQ program is to fund transportation projects or programs that contribute to the attainment or maintenances of the NAAQS in nonattainment or maintenance areas. The FHWA has not made any changes in the final rule based on these comments.

8. Attainment Definition—Removal of Areas Beyond 20-Year Maintenance Plan

Oregon DOT suggested that an area should be considered attainment if it has reached the end of its 20-year maintenance plan.

The FHWA agrees that when an area reaches the end of its 20-year maintenance plan for an applicable pollutant, the CMAQ performance reporting requirement should no longer apply. Changes were made to the definition of "maintenance area" in section 490.101 and to the data requirements in section 490.809(c).

9. Modification of Emissions Information at 2-Year Report

The Connecticut DOT recommended that FHWA allow revisions to the applicability of the on-road mobile source emissions performance measure to certain criteria pollutants if the NAAQS designation status changes

during the 4-year performance period, especially at the 2-year midpoint.

The Oregon Metro Council and the Joint Policy Advisory Committee on Transportation expressed concern that the proposed rule was unclear about how to address delay and cancellation of projects funded by CMAQ in the emissions reduction reporting. In particular, this commenter asked about procedures for removing the emissions reductions already accounted for in previous reporting to ensure that emission reduction credit is not taken for a project that continues to get slipped and carried over from one year to the next.

The FHWA agrees that flexibility should be provided to areas if their designations change during the 4-year performance period. The FHWA has revised the language in § 490.809(c) so that nonattainment and maintenance areas will be revised if an area is no longer nonattainment or maintenance, for any pollutants in § 490.803.

10. Concerns About the CMAQ Public Access System Data; Use of Observed Data and Other Alternative Methods

Some commenters expressed concerns with data deficiencies in the CMAQ Public Access System that should be corrected before reliance on its use for the on-road mobile source emissions performance measure. For example, AASHTO and Connecticut DOT commented that the inability to de-obligate an entry was a deficiency in the User Profile and Access Control System (UPACS) that needs to be corrected to meet the requirements of the on-road mobile source emissions performance measure. The AASHTO, Oregon DOT, and Connecticut DOT expressed concern that emissions reductions often are estimated differently by different MPOs and that sometimes even similar projects within an agency have vastly different estimates. The Chicago Metropolitan Agency for Planning warned that it will be difficult to ensure data quality submitted for performance reports because projects in the database have not matched up well with local project descriptions, which is in part a result of the local programmer (often the MPO) submitting data to the State, which then repackages it for submission to the Public Access System. Others commented that because the UPACS/ Public Access System is intended to track emissions reductions benefits, it is not well suited to evaluate attainment of targets. One commenter noted that adding health impact information for each pollutant would be useful to decisionmakers. Another recommended that FHWA provide a workbook to input

more environmental information into the CMAQ Public Access System (e.g., population density, traffic congestion, extreme weather events). The Pennsylvania DOT recommended that the emission reduction performance measure should be based on cost-effectiveness.

Several commenters sought clarification on various issues related to calculating emissions reductions for purposes of the proposed on-road mobile source emissions performance measure, and various alternative methods or improvements to the UPACS/CMAQ Public Access System were suggested.

The Oregon Metro Council and the Joint Policy Advisory Committee on Transportation expressed concern that the proposed on-road mobile source emissions performance measure does not meet the same standards as other performance measures because it is not based on observed data.

The Oregon DOT and Washington State DOT commented that collecting emissions data on a project-by-project basis through vehicle probing or other means would be cost-prohibitive and take years to collect enough data to use. Others recommended that FHWA create a look-up table that it would update periodically and which lists emission reductions that may be expected for a range of smaller projects. Similarly, Oregon DOT suggested that FHWA consider ways to quantify some projects that nationwide tend to have missing data.

While FHWA is aware that this measure is based on estimated emissions reduction, not measured or observed emissions, the tools to do otherwise are not available, and the time needed to measure the change in emissions from every CMAQ project would be not be practicable. State DOTs and MPOs have been strongly encouraged to quantitatively report their emission benefits for all CMAQ projects since 1992. The first modules of FHWA's tool kit of best practices are already available, and additional modules now under development will be available before the first performance period. No changes were made in response to these comments.

11. Applicability of Measure to All Criteria Pollutants and Precursors

The United States Green Building Council commented that MPOS should be required to measure the criteria air pollution of their plans and subsequently work to reduce criteria pollutant levels. Another suggested that the on-road mobile source emissions performance measure should allow

States and MPOs to include emissions reductions from CMAQ projects for all criteria pollutants (and their precursors), regardless of the type of attainment/nonattainment areas in which the project is located. This commenter reasoned that it may be difficult to separate out reductions that only pertain to the specific nonattainment and maintenance areas, particularly for regional or statewide CMAQ projects.

Several commented that no other non-CMAQ pollutants should be added to the on-road mobile source emissions performance measure. Specifically, Oregon DOT recommended that FHWA limit defined pollutants and not include open ended definitions that have the potential to expand performance measure burdens under this rule due to actions by another agency. The Connecticut DOT commented that subpart H performance targets only should be set for criteria pollutants for which a State currently reports emissions reductions.

The FHWA agrees that it is not always easy to determine the emissions benefits for some projects by nonattainment or maintenance area. However, to the extent an area wants to take credit for the emissions reductions for a statewide project, they should use the best tools available to determine which portion of that project benefits their area. This problem is not new to the CMAQ program or even regional emissions analyses under transportation conformity that must account for the emissions of all projects within a nonattainment or maintenance area. Therefore, FHWA has not made any changes in the final rule based on this comment.

12. Use of Standard System Versus Metric System To Measure Emissions

The AASHTO and Connecticut DOT recommended that FHWA change the protocol for the CMAQ Public Access System from the metric system (kg/day) to standard (lbs/day) for consistency to life of the project cost effectiveness. Others recommended that emission reduction benefits be compared in tons per annualized days to allow a fair comparison between projects that may have a varied number of effective days. The Association of Metropolitan Planning Organizations commented that converting the kilograms per day emissions data to tons per year does not provide any new information about the performance of the project or how it compares to other projects. Rather than having the measure be expressed in short tons per year, one commenter suggested that the measure should be

expressed in total number of short tons of pollutant removed over the 2- and 4-year periods. This commenter also recommended that the equation given in section 490.813(b) should be modified to add a parameter for the number of years or the regulation should provide an additional equation for the 4-year calculation.

The FHWA agrees with the concerns raised about the proposed metric and therefore has removed that conversion from the emissions measure calculation in section 490.813(b). This change also results in a change in the units for the emissions measure in section 490.813.

VI. Section-by-Section Discussion of the General Information and National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program

A. Subpart A—General Information

Discussion Section of § 490.101 Definitions

The FHWA made the following changes and additions to the definitions proposed in the NPRM.

American Community Survey (ACS)—A definition was added to describe a data source that is needed to support new required measure components. The ACS is being identified as a source of information to acquire data on travel choices to journey to work in urban areas.

Freight bottlenecks—The definition of “freight bottleneck” has been changed to “truck freight bottleneck” and revised to provide a general description that allows State DOTs to determine based upon individual context. The definition also does not limit the location to the Interstate. Each State will need to define what constitutes bottlenecks based upon the specific context of the State and the local impediments that each State experiences with regard to freight movement.

Maintenance area—FHWA has amended the definition of maintenance area to exclude areas that reach the end of their 20-year maintenance period for the purposes of part 490.

National Performance Management Research Data Set (NPMRDS)—the definition of the NPMRDS was revised to clarify that only mainline highway portions of the NHS are included in the data set. In addition, the definition was revised to change the interval of travel times from 5 to 15 minutes.

Non-SOV Travel—a definition was added for travel occurring on modes other than driving alone in a motorized

vehicle and includes travel that is avoided by telecommuting. This definition was added as the term, “non-SOV Travel,” is used within the regulatory text as an indicator of transportation mode choice.

Discussion Section of § 490.103 Data Requirements

The FHWA made the following changes regarding Data Requirements.

Throughout the final rule the timing for determination of measure applicability has been changed from “at the time when the State Baseline Performance Period Report is due” to “one year before the time when the State Baseline Performance Period Report is due.” In § 490.103(c), State DOTs must use the nonattainment and maintenance boundaries based on the most recent EPA designations at the time that is “one year before” the State Baseline Performance Report is due. As discussed in the change to the definition of “maintenance” areas, EPA designations of maintenance areas that have reached the end of their 20-year maintenance period will not be applicable to the requirements of subpart H.

The FHWA revised the equivalent data requirements under section 490.103(e)(5)(ii) to clarify that the equivalent data set only is required to include travel time data for the “mainline highways” on the NHS. In addition, § 490.103(e)(5)(ii) was revised to include travel times at a maximum of 15 minute intervals. The temporal granularity of the average travel times in the equivalent data was reduced from the proposed 5 minute interval level to 15 minutes.

In section 490.103(e)(5)(iii), for equivalent data sets, travel must be observed and may be derived from travel times over longer time periods (known as path processing or equivalent).

Text was added in § 490.103(f)(1) to clarify that it is acceptable to use the NPMRDS Travel Time Segments as the Reporting Segments by stating that it is optional to create new Reporting Segments.

The FHWA revised § 490.103(f)(2) to increase the maximum length of reporting segments in urban areas from ½ mile to 1 mile (unless an individual Travel Time segment is longer).

In § 490.103(g) of the NPRM, FHWA proposed that the State DOT would submit its reporting segments for the NHS and the desired travel times for applicable⁶⁷ reporting segments to

HPMS no later than November 1, prior to the beginning of the calendar year in which they will be used for travel time data collection. The FHWA also proposed that these reported reporting segments would be used throughout the performance period. The FHWA felt that a 2-step data reporting (first step is reporting segments and desired travel times and second step is reporting metric data for corresponding reporting segments) along with constant reporting segments throughout the performance period is necessary to ensure consistency between data sets at the time of target establishment and subsequent progress evaluations. Since this final rule removes the proposed Peak Hour Travel Time measures in section 490.507, travel time data sets could change (NPMRDS to/from an equivalent data set) during a performance period, and removing the requirements to maintain constant NHS limits during a performance period in section 490.105(d)(3), FHWA believes the first step of data reporting unnecessary. Accordingly, FHWA removes, in the final rule, the proposed reporting requirement for reporting segments and desired travel times prior to the beginning of the calendar year in which they will be used for travel time data collection in § 490.103(g). The FHWA believes that eliminating this reporting step will reduce the burden on the State DOTs. As a result, FHWA moves the requirement for documentation of the State DOT and applicable MPOs coordination and agreement on the travel time data set in § 490.103(g)(4) in the NPRM to § 490.103(f)(4) in the final rule. The FHWA also moves the requirement for the reporting segments in an equivalent data be referenced by HPMS location referencing standards in § 490.103(g)(5) in the NPRM to § 490.103(e)(5)(i) in the final rule.

Section 490.103(g) has been revised in this final rule. In this section, State DOTs are encouraged to report the Posted Speed Limits for the full extent of the NHS via HPMS as this data is needed for State DOTs to identify the occurrence of excessive delays.

Discussion Section of § 490.105 Establishment of Performance Targets

Section 490.105(d)(3) and (e)(3)(i)— Maintaining Urbanized Area Constant Throughout a Performance Period

In section 490.105(d)(3), FHWA removes the requirement for maintaining urbanized area constant throughout a performance period. The FHWA made this change because the requirements for NHS limits constant

⁶⁷ Reporting segments on NHS located within urbanized areas with populations over 1 million for the proposed Peak Hour Travel Time measures.

throughout a performance period was eliminated in the final rule for the second performance management measures. In addition to consistency between NHS limits data and urbanized area data, FHWA believes State DOTs and MPOs will have sufficient time to adopt updated U.S. Census decennial census data in their target establishment/adjustment since the NHS and urbanized area data used for travel time data collection for a calendar year will have a 2-year time lag. For example, 2015 NHS limits and urbanized area data collected is reported in 2016 to HPMS and that data will be used for travel time data collection in 2017. Additionally, HPMS allows 2 years to adopt updated decennial census urbanized area data. So, FHWA believes that there will be adequate time between U.S. Census publications of decennial census urbanized area data and target establishment and adjustment. For these reasons, FHWA revises § 490.105(d)(3) for removing the requirement for maintaining urbanized area constant throughout a performance period for the urbanized area specific targets, as provided in § 490.105(e)(8). For the same reason, the FHWA revises § 490.105(e)(3)(i) so that State DOTs no longer required to “declare” the boundaries used to establish each additional target and so that changes in urbanized area will be accounted for the additional targets, as described in § 490.105(e)(3).

Section 490.105(e)(8)(i) and (ii) and (f)(5)(i) and (ii)—Urbanized Area Population Threshold for CMAQ Traffic Congestion Measures

In section 490.703, FHWA revises the urbanized area population threshold for traffic congestion measures, in § 490.707(a) and (b), from 1 million to 200,000. In response to the revision in section 490.703, FHWA revises § 490.105(e)(8)(i), (e)(8)(ii), (f)(5)(i), and (f)(5)(ii). In § 490.105(e)(8)(i) and (f)(5)(i), the 1 million population threshold only applies to the first performance period (*i.e.*, the performance period beginning on January 1, 2018). In § 490.105(e)(8)(ii) and (f)(5)(ii), the 200,000 population threshold applies to the second performance period (*i.e.*, the performance period beginning on January 1, 2022) and all subsequent performance periods thereafter.

Sections 490.105(e)(8)(iii), (f)(5)(iii), and (f)(6)(iii), and 490.107(c)(3)—Population Data Sources for CMAQ Measure Applicability Determination

Total population of an urbanized area in section 490.713(b) in the final rule is

revised from the Decennial Census population number to the most recent annual population estimate from the U.S. Census Bureau. Section 490.105(e)(8)(iii)(D) and (f)(5)(iii)(D) have been revised so that the data source for applicability determination and the measure computation are the same.

To maintain consistency with the population data source for determining the applicability of the CMAQ traffic congestion measures, FHWA revises sections 490.105(f)(6)(iii) and 490.107(c)(3) to use the most recent annual population estimates from the U.S. Census Bureau in determining which MPOs are required to submit MPO CMAQ Performance Plan.

Section 490.105(e)(8) & (9) and (f)(5) & (6)—CMAQ Measure Applicability Determination Timing and Methodology

In paragraphs (e)(8)(iii)(D) through (F), (e)(8)(iv), (f)(5)(iii)(D) through (F) and (f)(5)(iv), FHWA revises the timing of determining which State DOTs and MPOs are required to implement traffic congestion measures in § 490.707(a) and (b). The applicability determination for traffic congestion measures will be made 1 year before when the State DOT Baseline Performance Period Report.

In paragraphs (e)(9)(v) and (f)(5)(v), FHWA revises the timing of determining which State DOTs and MPOs are required to implement on-road mobile source emissions measure in § 490.807. The applicability determination for on-road mobile source emissions measure will be made 1 year before when the State DOT Baseline Performance Period Report.

In paragraphs (e)(8)(iii)(F), (e)(8)(v), (f)(5)(iii)(F), and (f)(5)(v) of this section, FHWA revises the requirements for the determination of nonattainment and maintenance areas to revisit the designations one year before the State DOT Mid Performance Period Progress Report is due to FHWA. Any urbanized areas that are determined at this point to be no longer in nonattainment or maintenance for a criteria pollutant included in section 490.703 will not be subject to the traffic congestion measure requirements for the remainder of the performance period.

In paragraphs (e)(9)(v), (e)(9)(viii), and (f)(6)(v) of this section, FHWA revises the requirements for the determination of nonattainment and maintenance areas to revisit the designations one year before the State DOT Mid Performance Period Progress Report is due to FHWA. Any area within State boundary or metropolitan planning area that are determined at this point to be no longer in nonattainment or maintenance for

any criteria pollutant included in section 490.803 will not be subject to the on-road mobile source emission measure requirements for the remainder of the performance period.

In paragraphs (e)(8)(vi) and (f)(5)(vi) of this section, FHWA revises the phase-in for the establishment of urbanized area specific targets. The phase-in does not require State DOTs and MPOs to establish a 2-year target for the first performance period to provide time to build capacity and to acquire sufficient to calculate the new PHED measure in § 490.707(a). The phase-in of urbanized area specific targets does not apply to the new non-SOV travel measure in § 490.707(b).

Discussion Section of § 490.107 Reporting on Performance Targets

Section 490.107(a)(4)—Initial State Performance Report

Section 490.107(a)(4) and (5) have been removed in this final rule.

Section 490.107(b)(1)(ii)(E)—NHS Limits for Targets

The NHS limits for targets are removed from section 490.107(b)(1)(ii)(E) and State are not required to include them in the State Baseline Performance Period Report. This requirement was removed as NHS limits will not be held constant for the duration of the performance period in the assessment of progress made by State DOTs to achieve targets. As discussed in the Pavement and Bridge Condition Performance Measure final rule, commenters felt that changes in NHS limits that may occur from year to year can be reasonably considered in the establishment of targets.

Section 490.107(b)(1)(ii)(E), (b)(2)(ii)(D), and (b)(3)(ii)(D)—Reporting Congestion at Truck Freight Bottlenecks

Section 490.107(b)(1)(ii)(E), (b)(2)(ii)(D), and (b)(3)(ii)(D) have been revised to clarify that States must document the location of freight bottlenecks with the State including those identified in the National Strategic Freight Plan. The section also sets forth the conditions under which a State Freight Plan may serve as the basis for identifying truck freight bottlenecks.

Section 490.107(b)(1), (2) and (3)—Reporting Metrics for GHG Measure

As discussed in the discussion section for § 490.511, State DOTs are required to report total annual on-road CO₂ emissions on the NHS and total annual on-road CO₂ emissions, for the measure specified in § 490.507(b), to FHWA as part of the State Biennial Performance Report. Accordingly, FHWA adds

§ 490.107(b)(1)(ii)(H), (b)(2)(ii)(J), and (b)(3)(ii)(I) in the final rule.

Section 490.107(b)(1)—Reporting Data Collection Method for the Percent Non-SOV Travel Measure

As discussed in discussion section for § 490.709, State DOTs are required to report in their Baseline Performance Period Report the data collection method that is used to determine the Percent non-SOV Travel measure, in section 490.707(b), for each applicable urbanized area in the State, as provided in section 490.709(f)(2). Accordingly, FHWA adds § 490.107(b)(1)(ii)(I) in the final rule.

Section 490.107(c)(3)—MPO CMAQ Performance Plan Applicability Determination Timing

In § 490.107(c)(3), FHWA revises the timing of determining which MPOs are required to develop and report CMAQ Performance Plan. The applicability determination for the MPO CMAQ Performance Plan will be made 1 year before when the State DOT Baseline Performance Period Report. Also, FHWA revises § 490.107(c)(3) so that nonattainment and maintenance areas to revisit the designations one year before the State DOT Mid Performance Period Progress Report is due to FHWA. Any area within metropolitan planning area, within an urbanized area with a population greater than 1 million, that are determined at this point to be no longer in nonattainment or maintenance for any criteria pollutant included in section 490.803 will not be subject to the MPO CMAQ Performance Plan for the remainder of that performance period.

B. Subpart E—National Performance Management Measures for the NHPP System Performance

Discussion Section 490.503 Applicability

The FHWA removed the applicability language relating to Peak Hour Travel Time measures because those measures have been removed from the rule. The FHWA added a provision for the GHG measure in § 490.507(b), making it applicable to all mainline highways on the Interstate and non-Interstate NHS.

Discussion Section of § 490.505 Definitions

The following changes were made to the definitions in section 490.505 to address comments received.

A definition has been established to define Greenhouse Gas as any gas that

absorbs infrared radiation in the atmosphere. The definition further notes that ninety-five percent of transportation GHG emissions are carbon dioxide (CO₂) from burning fossil fuel. Other transportation GHG emissions are methane (CH₄), nitrous oxide (N₂O), and hydrofluorocarbons (HFCs). The definition also establishes the acronym, “GHG,” that is used throughout the section to refer to Greenhouse Gas. This definition has been added as a GHG measure is established in this section to assess system performance.

The proposed definitions for Desired Peak Hour Travel Time, Peak Hour Travel Time, The Peak Period, and Peak Hour Travel Time Ratio were all removed from section as the measure of the percentage of the system meeting peak hour travel time expectations has been removed.

Discussion Section of § 490.507 National Performance Management Measures for System Performance

The NHPP Reliability measure has been changed from, “Percent of the Interstate System providing for Reliable Travel Times,” to “Percent of person-miles travelled on the Interstate System that are reliable.” This same change has been made for the non-Interstate NHS reliability measure. The proposed Peak Hour Travel Time measures were removed in the final rule.

The FHWA added a GHG emissions performance measure in this section. The FHWA established the measure in a manner that utilizes existing data sources and minimizes burden on transportation agencies.

The GHG emissions performance metric is on-road CO₂ emissions from vehicles operating on the NHS. The measure will be expressed as a percent change in CO₂ from a reference year of 2017 levels in order to provide more meaning and context to decisionmakers and the public than a measure using a certain number of metric tons of CO₂.

Discussion Section of § 490.509 Data Requirements

Section 490.509(a) Through (e)—Data Requirement for the Reliability Measures

The FHWA removed the proposed requirement to replace missing travel times with travel time at posted speed limit for the NHPP Reliability measures and all other travel time derived measures in part 490. After further analysis of data and consideration of

comments received, it was determined that, in cases where a considerable portion of the data was missing, the addition of the imputed travel times inaccurately skewed the measure results. In addition, FHWA believes that the occurrence of missing data will be reduced due to the greater prevalence of probes in the future, the allowance of path processing techniques to identify travel times, and the decreased temporal granularity of the measurements from 5 minutes to 15 minutes.

In addition, FHWA has added paragraph (e) in this section to allow State DOTs to exclude any travel times that may have been collected while the roadway was closed.

The FHWA added requirements to identify the data sources for both average annual daily traffic (AADT) volumes and average occupancy factors to support the data needs to adjust the NHPP Reliability measures to reflect person-miles of travel on the NHS. The HPMS has been identified as the data source for segment AADT, which is used to represent a full year of traffic volume by multiplying the average daily value by 365. Average occupancy factors will be determined and published by FHWA on its Web site from national surveys focused on household travel. The FHWA anticipates using the National Household Travel Survey (NHTS) to develop these factors for every State and large metropolitan areas. State DOTs, MPOs, and FHWA will be able to use the combination of total annual traffic volume, average occupancy factors, and length of reporting segment to weight the associated impact of reliability performance on all people traveling on the roadway annually.

Section 490.509(f) Through (h)—Data Requirements for the GHG Measure

The data requirements for calculating the CO₂ emissions performance measure are: (1) Emissions factors of CO₂ per gallon of motor fuel, (2) annual motor fuel sales volumes, and (3) vehicle miles of travel on the NHS and on all roads. Data sources for each are readily available.

The FHWA will post the applicable emissions factors annually by August 15 for use in calculating the performance measure for a range of fuels, based on U.S. Energy Information Agency (EIA) data.⁶⁸ Examples of emissions factors are listed below for informational purposes:

⁶⁸ U.S. Energy Information Agency, and <http://www.eia.gov/tools/faqs/faq.cfm?id=307&t=11>.

Fuel	Pounds CO ₂	Kilograms CO ₂
E10 (Gasoline with 10% ethanol)	18.95/gallon	8.59/gallon.
Gasoline	19.60/gallon	8.89/gallon.
Diesel	22.40/gallon	10.16/gallon.
Compressed Natural Gas (CNG)	54.60/McF (McF = 1,000 Cubic Feet)	24.76/McF (McF = 1,000 Cubic Feet).

State DOTs already collect information on fuel sales for motor vehicle fuels and report it to FHWA. In order to provide maximum flexibility and promote ease of use, State DOTs may use either of the following sources for annual motor fuel sales information:

1. Annual fuel sales volumes as posted August 15 for the previous year in FHWA's *Highway Statistics* in Table MF-21 "Motor Fuel Use."⁶⁹ Fuel sales are provided as a total number of gallons for combined gasoline/gasohol (gasoline ethanol blends such as E10), and special fuels (diesel, biodiesel, natural gas, etc.) combined. According to EIA, 95 percent of current gasoline sales are of E10 (ten percent blend of ethanol with gasoline).⁷⁰

2. The State DOT's fuel sales data the State DOT used to create the summary data included in FHWA's MF-21, if it allows for a great level of detail by fuel type. The FHWA encourages States to track sales at a more granular level and to use the appropriate emissions factor posted by FHWA for each sub-fuel. State DOTs shall make this data available to FHWA, upon request.

Vehicle miles of travel on the NHS and on all roads by State are published in FHWA's *Highway Statistics* in Table VM-3 "Vehicle Miles of Travel, by Federal-Aid Highways." For consistency, the measure uses the most recent published annual data as of August 15 of the year in which the metric is being calculated. For example, State DOTs will access the most recent data on August 15, 2018, to calculate the annual CO₂ emissions on the NHS in 2017.

Discussion Section of § 490.511 Calculation of System Performance Metrics

Section 490.511(b) and (e)—Metric for Reliability Measures

The FHWA changed the basic time period for the travel time reliability measure from 5 minutes to 15 minutes. The FHWA also clarified that reporting segment-level reliability metrics and related data can be reported by either

NPMRDS TMC segment(s) or HPMS sections.

The FHWA added information to be reported to HPMS along with the metric-related information, including directional AADT (the AADT in the direction of travel for the reporting segment) and a vehicle occupancy factor if not using the FHWA-supplied factor.

Sections 490.511(c), (d), and (f)—Metric for the GHG Measure

State DOTs are required to calculate annual total tailpipe CO₂ emissions on the NHS as the metric for the GHG measure. To calculate the CO₂ emissions performance metric, State DOTs will use a methodology that relies on fuel sales volumes.

In order to calculate total annual on-road CO₂ emissions, the total volume of each fuel sold is multiplied by the appropriate CO₂ emission factors. The total CO₂ emissions for each fuel type are then summed. The CO₂ emissions measure is specific to the performance of the NHS. Therefore, it is necessary to estimate the portion of on-road CO₂ emissions attributable to the NHS by State.⁷¹ Existing data does not differentiate the exact volumes of fuel burned on the NHS versus the volume of fuels burned on other roads. Therefore, States will use the proportion of the State's VMT that occurs on the NHS as a proxy for the proportion of the State's on-road CO₂ emissions on the NHS.⁷² State DOTs calculate on-road CO₂ emissions on the NHS by multiplying on-road CO₂ emissions by the proportion of NHS VMT out of total VMT.

As fuel sales volumes are not generally available at the metropolitan area level, State DOTs and MPOs have flexibility on how they calculate on-road CO₂ emissions for MPOs. Options range from simply using the MPO share of the State's VMT as a proxy for the MPO share of CO₂ emissions, to more

detailed analytical methods, such as using travel demand modeling and EPA's MOVES model,⁷³ or using FHWA's EERPAT model. These methods are discussed in detail under Section V. An MPO also may use another methodology if the methodology is demonstrably valid and useful for CO₂ measurement. The use of a methodology not described in the rule does not require FHWA approval, but is subject to oversight.

State DOTs will report total annual on-road CO₂ emissions on the NHS (the GHG metric) and total annual on-road CO₂ emissions (the step in the calculation prior to computing the GHG metric) to FHWA as part of the State Biennial Performance Report. State DOTs will report the 2017 on-road CO₂ emissions on the NHS in the first Biennial Performance Report. State DOTs will use the 2017 reference value calculated for the first Biennial Performance Report in future Biennial Performance Reports unless FHWA posts on its Web site that there has been a change that warrants recalculation of the 2017 value, in which case the State DOT will provide an updated value in the next Biennial Performance Report. State DOTs will report the GHG metric and total annual CO₂ emissions, every 2 years in their Biennial Performance Report for each of the preceding 2 calendar years. In doing this, the State DOT can either acquire the data needed for both years at once to calculate the metric, or they can calculate the metric each year. In either case, the State DOT will report both years to FHWA at one time in their Biennial Performance Report.

Discussion Section of § 490.513 Calculation of System Performance Measures

Section 490.513(a) has been revised to more clearly identify that State DOTs and MPOs will calculate measures in this section for the purpose of carrying out the system performance related performance requirements of part 490 and that FHWA will calculate measures in this section for the purpose of making significant progress determinations and for reporting on system performance.

⁶⁹ Note that the highway use fuel sales data in MF-21 includes only the fuel that is used to power on-road vehicles and does not include the fuel used for road construction or off-road activities such as powering lawn-mowers and construction equipment.

⁷⁰ www.eia.gov/todayinenergy/detail.php?id=26092.

⁷¹ Travel on the NHS accounts for approximately 55 percent of total U.S. VMT, varying by State.

⁷² FHWA recognizes that this is not a perfect proxy, as speeds, operating conditions, and vehicle types on the NHS differ from those on other roads and differ between states. However, in balancing the competing goals of simplicity and precision, FHWA believes that this approach provides actionable information that DOTs and MPOs can use in evaluating system performance and making decisions, without significantly increasing workloads.

⁷³ Or EMFAC in California.

Section 490.513(a) Through (c)— Calculation of Reliability Measures

Section 490.513 has been revised to change the measure calculation method to add in weighting for person-miles traveled. The NHPP Reliability measure is calculated by summing the product of the total annual traffic volume, the average occupancy factor, and the segment length for each reporting segment that is exhibiting a LOTTR below 1.50 and comparing this, as a percentage, to the total person-miles traveled on the full system. This method has been designed to accommodate unique occupancy factors for each reporting segment if this information is available through data tables provided by FHWA as discussed in section 490.509.

Section 490.513(d)—Calculation of the GHG Measure

Total annual tons of CO₂ emissions from on-road transportation sources on the NHS are expressed as a percent change from 2017, computed to the nearest tenth of a percent. This is in accordance with common practice of expressing GHG emissions goals in terms of a percent change from a certain year.

C. Subpart F—National Performance Management Measures for Freight Movement on the Interstate

Discussion of Section 490.607 National Performance Management Measure To Assess Freight Movement on the Interstate System

The FHWA has eliminated the performance measure for Percent of Interstate System Mileage Uncongested. The final and sole performance measure for freight will be Truck Travel Time Reliability Index, which represents the average reliability index of all reporting segments on the Interstate system.

Discussion of Section 490.609 Data Requirements

Consistent with changes to sections 490.509 and 490.511(b), FHWA has revised the time bin intervals in this section from 5 to 15 minutes. This rule also revises the approach to missing data, adopting a requirement that when truck travel times are not available in the travel time data set (data not reported, or reported as “0” or null) for a given 15 minute interval, the missing travel time will be replaced with an observed travel time that represents all traffic on the roadway during the same 15 minute interval (“all vehicles” in NPMRDS nomenclature). Changes were also made to the method to replace missing truck travel times to remove the

requirement to only allow all vehicle travel times to be used as a replacement for truck travel times when this time was less than or equal to the posted speed limit. The FHWA also added a provision allowing State DOTs to exclude time periods when an NHS roadway is closed.

Discussion of Section 490.611 Calculation of Freight Movement Metric

First, as discussed in section 490.607, the Percent of the Interstate System Mileage providing for Reliable Truck Travel Time proposed in the NPRM has been renamed the Truck Travel Time Reliability (TTTR) Index. Second, the TTTR Index has been revised in several ways.

The TTTR Index measure now includes five time period components to better consider the variability in travel times experienced by trucks during all hours of the day and throughout the year. These time periods were selected to be consistent with the time periods used to calculate the LOTTR as proposed in the NPRM and finalized in section 490.511. As discussed in §§ 490.511 and 490.611, FHWA revised the data bins to use 15-minute intervals. The TTTR Index metrics are calculated as the ratio of the 95th percentile travel time divided by the 50th percentile travel time for each segment and each time period.

The reporting of the metric has been revised to require the reporting of the TTTR Index, the 95th percentile travel time, and the 50th percentile travel time for each of the five time periods for each reporting segment.

Discussion of Section 490.613 Calculation of Freight Movement Measure

Section 490.613(a) has been revised to more clearly identify that State DOTs and MPOs will calculate measures in this section for the purpose of carrying out the freight related performance requirements of part 490 and that FHWA will calculate measures in this section for the purpose of making significant progress determinations and for reporting on freight performance.

The method for calculating the freight performance measure has been changed from the proposed Percent of the Interstate System Mileage Providing for Reliable Truck Travel Times to a TTTR Index for the five time periods noted in § 490.611. Instead of using a threshold for determining if a section of Interstate is reliable, as proposed in the NPRM, an index is calculated and averaged for the entire Interstate in the State. The average TTTR Index is calculated by multiplying the maximum TTTR Index

metric of all 5 time periods for each reporting segment by the length of the reporting segment, then the sum of all segments is divided by the total length of Interstate to generate an average TTTR Index for the entire applicable area. This approach to calculating the measure will differentiate it from the NHPP Travel Time Reliability measure, and remove the expectation to maintain a TTTR below 1.50 to better recognize incremental improvements to system performance.

D. Subpart G—National Performance Measures for CMAQ Program—Traffic Congestion

Discussion Section of § 490.703 Applicability

The FHWA has decided to phase-in this expansion of the applicability of the CMAQ Traffic Congestion measures to medium-sized urbanized areas, recognizing that calculating the Peak Hour Excessive Delay (PHED) measure may be burdensome in the short term for some smaller urbanized areas in light of other new performance measure requirements.

The CMAQ Traffic Congestion measures of PHED and Modal Share focus on addressing traffic congestion that contributes to air pollution in areas classified as in nonattainment or maintenance under the Clean Air Act. The final rule revises §§ 490.703 and 490.105(e)(8)(i), (e)(8)(ii), (f)(5)(i), and (f)(5)(ii) so that the CMAQ Traffic Congestion measures in section 490.707 initially apply to the urbanized area with a population of more than 1 million that contains any part of nonattainment or maintenance areas, before expanding to nonattainment or maintenance areas with a population over 200,000 for the second and all subsequent performance periods.

The FHWA also revised section 490.703 to base the applicability on urbanized area attributes (existence of NHS mileage, population, and attainment status). The proposed section in the NPRM applied the measure to the NHS. This was changed because the new non-SOV travel measure applies beyond the NHS.

Discussion Section of § 490.705 Definitions

The FHWA limits the excessive delay measure to peak hours, which are revised from the peak hours in the Peak Hour Travel Time Reliability measure in the NPRM. The peak periods in the final rule include 9:00 to 10:00 a.m. and to provide flexibility to State DOTs and MPOs to add a fourth hour (either 3:00 to 4:00 p.m. or 7:00 to 8:00 p.m.) for the

afternoon peak period. The FHWA provides flexibility only within the 6:00 a.m. to 8:00 p.m. time period to be consistent with the dataset used in the reliability measure under section 490.103.

FHWA revises the speed threshold in the final rule to be 60 percent of the posted speed limit with a minimum of 20 mph.

Discussion Section of § 490.707 National Performance Management Measures for Traffic Congestion

In the NPRM, FHWA proposed excessive delay per capita as the measure of traffic congestion under CMAQ. This measure has been revised as described in section 490.705 to reflect the total peak hour excessive delay experienced by all travelers, normalized by the total population in the applicable area. In this final rule, the revised measure is peak hour excessive delay per capita.

The FHWA revised section 490.707 in the final rule to include a new measure under the CMAQ program that reflects the percentage of non-single occupancy vehicle trips taken by travelers within an urbanized area. This measure will help State DOTs and MPOs better understand the impact of lower-emission travel methods on their congestion profile and area air quality.

Discussion Section of § 490.709 Data Requirements

Discussion Section 490.709(a) Through (e)—Data Requirements for the Annual Hours of Peak Hour Excessive Delay Per Capita Measure

The FHWA retained the data requirements to determine hourly traffic volumes proposed in the NPRM and added a new allowance in section 490.709(c)(5) for travel times that represent periods when the roadway is closed.

The FHWA added § 490.709(d) and (e) in the final rule to establish the data needed to estimate the impact of travel time delay on all travelers. The method is used to group roadway traffic on the NHS into three types of vehicles, including: Trucks, buses, and cars and then estimates the total number people traveling by applying occupancy factors for these vehicles, respectively.

Section 490.709(d) has been established to specify the allowable methods to determine the volume of buses, trucks, and cars as a percentage of daily traffic using each roadway segment. Two methods are specified that provide State DOTs the option of determining the percentage of the three vehicle groups based on annual traffic

volume counts collected by continuous count stations or by using the average annual counts provided in the HPMS for each segment. State DOTs are required to distribute the traffic volumes to different directions of roadway when using the HPMS data to estimate volumes.

Section 490.709(e) has been established to specify the allowable methods to determine vehicle occupancy factors for buses, trucks, and cars. State DOTs have the option to use occupancy factors provided by FHWA and/or develop occupancy factors that are more specific than those provided by FHWA. The latter will be useful when specific strategies are used to increase person throughput (e.g., construction of high occupancy lanes, dedicated bus lanes, ride sharing). The FHWA intends to develop default occupancy factors for each applicable urbanized area using bus ridership data provided in the NTD and car occupancy rates derived from national travel surveys, such as the NHTS and ACS. A default occupancy factor of 1.0 will be used for trucks. The FHWA intends to update these occupancy factors on a routine basis. To supplement the default occupancy factors, State DOTs and MPOs are provided the option to develop occupancy factors for sections of NHS roads where more specific data on vehicle occupancy is available. This option will be useful when specific strategies are used to increase person throughput such as the construction of high occupancy lanes, dedicated bus lanes, and ride sharing.

Discussion Section 490.709(f)—Data Requirements for the Percentage of Non- SOV Travelled Measure

The FHWA revises section 490.709(f) in the final rule to include data requirements for the measure of non-SOV mode share. The FHWA provides State DOTs and MPOs with several data options for calculating this measure. One option is to use Table DP03 of the ACS for the urban area to estimate the total percent of non-SOV commuting to work travel in the urbanized area. A second option is for State DOTs or MPOs to use local surveys to estimate the percentage of non-SOV travel occurring in the urbanized areas. These surveys may focus on either household or work travel and must be conducted within the 2 years before the start of the performance period and be updated on at least a biennial frequency. A third option is for State DOTs and MPOs to estimate the percent of non-SOV travel based on volume measurements of actual use of each transportation mode, including but not limited to cars,

bicycles, pedestrian travel, travel avoided by telework, and on-road bus transit. Use or development of the third option is encouraged by FHWA as it will provide the most accurate data for future use. State DOTs and MPOs have flexibility to determine which of these count methodologies to use and are required to report these methodologies to FHWA. State DOTs are also encouraged to report these use counts to currently available national data sources, including the Travel Monitoring Analysis System (TMAS).

The FHWA revises section 490.709(g) that determines which State DOTs and MPOs are required to implement both CMAQ traffic congestion measures in § 490.707(a) and (b). This determination will be based on the most recent annual populations published by the U.S. Census of urbanized areas available 1 year before the State DOT Baseline Performance Period Report is due to FHWA. As a result of this revision, § 490.105(e)(8)(iii)(D) and (f)(5)(iii)(D) are revised in the final rule. As for computing the Annual Hours of Peak Hour Excessive Delay Per Capita in section 490.713(b), FHWA revises section 490.709(g) to state that the most recent annual population reported by the U.S. Census, at the time when the State DOT Biennial Performance Period is due to FHWA.

Discussion Section 490.709(h)— Population and Nonattainment and Maintenance Area Data Requirements for Both Traffic Congestion Measures

The FHWA revises section 490.709(h) in the final rule to be consistent with the revised section 490.807(c), which includes the language that nonattainment and maintenance areas will be revised if changes to the designations made by EPA are effective 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA. As discussed in section 490.101 maintenance areas that have reached the end of their 20-year maintenance period will not be subject to the requirements of this subpart.

Discussion Section of § 490.711 Calculation of Traffic Congestion Metrics

The FHWA revised the metric for the Peak Hour Excessive Delay per capita measure to be a reflection of person hours of delay instead of vehicle hours of delay as proposed in the NPRM. The new metric, Total Peak Hour Excessive Delay (person-hours), is calculated for each reporting segment and reported annually to FHWA. There is no metric required for the Percent non-SOV travel

measure as segment level data is not available for this measure.

The FHWA revises section 490.711(b)(1) for the peak period to include 9:00 to 10:00 a.m. and to provide flexibility to State DOTs and MPOs to add a fourth hour (either 3:00 to 4:00 p.m. or 7:00 to 8:00 p.m.) for the afternoon peak period consistent with the changes made to section 490.705. The FHWA provides flexibility within the 6:00 a.m. to 8:00 p.m. time period to be consistent with the dataset used in the reliability measure under § 490.103.

The FHWA changed the length of the NPMRDS time bins from 5 minutes to 15 minutes. This also changed the maximum travel time segment delay from 300 seconds to 900 seconds. The hourly volume is thus divided by four instead of 12.

The FHWA revised section 490.711(e) to express the PHED in person-hours of delay by incorporating average vehicle occupancy (AVO) into the calculation of the delay metric. To incorporate AVO into the metric, State DOTs will refer to either the AVO information for cars, buses, and trucks provided by FHWA or their own AVO information along with information about the percentage of cars, buses, and trucks as a share of total AADT to calculate a weighted AVO. This weighted AVO will then be multiplied by the vehicle-hours of excessive delay to establish the total person-hours of excessive delay. The FHWA recognizes the variations in AVO among and within urbanized areas and the challenges in obtaining segment-level AVOs. The FHWA will provide AVO for cars, trucks, and on-road bus transit for applicable urbanized areas. The FHWA also recognizes that urbanized areas may have more specific AVO data and thus, provides flexibility for State DOTs and MPOs to substitute these data.

Discussion Section of § 490.713 Calculation of Traffic Congestion Measures

Section 490.713(a) has been revised to more clearly identify that State DOTs and MPOs will calculate measures in this section for the purpose of carrying out the traffic congestion related performance requirements of part 490 and that FHWA will calculate measures in this section for the purpose of reporting on PHED performance.

The method to calculate the Excessive Delay per capita measure proposed in the NPRM has been retained in the final rule for the PHED per capita measure as the changes to limit to peak hours and account for all travelers are contained within the metric calculation discussed in the section 490.711. The measure is

calculated by summing the hours of excessive delay experienced by all travelers on all reporting segments by the most recent annual population estimate published by the U.S. Census for the applicable area.

The FHWA revises the final rule to include a measure of non-SOV mode share, providing flexibility for State DOTs and MPOs to choose between three options for calculating this measure. When employing the option using ACS data to calculate the percent non-SOV travel, State DOTs and MPOs calculate the measure by subtracting the estimated percent SOV from 100 percent. When employing the option using data derived from local surveys, State DOTs and MPOs will report the results of their calculations (as a percent of non-SOV travel). When employing the option using data derived from system use measurements to calculate percent non-SOV travel, State DOTs and MPOs will divide the non-SOV volume by total volume, where non-SOV volume includes travel modes other than driving alone in a motorized vehicle, including travel avoided by teleworking.

In addition, in recognition of expected improvements in the ability to accurately measure multimodal travel, FHWA plans to revisit this measure after the completion of FHWA's multimodal research study in Fall 2018.

E. Subpart H—National Performance Measure for the CMAQ Program—On Road Mobile Source Emissions

Discussion Section of § 490.803 Applicability

The performance measure is applicable to all States and MPOs with projects financed with funds from the 23 U.S.C. 149 CMAQ program apportioned to State DOTs for areas designated as nonattainment or maintenance for ozone (O₃), carbon monoxide (CO), or particulate matter (PM).

Discussion Section of § 490.805 Definitions

The proposed definitions of “donut area” and “isolated rural nonattainment and maintenance areas” were removed because those terms do not appear in the final regulation.

Discussion Section of § 490.809 Data Requirements

Section 490.809(c) was revised to specify that the baseline nonattainment and maintenance area designations should be based on area status one year before the date that the State DOT Baseline Performance Period Report is

due to FHWA, which means as of October 1, 2017, for the first State DOT Baseline Performance Period Report. The FHWA also revised the language in section 490.809(c) so that the nonattainment and maintenance areas will be revised if an area is no longer nonattainment or maintenance for any pollutant in section 490.803. This determination will be based on area status 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA.

Discussion Section of § 490.811 Calculation of Emissions Metric

Section 490.811 as proposed in the NPRM was removed in response to comments.

Discussion Section of Former § 490.813 Calculation of Emissions Measure

Section 490.813 in the NPRM has been renumbered as § 490.811 in the final rule, due to the deletion of proposed § 490.811 regarding an emissions metric. The section was also revised due to the removal of the emissions metric as that resulted in a change in the units for the emissions measure in this section.

VII. Rulemaking Analyses and Notices

The FHWA considered all comments received before the close of business on the comment closing date indicated above. The comments are available for examination in the docket FHWA–2013–0054 at www.regulations.gov.

A. Rulemaking Analysis and Notices Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order (E.O.) 12866 and within the meaning of DOT regulatory policies and procedures due to the significant public interest in regulations related to performance management. It is anticipated that the economic impact of this rulemaking will not be economically significant within the meaning of E.O. 12866 as discussed below. This action complies with E.O.s 12866 and 13563 to improve regulation. This action is considered significant because of widespread public interest in the transformation of the Federal-aid highway program to be performance-based, although it is not economically significant within the meaning of E.O. 12866. The FHWA is presenting an RIA (or regulatory impact analysis) in support of the final rule on Assessing Performance of the National Highway

System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program. The RIA evaluates the economic impact, in terms of costs and benefits, on Federal, State, and local governments, as well as private entities regulated under this action, as required by E.O. 12866 and E.O. 13563. However, the RIA did not attempt to directly quantify the changes from the improved decisionmaking. The estimated costs are measured on an incremental basis, relative to current NHS performance, freight movement, and traffic congestion and emissions reporting practices.

The RIA estimated costs and benefits resulting from the final rule in order to inform policymakers and the public of its relative value. The complete RIA may be accessed from the docket (docket number FHWA–2013–0054).

The cornerstone of MAP–21's highway program transformation is the transition to a performance-based program. In accordance with the law, State DOTs will invest resources in projects to achieve performance targets that make progress toward national goal

areas. The MAP–21 establishes national performance goals for system reliability, freight movement and economic vitality, and environmental sustainability.

This final rule establishes performance measures to assess the following: System performance on the Interstate System and non-Interstate NHS for the purpose of carrying out the NHPP, freight movement on the Interstate, and traffic congestion and on-road mobile source emissions for the purpose of carrying out the CMAQ program. The three NHPP-related measures are (1) Percent of person-miles traveled on reliable Interstate System roadways, (2) Percent of person-miles traveled on reliable non-Interstate NHS roadways, and (3) Percent Change in Tailpipe CO₂ Emissions on the NHS from the Calendar Year 2017. The performance measure to assess freight movement on the Interstate is Weighted Percent of the Interstate System Mileage providing for Reliable Truck Travel Times. The three measures to assess the CMAQ program includes two measures for traffic congestion: (1) Annual Hours of Peak-Hour Excessive Delay Per Capita and (2) Percent of non-Single

Occupancy Vehicle (SOV) Travel—and one measure to assess on-road mobile source emissions—Total Emission Reductions for applicable criteria pollutants or precursors.

Estimated Cost of the Final Rule

To estimate costs, FHWA assessed the level of effort, expressed in labor hours and categories, and the capital needed to comply with each component of the final rule. Level of effort by labor category is monetized with loaded wage rates to estimate total costs.

Because there is some uncertainty regarding the availability of NPMRDS data for use by State DOTs and MPOs, FHWA estimated the cost of the final rule according to two scenarios. Under Scenario 1, FHWA assumes that it will provide State DOTs and MPOs with the required data from NPMRDS. Table 3 displays the total cost of the final rule under Scenario 1 for the 10-year study period (2017–2026). Total costs are estimated to be \$144.0 million undiscounted, \$106.4 million discounted at 7 percent, and \$125.5 million discounted at 3 percent.

TABLE 3—TOTAL COST OF THE FINAL RULE UNDER SCENARIO 1

Cost components	10-year total cost		
	Undiscounted	7%	3%
Section 490.103—Data Requirements	\$20,329,609	\$15,104,439	\$17,776,941
Intake and Process DOT Travel Time Data	15,325,924	11,094,661	13,258,812
NPMRDS Data Acquisition	3,600,000	2,606,093	3,114,444
NPMRDS Data Training	523,963	523,963	523,963
NPMRDS Data Reconciliation	879,722	879,722	879,722
Section 490.105–490.109—Reporting Requirements	90,533,557	67,705,203	79,346,012
Document and Submit Description of Coordination Between State DOTs and MPOs	2,547,274	2,547,274	2,547,274
Establish and Update Performance Targets	36,356,497	27,788,508	32,168,577
Reporting on Performance Targets Progress	35,446,842	25,738,285	30,683,726
Prepare CMAQ Performance Plan	14,887,674	10,810,080	12,887,165
Assess Significant Progress Toward Achieving Performance Targets	1,248,936	782,529	1,016,682
Adjust HPMS to Handle Data in TMC Format and Design Post-Submission Reports	26,182	24,469	25,420
Data Processing (e.g., Data Verification)	20,152	14,058	17,168
Section 490.511—Calculation of Performance Metrics for NHS Performance	5,681,474	4,088,067	4,902,708
Calculate LOTTR	2,711,510	1,938,066	2,333,323
Calculate Annual Total Tailpipe CO ₂ Emissions on the NHS	2,969,964	2,150,001	2,569,385
Section 490.513—Calculation of Performance Measures for NHS Performance	3,266,268	2,371,668	2,827,368
Calculate Interstate and Non-Interstate NHS Travel Time Reliability Performance Measures	3,186,603	2,313,822	2,758,408
Calculate Percent Change in Tailpipe CO ₂ Emissions on the NHS Compared to the Calendar Year 2017 Level Performance Measure	79,665	57,846	68,960
Section 490.611—Calculation of Freight Movement Metric	1,611,187	1,207,755	1,414,654
Calculate Truck Travel Time Reliability Index Metric	1,611,187	1,207,755	1,414,654
Section 490.613—Calculation of Freight Movement Measure	7,647,847	5,553,174	6,620,179
Calculate Truck Travel Time Reliability Index Performance Measure	7,647,847	5,553,174	6,620,179
Section 490.711—Calculation of Traffic Congestion Metric	6,227,101	4,357,789	5,308,381
Calculate Total Peak Hour Excessive Delay Metric	6,227,101	4,357,789	5,308,381
Section 490.713—Calculation of Traffic Congestion Measures	6,015,878	4,056,117	5,045,792
Calculate Annual Hours of Peak Hour Excessive Delay Performance Measure	5,917,257	3,989,623	4,963,074
Calculate Percent Non-SOV Travel Performance Measure	98,621	66,494	82,718
Section 490.813—Calculation of Emissions Measure	2,660,121	1,931,539	2,302,671
Calculate Total Emissions Reduction Performance Measure	2,660,121	1,931,539	2,302,671
Total Cost of Final Rule	143,973,042	106,375,750	125,544,706

* Totals may not sum due to rounding.

Under Scenario 2, which represents “worst case” conditions, State DOTs will choose to independently acquire the necessary data. Table 4 displays the

total cost of the final rule under Scenario 2 for the 10-year study period (2017–2026). Total costs over 10 years are estimated to be \$205.5 million

undiscounted, \$153.1 million discounted at 7 percent, and \$179.8 million at 3 percent.

TABLE 4—TOTAL COST OF THE FINAL RULE UNDER SCENARIO 2

Cost Components	10-year total cost		
	Undiscounted	7%	3%
Section 490.103—Data Requirements	\$81,838,250	\$61,852,128	\$72,074,370
Acquire Freight and General Traffic Data	51,000,000	38,327,684	44,809,156
Adjust Contract for Freight-only Data	9,000,000	6,763,709	7,907,498
Remove Estimated Data Values from Database	3,405,761	2,559,508	2,992,339
Intake and Process	17,028,804	12,797,542	14,961,693
Data Training	523,963	523,963	523,963
Data Reconciliation	879,722	879,722	879,722
Section 490.105–490.109—Reporting Requirements	90,533,557	67,705,203	79,346,012
Document and Submit Description of Coordination Between State DOTs and MPOs	2,547,274	2,547,274	2,547,274
Establish and Update Performance Targets	36,356,497	27,788,508	32,168,577
Reporting on Performance Targets Progress	35,446,842	25,738,285	30,683,726
Prepare CMAQ Performance Plan	14,887,674	10,810,080	12,887,165
Assess Significant Progress Toward Achieving Performance Targets	1,248,936	782,529	1,016,682
Adjust HPMS to Handle Data in TMC Format and Design Post-Submission Reports	26,182	24,469	25,420
Data Processing (e.g., Data Verification)	20,152	14,058	17,168
Section 490.511—Calculation of Performance Metrics for NHS Performance	5,681,474	4,088,067	4,902,708
Calculate LOTTR	2,711,510	1,938,066	2,333,323
Calculate Annual Total Tailpipe CO ₂ Emissions on the NHS	2,969,964	2,150,001	2,569,385
Section 490.513—Calculation of Performance Measures for NHS Performance	3,266,268	2,371,668	2,827,368
Calculate Interstate and Non-Interstate NHS Travel Time Reliability Performance Measures	3,186,603	2,313,822	2,758,408
Calculate Percent Change in Tailpipe CO ₂ Emissions on the NHS Compared to the Calendar Year 2017 Level Performance Measure	79,665	57,846	68,960
Section 490.611—Calculation of Freight Movement Metric	1,611,187	1,207,755	1,414,654
Calculate Truck Travel Time Reliability Index Metric	196,486	183,632	190,763
Section 490.613—Calculation of Freight Movement Measure	7,647,847	5,553,174	6,620,179
Calculate Truck Travel Time Reliability Index Performance Measure	7,647,847	5,553,174	6,620,179
Section 490.711—Calculation of Traffic Congestion Metric	6,227,101	4,357,789	5,308,381
Calculate Total Peak Hour Excessive Delay Metric	1,843,947	1,260,566	1,556,458
Section 490.713—Calculation of Traffic Congestion Measures	6,015,878	4,056,117	5,045,792
Calculate Annual Hours of Peak Hour Excessive Delay Per Capita Performance Measure	5,917,257	3,989,623	4,963,074
Calculate Percent of Non-SOV Travel Performance Measure	98,621	66,494	82,718
Section 490.813—Calculation of Emissions Measure	2,660,121	1,931,539	2,302,671
Calculate Total Emissions Reduction Performance Measure	2,660,121	1,931,539	2,302,671
Total Cost of Final Rule	205,481,684	153,123,439	179,842,135

* Totals may not sum due to rounding.

The costs in Tables 3 and 4 assume a portion of the estimated 409 MPOs will establish their own targets, and the rest will adopt State DOT targets. It is assumed that State DOTs and MPOs serving Transportation Management Areas (TMA)⁷⁴ will use staff to establish performance targets. Conversely, it is assumed that MPOs not serving a TMA will agree to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT targets. Therefore, they will not incur any incremental costs. There are currently an estimated 201 MPOs

serving TMAs.⁷⁵ The FHWA made this assumption because larger MPOs may have more resources available to develop performance targets. The FHWA believes that this is a conservative estimate, as larger MPOs may elect not to establish their own targets for a variety of reasons, including resource availability.

The final rule's 10-year undiscounted cost (\$144.0 million in Scenario 1 and

\$205.5 million in Scenario 2, in 2014 dollars) decreased relative to the proposed rule (\$165.3 million in Scenario 1 and \$224.5 million in Scenario 2, in 2012 dollars). As discussed below, FHWA made a number of changes that affected cost.

General Updates

In the final rule RIA, FHWA updated all costs to 2014 dollars from the 2012 dollars used in the proposed rule RIA. In addition, FHWA updated labor costs to reflect current BLS data. These general updates increased the estimated cost of the final rule relative to the proposed rule.

The FHWA deferred the effective date from 2016 to 2017 and shortened the period of analysis from 11 years in the proposed rule to 10 years in the final rule. All costs that related to activities

⁷⁴ A TMA is an urbanized area having a population of over 200,000 or otherwise requested by the Governor and the MPO and officially designated by FHWA or FTA. 23 U.S.C. 134(k).

⁷⁵ The FHWA updated the estimated total number of MPOs to 409, which is less than the 420 MPOs used at the time that the NPRM was published. The estimated number of MPOs serving TMAs is now 201, less than the estimate of 210 in the NPRM. At the time the RIA was prepared for the NPRM, FHWA assumed that the 36 new urbanized areas resulting from the 2010 Census would have MPOs designated for them. In reality, some of the newly designated urbanized areas merged with existing MPOs, resulting in the designation of fewer new MPOs than expected.

that were scheduled to begin in 2016 under the NPRM will now begin in 2017, and costs are estimated for 10 years instead of 11 years to be consistent with the other two performance measure rulemaking RIAs. This reduction in the period of analysis led FHWA to remove the cost of the Initial Performance Report, which State DOTs have already submitted to the agency. Therefore, estimated costs of the final rule decreased relative to the proposed rule.

The FHWA also updated the estimated total number of MPOs to 409, which is less than the 420 MPOs used at the time that the NPRM was published. The estimated number of MPOs serving TMAs is now 201, less than the estimate of 210 in the NPRM. The number of non-TMA MPOs is 208, less than the estimate of 210 in the NPRM. At the time the RIA was prepared for the NPRM, FHWA assumed that the 36 new urbanized areas resulting from the 2010 Census would have MPOs designated for them. However, some of these newly designated urbanized areas merged with existing MPOs, resulting in the designation of fewer new MPOs than expected. The FHWA estimates that, on average, only the 201 larger MPOs serving TMAs will establish their own quantifiable performance targets. The FHWA also estimates that the 208 smaller MPOs serving non-TMAs will choose to agree to plan and program projects so that they contribute toward the accomplishment of State DOT NHS performance, freight movement, and traffic congestion and emissions condition-related performance targets. Therefore, only the 201 larger MPOs serving TMAs will incur costs to reprogram and upgrade their software to be able to perform calculations of the performance measures. The reduction in the number of MPOs decreased the estimated costs to comply with the requirements of the final rule relative to the proposed rule.

Other Updates

In the final rule, FHWA eliminated three of the proposed performance measures (one of the proposed freight measures for percent of the Interstate congested and merging two proposed peak-hour travel time measures under NHPP with proposed excessive delay measure under CMAQ Traffic Congestion into one measure under CMAQ). In addition, the final rule does not include one of the proposed performance metrics (On-Road Mobile Source Emissions). At the same time, the final rule created two new performance measures (Percent of Non-SOV Travel and Percent Change in

Tailpipe CO₂ Emissions on the NHS Compared to the Calendar Year 2017 Level). Additionally, in the RIA, FHWA adjusted estimates for level of effort and number of affected State DOTs and MPOs to be consistent with the final rule requirements. On balance, these changes reduced the total estimated cost of the final rule relative to the proposed rule.

Break-Even Analysis

Currently, State DOTs differ in the way they evaluate the performance of the NHS, freight movement, traffic congestion, and on-road mobile source emissions. These differences hinder accurate analysis at the national level. The final rulemaking will not only establish uniform performance measures, but also will establish processes that (1) State DOTs and MPOs use to report measures and establish performance targets and (2) FHWA uses to assess progress that State DOTs have made toward achieving targets.

Upon implementation, FHWA expects that the will rule will result in some significant benefits that are not easily monetized, but nonetheless deserve mention in this analysis. Specifically, the final rule will allow for more informed decisionmaking on traffic congestion-, freight-, and air-quality-related project, program, and policy choices. The final rule also will yield greater accountability because the MAP-21-mandated reporting will increase visibility and transparency. In addition the final rule will help focus the Federal-aid highway program on achieving balanced performance outcomes.

The expected benefits discussed above (*i.e.*, more informed decisionmaking, greater accountability, and the focus on making progress toward the national goal for infrastructure condition) will lead to an enhanced performance of the NHS due to reduced traffic congestion, improved freight movement, and reduced emissions. The benefits, while real and substantial, are difficult to forecast and monetize. Therefore, FHWA addresses this issue by using the break-even analysis method suggested by OMB Circular A-4. Break-even analyses calculate the threshold a specific variable must achieve in order for benefits to equal costs while holding every other variable in the analysis constant.

The FHWA identified four variables (or outcomes) for which to estimate break-even thresholds: (1) Number of passenger travel hours, (2) tons of transportation-related carbon dioxide emissions, (3) number of truck travel

hours, and (4) kilograms of on-road mobile source emissions, comprising volatile organic compounds, nitrogen oxide, particulate matter, and carbon monoxide. The FHWA selected these variables because it is reasonable to assume that the performance measures will influence each of these variables relative to current baseline levels.

After identifying these variables, FHWA combined the final rule costs associated with the performance measures that will influence each variable. The FHWA expects that implementation of four of the rule's performance measures (Percent of Person-Miles Traveled on the Interstate That Are Reliable, Percent of Person-Miles Traveled on the Non-Interstate NHS That Are Reliable, Annual Hours of Peak Hour Excessive Delay Per Capita, and Percent of Non-SOV Travel) will influence passenger travel hours. The FHWA expects that implementation of the performance measure for Percent Change in Tailpipe CO₂ Emissions on the NHS Compared to the Calendar Year 2017 Level will influence tons of carbon dioxide emissions. The FHWA expects that implementation of the performance measure for Truck Travel Time Reliability Index will influence number of truck travel hours. The FHWA expects that implementation of the performance measure for Total Emissions Reduction will influence kilograms of on-road mobile source emissions.

The FHWA chose to present two of the break-even variables (number of passenger travel hours and tons of carbon dioxide emissions) together because the performance measure expected to improve tons of carbon dioxide emissions, Percent Change in Tailpipe CO₂ Emissions on the NHS Compared to the Calendar Year 2017 Level, is one of three performance measures used to assess the performance of the Interstate System and the non-Interstate NHS for the purpose of carrying out the National Highway Performance Program (NHPP). The other two performance measures under NHPP are Percent of Person-Miles Traveled on the Interstate That Are Reliable and Percent of Person-Miles Traveled on the Non-Interstate NHS That Are Reliable, both of which are expected to influence passenger travel hours. In order to assess NHPP performance measures together, FHWA presents the break-even thresholds for these variables together. The remaining two performance measures included in the break-even analysis for number of passenger travel hours (Annual Hours of Peak Hour Excessive Delay Per Capita and Percent of Non-SOV Travel) assess

the CMAQ program but are expected to influence passenger travel hours.

Two variables (number of passenger travel hours and number of truck travel hours) are associated with performance measures whose costs differ under two scenarios feasible under the final rule; in Scenario 1, FHWA provides travel time data to State DOTs, in Scenario 2, State DOTs acquire the necessary data independently. To account for this, FHWA performed the break-even analyses twice for these two variables (*i.e.*, once using Scenario 1 costs, and a second time using Scenario 2 costs). The costs associated with the remaining two variables (tons of carbon dioxide emissions and kilograms of on-road mobile source emissions) do not change under Scenarios 1 and 2, therefore only one break-even threshold is calculated for each analysis. In all, FHWA presents six break-even thresholds: (1) Number of passenger travel hours under Scenario 1, (2) number of passenger travel hours under Scenario 2, (3) tons of carbon dioxide emissions, (4) number of truck travel hours under Scenario 1, (5) number of truck travel hours under Scenario 2, and (6) kilograms of on-road mobile source emissions.

For the break-even analyses associated with passenger travel hours

and tons of carbon dioxide emissions, FHWA summed the costs associated with the following final rule sections:

- Sections 490.103. Seventy-five percent of the total cost of complying with the data requirements;
- Section 490.105. Approximately 71 percent of the cost of establishing performance targets;
- Section 490.107. Approximately 71 percent of the cost of documenting and submitting a description of coordination between State DOTs and MPOs;
- Section 490.107. Approximately 71 percent of the cost of reporting performance targets;
- Section 490.107. Approximately 67 percent of the cost of preparing CMAQ performance plan;
- Section 490.107. Seventy-five percent of the cost of adjusting HPMS and processing data;
- Section 490.109. Cost of assessing significant progress for NHPP measures;
- Section 490.511. The cost of calculating the system performance metrics;
- Section 490.513. The cost of calculating the system performance management measures;
- Section 490.711. Cost of calculating the traffic congestion metric; and
- Section 490.713. Cost of calculating the traffic congestion measure.

Table 5 presents the savings in passenger travel hours and carbon dioxide emissions that the final rule under Scenario 1 would need to save in order to be cost-beneficial (*i.e.*, FHWA provides NPMRDS data to State DOTs). The results represent two break-even points: (1) The passenger car travel time (in hours) that will need to be saved in order to justify the costs, and (2) the amount of carbon dioxide emissions (in tons) that will need to be saved in order to justify the costs. The analysis shows that the final rule will need to result in the reduction of approximately 370,000 hours of passenger car travel time, or 3.7 million hours over 10 years, as well as 31,000 tons of carbon dioxide emissions, or 312,000 tons over 10 years. To provide context, private commuters in 471 urban areas across the United States experience 6.9 billion hours of travel delay per year.⁷⁶ The EPA data indicates that the transportation sector emitted approximately 1.74 billion tons of carbon dioxide in 2014.⁷⁷ As a result, the reduction represents a less than 0.01 percent decrease in the amount of travel delay per year for major U.S. urban areas and in the average annual amount of carbon dioxide emissions from the transportation sector.

TABLE 5—BREAK-EVEN ANALYSIS OF NHPP AND CMAQ TRAFFIC CONGESTION PERFORMANCE MEASURES UNDER SCENARIO 1

	Undiscounted 10-year costs	Average commuter value of time (\$ per hour)	Number of hours of travel that need to be reduced	Average annual number of hours of travel that need to be reduced
	a	b	c = a ÷ b	d = c ÷ 10
Passenger Travel Hours	\$86,069,537	\$23.42	3,674,733	367,473
	Undiscounted 10-year costs	Average emission ton cost (\$ per ton)	Number of emissions tons needed to be reduced	Average annual number of emissions tons needed to be reduced
Carbon dioxide emissions	\$13,906,452	\$44.53	312,302	31,230

Table 6 presents the results from the break-even analysis under Scenario 2 (*i.e.*, State DOTs independently acquire the necessary data). The results represent two break-even points: (1) The passenger car travel time (in hours) that will need to be saved in order to justify the costs, and (2) the amount of carbon

dioxide emissions (in tons) that will need to be saved in order to justify the costs. The analysis shows that the final rule will need to result in the reduction of approximately 560,000 hours annually, or 5.6 million hours over 10 years as well as 31,000 tons of carbon dioxide emissions, or 312,000 tons over

10 years. To provide context, private commuters in 471 urban areas across the United States experience 6.9 billion hours of travel delay per year.⁷⁸ The EPA data indicates that the transportation sector emitted approximately 1.74 billion tons of

⁷⁶ Texas A&M Transportation Institute, "2015 Urban Mobility Scorecard," 2014, Table 2, p. 25. <http://d2dtl5nnlppfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-scorecard-2015.pdf>.

⁷⁷ In 2014, the transportation sector accounted for 1.74 billion tons of carbon dioxide emissions, according to the EPA's Greenhouse Gas Inventory Data Explorer.

⁷⁸ Texas A&M Transportation Institute, "2015 Urban Mobility Scorecard," 2014, Table 2, p. 25. <http://d2dtl5nnlppfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-scorecard-2015.pdf>.

carbon dioxide in 2014.⁷⁹ As a result, the reduction represents a less than 0.01 percent decrease in the amount of travel

delay per year for major U.S. urban areas and in the average annual amount

of carbon dioxide emissions from the transportation sector.

TABLE 6—BREAK-EVEN ANALYSIS OF NHPP AND CMAQ TRAFFIC CONGESTION PERFORMANCE MEASURES UNDER SCENARIO 2

	Undiscounted 10-year costs	Average commuter value of time (\$ per hour)	Number of hours of travel that need to be reduced	Average annual number of hours of travel that need to be reduced
	a	b	c = a ÷ b	d = c ÷ 10
Passenger travel hours	\$132,201,018	\$23.42	5,644,314	564,431
	Undiscounted 10-year costs	Average emission ton cost (\$ per ton)	Total number of emissions tons that need to be reduced	Average annual number of emissions tons that need to be reduced
Carbon dioxide emissions	\$13,906,452	\$44.53	312,302	31,230

* Please refer to the Summary Report for details on the methodology used in the analysis.

Relative to the proposed rule, the thresholds for the NHS performance break-even analysis increased in the final rule. Specifically, under Scenario 1, the number of annual hours of reduction in passenger car travel time increased from approximately 350,000 in the proposed rule to approximately 370,000 in the final rule. Under Scenario 2, the number of annual hours of reduction in passenger car travel time increased from approximately 500,000 in the proposed rule to 560,000 in the final rule. The break-even points increased primarily due to the addition of the Percent of Non-SOV Travel performance measure. No break-even point was estimated for carbon dioxide emissions in the proposed rule stage because the relevant performance measure, Percent Change in Tailpipe CO₂ Emissions on the NHS Compared to

the Calendar Year 2017 Level, was added to the final rule.

For the break-even analyses associated with improving freight performance, the costs associated with the following final rule sections are summed together to estimate the total cost of provisions aimed at reducing freight congestion:

- Section 490.103. Twenty-five percent of the cost of obtaining data requirements;
- Section 490.105. Approximately 14 percent of the cost of establishing performance targets;
- Section 490.107. Approximately 14 percent of the cost of documenting and submitting a description of coordination between State DOTs and MPOs;
- Section 490.107. Approximately 14 percent of the cost of reporting performance targets;
- Section 490.107. Twenty-five percent of the cost of adjusting HPMS and processing data;

- Section 490.109. Cost of assessing significant progress for NHFP measure;
- Section 490.611. Cost of calculating freight movement metric; and
- Section 490.613. Cost of calculating freight movement measure.

Table 7 presents the results from the freight movement break-even analysis under Scenario 1. The results represent the freight travel time (in hours) that will need to be saved in order to justify the costs. The analysis shows that the final rule will need to result in the reduction of approximately 98,000 hours annually, or 982,000 hours over 10 years. To provide context, truck drivers in 498 urban areas across the United States experience 353 million hours of travel delay per year.⁸⁰ This reduction represents a 0.03 percent decrease in the amount of travel delay per year for major U.S. urban areas.

TABLE 7—BREAK-EVEN ANALYSIS OF NHFP PERFORMANCE MEASURE UNDER SCENARIO 1

Undiscounted 10-year costs	Average truck value of time (\$ per hour)	Number of hours of travel that need to be reduced	Average an- nual number of hours of travel that need to be reduced
A	B	c = a ÷ b	d = c ÷ 10
\$25,752,858	\$26.22	982,239	98,224

⁷⁹In 2014, the transportation sector accounted for 1.74 billion tons of carbon dioxide emissions, according to the EPA's Greenhouse Gas Inventory Data Explorer.

⁸⁰Texas A&M Transportation Institute, "TTI's 2012 Urban Mobility Report," 2011, Table 5, p. 43. <https://assets.documentcloud.org/documents/566377/2012-urban-mobility-report.pdf>.

Table 8 presents the results from the freight movement break-even analysis under Scenario 2 (*i.e.*, State DOTs independently acquire the necessary data). The results represent the freight travel time (in hours) that will need to

be saved in order to justify the costs. The analysis shows that the final rule will need to result in the reduction of approximately 157,000 hours annually, or 1.6 million hours over 10 years. To provide context, truck drivers in 498

urban areas across the United States experience 353 million hours of travel delay per year.⁸¹ This reduction represents a 0.04 percent decrease in the amount of travel delay per year for major U.S. urban areas.

TABLE 8—BREAK-EVEN ANALYSIS OF NHFP PERFORMANCE MEASURE UNDER SCENARIO 2

Undiscounted 10-year costs	Average truck value of time (\$ per hour)	Number of hours of travel that need to be reduced	Average annual number of hours of travel that need to be reduced
A	B	c = a ÷ b	d = c ÷ 10
\$41,130,019	\$26.22	1,568,738	156,874

* Please refer to the Summary Report for details on the methodology used in the analysis.

Relative to the proposed rule, the thresholds for the freight performance break-even analysis decreased in the final rule. Specifically, under Scenario 1, the number of annual hours of reduction in freight travel time decreased from approximately 140,000 in the proposed rule to 98,000 in the final rule. Under Scenario 2, the number of annual hours of reduction in freight travel time decreased from 250,000 in the proposed rule to 160,000 in the final rule. The break-even points decreased primarily due to the elimination of the Average Truck Speed performance measure.

For the break-even analysis associated with the performance measure for Total

Emissions Reduction, the costs associated with the following final rule sections are summed together to estimate the total cost of provisions aimed at reducing total emissions:

- Section 490.105. Approximately 14 percent of the cost of establishing performance targets;
- Section 490.107. Approximately 14 percent of the cost of documenting and submitting a description of coordination between State DOTs and MPOs;
- Section 490.107. Approximately 14 percent of the cost of reporting performance targets;
- Section 490.107. Approximately 33 percent of the cost of preparing CMAQ performance plan;

- Section 490.811. Cost of calculating emissions metric; and
- Section 490.813. Cost of calculating emissions measure.

Tables 9, 10, and 11 present the results from the total emissions break-even analysis. The costs associated with the Total Emissions Reduction performance measure are identical under Scenario 1 and Scenario 2 because State DOTs would not need data from NPMRDS. Therefore, FHWA presents one set of results. The results represent the amount of emissions (in kilograms) that will need to be reduced in order to justify the costs. To calculate the cost of a kilogram of emissions, the analysis used the following inputs:

TABLE 9—INPUTS FOR CALCULATING COST PER KILOGRAM OF EMISSIONS

Emission	Passenger consumption rate (grams per VMT)	Percentage of “emission kilogram“	Societal cost of emissions (\$ per long ton)	Weighted “emission kilogram“
	A	b = a ÷ Σa	C	d = b c
Volatile Organic Compound (VOC)	1.034	9.289	\$1.46	\$0.14
Nitrogen Oxide (NO _x)	0.693	6.226	5.96	0.37
Particulate Matter (PM _{2.5})	0.0041	0.037	325.88	0.12
Carbon Monoxide (CO)	9.4	84.448	0.00	0.00
Cost of an Emission Kilogram				0.63

Based on this cost per kilogram, the analysis shows that the final rule will need to result in the reduction of approximately 2.9 million kilograms annually, or 29.1 million kilograms over

10 years. To provide context, data from the EPA Office of Air Quality Planning and Standards indicate that highway vehicles emitted 2 billion kilograms of VOCs, 4.1 billion kilograms of NO_x, 0.2

billion kilograms of PM_{2.5}, and 20.2 billion kilograms CO in 2014.⁸² This reduction represents approximately 0.01 percent of total annual national emissions of these pollutants.

⁸¹ Texas A&M Transportation Institute, "TTI's 2012 Urban Mobility Report," 2011, Table 5, p. 43. <https://assets.documentcloud.org/documents/566377/2012-urban-mobility-report.pdf>.

⁸² EPA, "Air Pollutant Emissions Trends Data," Average Annual Emissions. <https://www.epa.gov/air-emissions-inventories/air-pollutant-emissions-trends-data>.

TABLE 10—BREAK-EVEN ANALYSIS OF TOTAL EMISSIONS REDUCTION PERFORMANCE MEASURE USING EMISSION KILOGRAM METRIC

Undiscounted 10-year costs	Average emission kilogram cost (\$ per long ton)	Number of emissions kilograms needed to be reduced	Average annual number of emissions kilograms needed to be reduced
a	B	c = a ÷ b	d = c ÷ 10
\$18,244,195	\$0.63	29,119,356	2,911,936

This amount was split into specific emissions reductions in volatile organic compounds, nitrogen oxide, particulate

matter 2.5, and carbon monoxide. Table 11 shows these reductions.

TABLE 11—CALCULATION OF AVERAGE ANNUAL REQUIRED EMISSIONS REDUCTION

Average annual number of emissions kilograms needed to be reduced	
VOC Kilograms	270,498
NO _x Kilograms	181,291
PM _{2.5} Kilograms	1,073
CO Kilograms	2,459,074
Total "Emission" Kilograms	2,911,936

Relative to the proposed rule, the thresholds for the total emissions break-even analysis decreased in the final rule. Specifically, the reduction in total emissions decreased from 4,400 emission tons (approximately 4 million kilograms⁸³) in the proposed rule to 2.9 million emission kilograms in the final rule. The break-even points decreased primarily due to the elimination of the performance metric for on-road mobile source emissions.

Responses to Public Comments on the NPRM's Regulatory Impact Analysis

A number of State DOTs, MPOs, and other organizations provided comments on the regulatory impact analysis for the NPRM.⁸⁴ In terms of benefits, the Association for Commuter Transportation, an advocacy group, expressed support and asserted that the costs of the rule are minimal relative to the planning process used to determine how to spend nearly \$50 billion a year.

The Michigan and Montana DOTs and Sarasota/Manatee MPO claimed that the costs of the rule do not justify the

benefits. As described in Section 5 of the RIA, FHWA believes that the final rule will result in many benefits (both qualitative and quantitative). Through five break-even analyses, FHWA demonstrates the levels of change needed to justify the costs of the rule. The full analysis is available in the docket of this final rulemaking.

The AMPO asserted that the rule will require MPOs to adjust current operations to accommodate new roles and responsibilities. The final rule for Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning (Docket No. FHWA–2013–0037) accounts for activities unique to this planning process, including specific items suggested by this commenter. The FHWA considered the new roles and responsibilities MPOs would face under the final rule, separately from costs related to the planning process so as not to double count effort, and estimated the associated costs in this final rule's RIA. For a detailed description of the analysis, see Section 4 of the RIA found in the docket of this rulemaking.

The Denver Regional Council of Governments and the New York Metropolitan Transportation Council suggested that FHWA underestimated the costs of the rule. Under the final rule, MPOs are not required to provide separate reporting to FHWA, but must agree on a reporting process with State DOTs and report certain requirements to the State. The final rule for Statewide

and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning (Docket No. FHWA–2013–0037) accounts for activities unique to this planning process. The FHWA, however, has estimated the costs for State DOTs and MPOs to prepare and submit reports as well as the costs of all other provisions specific to this final rule. For a detailed analysis, see Section 4 of the RIA.

Two commenters questioned FHWA's estimate of the cost of data requirements. The Oregon Department of Transportation and the Washington State Department of Transportation requested more details from FHWA on the costs of obtaining NPMRDS if FHWA does not provide the data to State DOTs. Due to uncertainty regarding the long-term funding of NPMRDS, FHWA estimated the costs of this rule under two scenarios: One in which NPMRDS data are made available to State DOTs and another in which State DOTs must acquire their own data. Based on interviews with Federal and State DOT SMEs, FHWA confirmed that the data required for calculating performance metrics and measures are readily accessible from the NPMRDS or equivalent data sources. Use of NPMRDS or other data sources would constitute an incremental burden on State DOTs in the form of sharing data, training staff, acquiring and processing data, and other processes. The level of this burden would depend on each individual State DOT's existing level of

⁸³ Using a conversion rate of 1 U.S. ton = 907.185 kilograms.

⁸⁴ Association of Metropolitan Planning Organizations, Denver Regional Council of Governments, Association for Commuter Transportation, Michigan Department of Transportation, Montana Department of Transportation, New York Metropolitan Transportation Council, Oregon Department of Transportation, Sarasota/Manatee Metropolitan Planning Organization, Washington State Department of Transportation.

sophistication in current roadway traffic data analysis. For a detailed analysis, see Section 4 of the RIA.

B. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this action on small entities and has determined that the action would not have a significant economic impact on a substantial number of small entities. The final rule addresses the obligation of Federal funds to State DOTs for Federal-aid highway projects. The rule affects two types of entities: State governments and MPOs. State governments do not meet the definition of a small entity under 5 U.S.C. 601, which have a population of less than 50,000.

The MPOs are considered governmental jurisdictions, and to qualify as a small entity they would need to serve less than 50,000 people. The MPOs serve urbanized areas with populations of 50,000 or more. As discussed in the RIA, the rule is expected to impose costs on MPOs that serve populations exceeding 200,000. Therefore, the MPOs that incur economic impacts under this proposed rule do not meet the definition of a small entity.

I hereby certify that this regulatory action would not have a significant impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

The FHWA has determined that this action does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule does not include a Federal mandate that may result in expenditures of \$151 million or more in any 1 year (when adjusted for inflation) in 2012 dollars for either State, local, and tribal governments in the aggregate, or by the private sector. Additionally, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

D. Executive Order 13132 (Federalism Assessment)

The FHWA has analyzed this action in accordance with the principles and criteria contained in Executive Order

13132. The FHWA has determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action does not preempt any State law or State regulation or affect the States’ ability to discharge traditional State governmental functions.

E. Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. The DOT has analyzed this action under the PRA and has determined that this rulemaking contains collection of information requirements for the purposes of the PRA.

This rule provides definitions and outlines processes for performance elements of this final rule. Some burdens in this rule would be realized in other reporting areas as described below. The PRA activities that are already covered by existing OMB Clearances have reference numbers for those clearances as follows: HPMS information collection, OMB No. 2125–0028 with an expiration of May 2019 and CMAQ Program OMB 2125–0614 with an expiration date of August 2018. Any increase in PRA burdens caused by MAP–21 and the FAST Act in these areas will be addressed in PRA approval requests associated with those rulemakings.

This rulemaking requires the submittal of performance reports. The DOT has analyzed this final rule under the PRA and has determined the following:

Respondents: Approximately 262 applicants consisting of State DOTs and MPOs.

Frequency: Biennially.

Estimated Average Burden per

Response: Approximately 416 hours to complete and submit the report.

Estimated Total Annual Burden

Hours: Approximately 65,312 hours annually.

G. National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has determined that this action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

H. Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this action under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

I. Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

J. Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause an environmental risk to health or safety that might disproportionately affect children.

K. Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The rulemaking addresses obligations of Federal funds to State DOTs for Federal-aid highway projects and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

L. Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has

determined that this is not a significant energy action under that order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

*M. Executive Order 12898
(Environmental Justice)*

The E.O. 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this rule does not raise any environmental justice issues.

N. Privacy Impact Assessment

The FHWA continues to assess the privacy impacts of this rule as required by section 522(a)(5) of the FY 2005 Omnibus Appropriations Act, Public Law 108-447, 118 Stat. 3268 (December 8, 2004) [set out as a note to 5 U.S.C. 552a].

The FHWA has selected the use of the new NPMRDS as the data source to calculate the metrics for the travel time/speed based measures to ensure consistency and coverage at a national level. This private sector data set provides average travel times derived from vehicle/passenger probe data traveling on the NHS. The FHWA recognizes that probe data is an evolving field and we will continue to evaluate the privacy risks associated with its use.

O. Regulation Identifier Number

An RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 490

Bridges, Highway safety, Highways and roads, Incorporation by reference, Reporting and recordkeeping requirements.

Issued in Washington, DC, on January 9, 2017, under authority delegated in 49 CFR 1.85.

Gregory G. Nadeau,
Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA amends 23 CFR part 490 as follows:

**PART 490—NATIONAL
PERFORMANCE MANAGEMENT
MEASURES**

■ 1. The authority citation for part 490 continues to read as follows:

Authority: 23 U.S.C. 134, 135, 148(i), and 150; 49 CFR 1.85.

■ 2. Revise subpart A to read as follows:

Subpart A—General Information

Sec.

490.101 Definitions.

490.103 Data requirements.

490.105 Establishment of performance targets.

490.107 Reporting on performance targets.

490.109 Assessing significant progress toward achieving the performance targets for the National Highway Performance Program and the National Highway Freight Program.

490.111 Incorporation by reference.

§ 490.101 Definitions.

Unless otherwise specified, the following definitions apply to this part:
American Community Survey (ACS) is a national level ongoing survey from the U.S. Census Bureau that includes data on jobs, occupations, educational attainment, transportation patterns, and other topics of the Nation's population.

Attainment area as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions.

Bridge as used in this part is defined in § 650.305 of this chapter, the National Bridge Inspection Standards.

Criteria pollutant is any pollutant for which there is established a NAAQS at 40 CFR part 50. The transportation related criteria pollutants per 40 CFR 93.102(b)(1) are carbon monoxide, nitrogen dioxide, ozone, and particulate matter (PM₁₀ and PM_{2.5}).

Full extent means continuous collection and evaluation of pavement condition data over the entire length of the roadway.

Highway Performance Monitoring System (HPMS) is a national level highway information system that includes data on the extent, condition, performance, use, and operating characteristics of the Nation's highways.

Mainline highways means the through travel lanes of any highway. Mainline highways specifically exclude ramps, shoulders, turn lanes, crossovers, rest areas, and other pavement surfaces that are not part of the roadway normally traveled by through traffic.

Maintenance area as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions. For the

purposes of this part, areas that have reached the end of their 20-year maintenance period¹ are not considered as maintenance areas.

Measure means an expression based on a metric that is used to establish targets and to assess progress toward achieving the established targets (e.g., a measure for flight on-time performance is percent of flights that arrive on time, and a corresponding metric is an arithmetic difference between scheduled and actual arrival time for each flight).

Metric means a quantifiable indicator of performance or condition.

Metropolitan Planning Organization (MPO) as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions.

Metropolitan Planning Area as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions.

National Ambient Air Quality Standards (NAAQS) as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions.

National Bridge Inventory (NBI) is an FHWA database containing bridge information and inspection data for all highway bridges on public roads, on and off Federal-aid highways, including tribally owned and federally owned bridges, that are subject to the National Bridge Inspection Standards (NBIS).

National Performance Management Research Data Set (NPMRDS) means a data set derived from vehicle/passenger probe data (sourced from Global Positioning Station (GPS), navigation units, cell phones) that includes average travel times representative of all traffic on each mainline highway segment of the National Highway System (NHS), and additional travel times representative of freight trucks for those segments that are on the Interstate System. The data set includes records that contain average travel times for every 15 minutes of every day (24 hours) of the year recorded and calculated for every travel time segment where probe data are available. The NPMRDS does not include any imputed travel time data.

Nonattainment area as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions.

¹ The maintenance period in CAA Section 175A (42 U.S.C. 7505a) requires the submittal of two maintenance plans totaling 20 years, unless the applicable implementation plan specifies a longer maintenance period. The end of the maintenance period is 20-years from the effective date of the re-designation to attainment and approval of the first 10-year maintenance plan.

Non-SOV travel is defined as any travel mode other than driving alone in a motorized vehicle (*i.e.*, single occupancy vehicle or SOV travel), including travel avoided by telecommuting.

Non-urbanized area means a single geographic area that comprises all of the areas in the State that are not “urbanized areas” under 23 U.S.C. 101(a)(34).

Performance period means a determined time period during which condition/performance is measured and evaluated to: Assess condition/performance with respect to baseline condition/performance; and track progress toward the achievement of the targets that represent the intended condition/performance level at the midpoint and at the end of that time period. The term “performance period” applies to all measures in this part, except the measures for the Highway Safety Improvement Program (HSIP) in subpart B of this part. Each performance period covers a 4-year duration beginning on a specified date (provided in § 490.105).

Reporting segment means the length of roadway that the State Department of Transportation (DOT) and MPOs define for metric calculation and reporting and is comprised of one or more travel time segments.

Target means a quantifiable level of performance or condition, expressed as a value for the measure, to be achieved within a time period required by the Federal Highway Administration (FHWA).

Transportation Management Area (TMA) as used in this part is defined in § 450.104 of this chapter, Transportation Planning and Programming Definitions.

Travel time data set means either the NPMRDS or an equivalent data set that is used by State DOTs and MPOs as approved by FHWA, to carry out the requirements in subparts E, F, and G of this part.

Travel time reliability means the consistency or dependability of travel times from day to day or across different times of the day.

Travel time segment means a contiguous stretch of the NHS for which average travel time data are summarized in the travel time data set.

Truck freight bottleneck, as used in this part, is defined as a segment of roadway identified by the State DOT as having constraints that cause a significant impact on freight mobility and reliability. Bottlenecks may include highway sections that do not meet thresholds for freight reliability identified in § 490.613 or other locations identified by the State DOT. Causes may

include recurring congestion, causing delays in freight movement, or roadway features that impact truck movements, such as steep grades, substandard vertical or horizontal clearances, weight restrictions, delays at border crossings or terminals, or truck operating restrictions.

§ 490.103 Data requirements.

(a) *In general.* Unless otherwise noted in paragraphs (b) through (g) of this section, the data requirements in this section apply to the measures identified in subparts C through H of this part. Additional data requirements for specific performance management measures are identified in 23 CFR sections—

- (1) 490.309 for the condition of pavements on the Interstate System;
- (2) 490.309 for the condition of pavements on the non-Interstate NHS;
- (3) 490.409 for the condition of bridges on the NHS;
- (4) 490.509 for the performance of the Interstate System;
- (5) 490.509 for the performance of the non-Interstate NHS;
- (6) 490.609 for the freight movement on the Interstate System;
- (7) 490.709 for traffic congestion; and
- (8) 490.809 for on-road mobile source emissions.

(b) *Urbanized area data.* The State DOTs shall submit urbanized area data, including boundaries of urbanized areas, in accordance with the HPMS Field Manual for the purpose of the additional targets for urbanized and non-urbanized areas in § 490.105(e) and establishing and reporting on targets for the CMAQ Traffic Congestion measures in § 490.707. The boundaries of urbanized areas shall be identified based on the most recent U.S. Decennial Census, unless FHWA approves adjustments to the urbanized area as provided by 23 U.S.C. 101(a)(34) and these adjustments are submitted to HPMS.

(c) *Nonattainment and maintenance areas data.* The State DOTs shall use the nonattainment and maintenance areas boundaries based on the effective date of U.S. Environmental Protection Agency (EPA) designations in 40 CFR part 81.

(d) *National Highway System data.* The State DOTs shall document and submit the extent of the NHS in accordance with the HPMS Field Manual.

(e) *Travel time data set.* Travel time data needed to calculate the measures in subparts E, F, and G of this part will come from the NPMRDS, unless the State DOT requests, and FHWA approves, the use of an equivalent data

source(s) that meets the requirements of this section. The State DOT shall establish, in coordination with applicable MPOs, a single travel time data set (*i.e.*, NPMRDS or equivalent data set) that will be used to calculate the annual metrics in subparts E, F, and G of this part. The same data source shall be used for each calendar year. A State DOT and MPO(s) must use the same travel time data set for each reporting segment for the purposes of calculating the metrics and measures. The use of equivalent data source(s) shall comply with the following:

(1) State DOTs and MPOs shall use the same equivalent data source(s) for a calendar year;

(2) The State DOT shall request FHWA approval for the use of such equivalent data source(s) no later than October 1st before the beginning of the calendar year in which the data source would be used to calculate metrics and FHWA must approve the use of that data source prior to a State DOT and MPO(s)’s implementation and use of that data source;

(3) The State DOT shall make the equivalent data source(s) available to FHWA, on request;

(4) The State DOT shall maintain and use a documented data quality plan to routinely check the quality and accuracy of data contained within the equivalent data source(s); and

(5) If approved by FHWA, the equivalent data source(s) shall:

- (i) Be used by both the State DOT and all MPOs within the State for all applicable travel time segments and be referenced by HPMS location referencing standards; and
- (ii) In combination with or in place of NPMRDS data, include:

(A) Contiguous segments that cover the mainline highways full NHS, as defined in 23 U.S.C. 103, within the State and MPO boundary; and

(B) Average travel times for at least the same number of 15 minute intervals and the same locations that would be available in the NPMRDS;

(iii) Be populated with observed measured vehicle travel times and shall not be populated with travel times derived from imputed (historic travel times or other estimates) methods. Segment travel times may be derived from travel times reported over a longer time period of measurement (path processing or equivalent);

(iv) Include, for each segment at 15 minute intervals throughout the time periods specified in paragraphs (e)(5)(iv)(A) and (B) of this section for each day of the year, the average travel time, recorded to the nearest second,

representative of at least one of the following:

(A) All traffic on each segment of the NHS (24 hours on Interstate; 6 a.m. to 8 p.m. for non-Interstate NHS); or

(B) Freight vehicle traffic on each segment of the Interstate System (24 hours);

(v) Include, for each segment, a recording of the time and date of each 15 minute travel time record;

(vi) Include the location (route, functional class, direction, State), length and begin and end points of each segment; and

(vii) Be available within 60 days of measurement.

(f) *Reporting segments.* State DOTs, in coordination with MPOs, shall define a single set of reporting segments of the Interstate System and non-Interstate NHS for the purpose of calculating the travel time-based measures specified in §§ 490.507, 490.607, and 490.707 in accordance with the following:

(1) Reporting segments shall be comprised of one or more contiguous Travel Time Segments of same travel direction. State DOTs have the option to accept the Travel Time Segments in the NPMRDS as the reporting segments;

(2) Reporting segments shall not exceed 1 mile in length in urbanized areas unless an individual Travel Time Segment is longer and 10 miles in length in non-urbanized areas unless an individual Travel Time Segment is longer;

(3) All reporting segments collectively shall be contiguous and cover the full extent of the directional mainline highways of the Interstate System and non-Interstate NHS required for reporting the measure; and

(4) The State DOT and applicable MPOs shall document, in manner that mutually agreed upon by all relevant parties, the coordination and agreement on the travel time data set and the defined reporting segments.

(g) *Posted speed limit.* State DOTs are encouraged to report the posted speed limits for the full extent of the NHS in their State via HPMS (HPMS Data Item "Speed_Limit").

§ 490.105 Establishment of performance targets.

(a) *In general.* State DOTs shall establish performance targets for all measures specified in paragraph (c) of this section for the respective target scope identified in paragraph (d) of this section with the requirements specified in paragraph (e) of this section. The MPOs shall establish performance targets for all measures specified in paragraph (c) of this section for respective target scope identified in

paragraph (d) of this section with the requirements specified in paragraph (f) of this section.

(b) *Highway Safety Improvement Program measures.* State DOTs and MPOs shall establish performance targets for the Highway Safety Improvement Program (HSIP) measures in accordance with § 490.209.

(c) *Applicable measures.* State DOTs and MPOs that include, within their respective geographic boundaries, any portion of the applicable transportation network or area shall establish performance targets for the performance measures identified in 23 CFR sections—

(1) 490.307(a)(1) and (2) for the condition of pavements on the Interstate System;

(2) 490.307(a)(3) and (4) for the condition of pavements on the NHS (excluding the Interstate);

(3) 490.407(c)(1) and (2) for the condition of bridges on the NHS;

(4) 490.507(a)(1) and (2) for the NHS Travel Time Reliability;

(5) 490.507(b) for the greenhouse gas (GHG) performance for the NHS;

(6) 490.607 for the freight movement on the Interstate System;

(7) 490.707(a) and (b) for traffic congestion; and

(8) 490.807 for on-road mobile source emissions.

(d) *Target scope.* Targets established by State DOTs and MPOs shall, regardless of ownership, represent the transportation network or geographic area, including bridges that cross State borders, that are applicable to the measures as specified in paragraphs (d)(1) and (2) of this section.

(1) State DOTs and MPOs shall establish statewide and metropolitan planning area wide targets, respectively, that represent the condition/performance of the transportation network or geographic area that are applicable to the measures, as specified in 23 CFR sections—

(i) 490.303 for the condition of pavements on the Interstate System measures specified in § 490.307(a)(1) and (2);

(ii) 490.303 for the condition of pavements on the NHS (excluding the Interstate) measures specified in § 490.307(a)(3) and (4);

(iii) 490.403 for the condition of bridges on the NHS measures specified in § 490.407(c)(1) and (2);

(iv) 490.503(a)(1) for the Travel Time Reliability measures specified in § 490.507(a)(1) and (2);

(v) 490.503(b) for the GHG measure for the NHS specified in § 490.507(b);

(vi) 490.603 for the Freight Reliability measure specified in § 490.607; and

(vii) 490.803 for the Total Emissions Reduction measure identified in § 490.807.

(2) State DOTs and MPOs shall establish a single urbanized area target that represents the performance of the transportation network in each applicable area for the CMAQ Traffic Congestion measures, as specified in § 490.703.

(3) For the purpose of target establishment in this section and reporting targets and progress evaluation in § 490.107, State DOTs shall describe the urbanized area boundaries within the State boundary in the Baseline Performance Period Report required by § 490.107(b)(1).

(e) *Establishment.* State DOTs shall establish targets for each of the performance measures identified in paragraph (c) of this section for respective target scope identified in paragraph (d) of this section as follows:

(1) *Schedule.* State DOTs shall establish targets not later than February 20, 2018, and for each performance period thereafter, in a manner that allows for the time needed to meet the requirements specified in this section and so that the final targets are submitted to FHWA by the due date provided in § 490.107(b).

(2) *Coordination.* State DOTs shall coordinate with relevant MPOs on the selection of targets in accordance with 23 U.S.C. 135(d)(2)(B)(i)(II) to ensure consistency, to the maximum extent practicable.

(3) *Additional targets for urbanized and non-urbanized areas.* In addition to statewide targets, described in paragraph (d)(1) of this section, State DOTs may, as appropriate, for each statewide target establish additional targets for portions of the State.

(i) State DOTs shall describe in the Baseline Performance Period Report required by § 490.107(b)(1) the boundaries used to establish each additional target.

(ii) State DOTs may select any number and combination of urbanized area boundaries and may also select a non-urbanized area boundary for the establishment of additional targets.

(iii) The boundaries used by the State DOT for additional targets shall be contained within the geographic boundary of the State.

(iv) State DOTs shall evaluate separately the progress of each additional target and report that progress as required under § 490.107(b)(2)(ii)(B) and (b)(3)(ii)(B).

(v) Additional targets for urbanized areas and the non-urbanized area are not applicable to the CMAQ Traffic Congestion measures and the Total

Emissions Reduction measure in paragraphs (c)(7) and (8) of this section, respectively.

(4) *Time horizon for targets.* State DOTs shall establish targets for a performance period as follows:

(i) The performance period will begin on:

(A) January 1st of the year in which the Baseline Performance Period Report is due to FHWA and will extend for a duration of 4 years for the measures in paragraphs (c)(1) through (7) of this section; and

(B) October 1st of the year prior to which the Baseline Performance Report is due to FHWA and will extend for a duration of 4 years for the measure in paragraph (c)(8) of this section.

(ii) The midpoint of a performance period will occur 2 years after the beginning of a performance period described in paragraph (e)(4)(i) of this section.

(iii) Except as provided in paragraphs (e)(7) and (e)(8)(v) of this section, State DOTs shall establish 2-year targets that reflect the anticipated condition/performance level at the midpoint of each performance period for the measures in paragraphs (c)(1) through (7) of this section, and the anticipated cumulative emissions reduction to be reported for the first 2 years of a performance period by applicable criteria pollutant and precursor for the measure in paragraph (c)(8) of this section.

(iv) State DOTs shall establish 4-year targets that reflect the anticipated condition/performance level at the end of each performance period for the measures in paragraphs (c)(1) through (7) of this section, and the anticipated cumulative emissions reduction to be reported for the entire performance period by applicable criteria pollutant and precursor for the measure in paragraph (c)(8) of this section.

(5) *Reporting.* State DOTs shall report 2-year targets, 4-year targets, the basis for each established target, progress made toward the achievement of targets, and other requirements to FHWA in accordance with § 490.107. State DOTs shall provide relevant MPO(s) targets to FHWA, upon request, each time the relevant MPOs establish or adjust MPO targets, as described in paragraph (f) of this section.

(6) *Target adjustment.* State DOTs may adjust an established 4-year target in the Mid Performance Period Progress Report, as described in § 490.107(b)(2). State DOTs shall coordinate with relevant MPOs when adjusting their 4-year target(s). Any adjustments made to 4-year targets established for the CMAQ Traffic Congestion measures in

paragraph (c)(7) of this section shall be agreed upon and made collectively by all State DOTs and MPOs that include any portion of the NHS in the respective urbanized area applicable to the measures.

(7) *Phase-in of new requirements for Interstate System pavement condition measures and the non-Interstate NHS Travel Time Reliability measures.* The following requirements apply only to the first performance period and to the measures in §§ 490.307(a)(1) and (2) and 490.507(a)(2):

(i) State DOTs shall establish their 4-year targets, required under paragraph (e)(4)(iv) of this section, and report these targets in their Baseline Performance Period Report, required under § 490.107(b)(1);

(ii) State DOTs shall not report 2-year targets, described in paragraph (e)(4)(iii) of this section, and baseline condition/performance in their Baseline Performance Period Report; and

(iii) State DOTs shall use the 2-year condition/performance in their Mid Performance Period Progress Report, described in § 490.107(b)(2)(ii)(A) as the baseline condition/performance. State DOTs may also adjust their 4-year targets, as appropriate.

(8) *Urbanized area specific targets.* The following requirements apply to establishing targets for the CMAQ Traffic Congestion measures in paragraph (c)(7) of this section, as their target scope provided in paragraph (d)(2) of this section:

(i) For the performance period that begins on January 1, 2018, State DOTs, with mainline highways on the NHS that cross any part of an urbanized area with a population more than 1 million within its geographic State boundary and that urbanized area contains any part of a nonattainment or maintenance area for any one of the criteria pollutants, as specified in § 490.703, shall establish targets for the CMAQ Traffic Congestion measures specified in § 490.707(a) and (b).

(ii) Beginning with the performance period that begins on January 1, 2022, and all subsequent performance periods thereafter, State DOTs, with mainline highways on the NHS that cross any part of an urbanized area with a population more than 200,000 within its geographic State boundary and that urbanized area contains any part of a nonattainment or maintenance area for any one of the criteria pollutants, as specified in § 490.703, shall establish targets for the CMAQ Traffic Congestion measures specified in § 490.707(a) and (b).

(iii) If required to establish targets for the CMAQ Traffic Congestion measures,

as described in paragraphs (e)(8)(i) and/or (ii) of this section, State DOTs shall comply with the following:

(A) For each urbanized area, only one 2-year target and one 4-year target for the entire urbanized area shall be established regardless of roadway ownership.

(B) For each urbanized area, all State DOTs and MPOs that contain, within their respective boundaries, any portion of the NHS network in that urbanized area shall agree on one 2-year and one 4-year target for that urbanized area. In accordance with paragraphs (e)(5) and (f)(9) of this section, the targets reported by the State DOTs and MPOs for that urbanized area shall be identical.

(C) Except as provided in paragraphs (e)(8)(iii)(F) and (e)(8)(v) of this section, State DOTs shall meet all reporting requirements in § 490.107 for the entire performance period even if there is a change of population, NHS designation, or nonattainment/maintenance area designation during that performance period.

(D) The 1 million and 200,000 population thresholds, in paragraphs (e)(8)(i) and (ii) of this section, shall be determined based on the most recent annual population estimates published by the U.S. Census available 1 year before when the State DOT Baseline Performance Period Report is due to FHWA.

(E) NHS designations and urbanized areas, in paragraphs (e)(8)(i) and (ii) of this section, shall be determined from the data, contained in HPMS, 1 year before when the State DOT Baseline Performance Period Report is due to FHWA.

(F) The designation of nonattainment or maintenance areas, in paragraphs (e)(8)(i) and (ii) of this section, shall be determined based on the effective date of U.S. EPA's designation under the NAAQS in 40 CFR part 81, as of the date 1 year before the State DOT Baseline Performance Period Report is due to FHWA. The nonattainment and maintenance areas shall be revised if, on the date 1 year before the State DOT Mid Performance Period Progress Report in § 490.107(b)(2)(ii) is due to FHWA, the area is no longer in nonattainment or maintenance for a criteria pollutant included in § 490.703.

(iv) If a State DOT does not meet the criteria specified in paragraph (e)(8)(i) or (ii) of this section 1 year before when the State DOT Baseline Performance Period Report is due to FHWA, then that State DOT is not required to establish targets for the CMAQ Traffic Congestion measures for that performance period.

(v) If the urbanized area, in paragraph (e)(8)(i) or (ii) of this section, does not

contain any part of a nonattainment or maintenance area for the applicable criteria pollutants, as specified in § 490.703, 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA, as described in paragraph (e)(8)(iii)(F) of this section, then that State DOT is not required to meet the requirements in § 490.107 for the CMAQ Traffic Congestion measures for that urbanized area for the remainder of that performance period.

(vi) The following requirements apply only the Peak Hour Excessive Delay (PHED) measure in § 490.707(a) to assess CMAQ Traffic Congestion in to the first performance period:

(A) State DOTs shall establish their 4-year targets, required under paragraph (e)(4)(iv) of this section, and report these targets in their Baseline Performance Period Report, required under § 490.107(b)(1).

(B) State DOTs shall not report 2-year targets, described in paragraph (e)(4)(ii) of this section, and baseline condition/performance in their Baseline Performance Period Report.

(C) State DOTs shall use the 2-year condition/performance in their Mid Performance Period Progress Report, described in § 490.107(b)(2)(ii)(A) as the baseline condition/performance. The established baseline condition/performance shall be collectively developed and agreed upon with relevant MPOs.

(D) State DOTs may, as appropriate, adjust their 4-year target(s) in their Mid Performance Period Progress Report, described in § 490.107(b)(2)(ii)(A). Adjusted 4-year target(s) shall be developed and collectively agreed upon with relevant MPO(s), as described in paragraph (e)(6) of this section.

(E) State DOTs shall annually report metrics for all mainline highways on the NHS for all applicable urbanized area(s) throughout the performance period, as required in § 490.711(f).

(9) *Targets for Total Emissions Reduction measure.* The following requirements apply to establishing targets for the measures specified in paragraph (c)(8) of this section:

(i) The State DOTs shall establish statewide targets for the Total Emissions Reduction measure for all nonattainment and maintenance areas for all applicable criteria pollutants and precursors specified in § 490.803.

(ii) For all nonattainment and maintenance areas within the State geographic boundary, the State DOT shall establish separate statewide targets for each of the applicable criteria pollutants and precursors specified in § 490.803.

(iii) The established targets, as specified in paragraph (e)(4) of this section, shall reflect the anticipated cumulative emissions reduction to be reported in the CMAQ Public Access System required in § 490.809(a).

(iv) In addition to the statewide targets in paragraph (e)(9)(i) of this section, State DOTs may, as appropriate, establish additional targets for any number and combination of nonattainment and maintenance areas by applicable criteria pollutant within the geographic boundary of the State. If a State DOT establishes additional targets for nonattainment and maintenance areas, it shall report the targets in the Baseline Performance Period Report required by § 490.107(b)(1). State DOTs shall evaluate separately the progress of each of these additional targets and report that progress as required under § 490.107(b)(2)(ii)(B) and (b)(3)(ii)(B).

(v) The designation of nonattainment or maintenance areas shall be determined based on the effective date of U.S. EPA's designation under the NAAQS in 40 CFR part 81, as of the date 1 year before the State DOT Baseline Performance Period Report is due to FHWA. The nonattainment and maintenance areas shall be revised if, on the date 1 year before the State DOT Mid Performance Period Progress Report in § 490.107(b)(2)(ii) is due to FHWA, the area is no longer in nonattainment or maintenance for a criteria pollutant included in § 490.803.

(vi) Except as provided in paragraphs (e)(9)(vii) and (viii) of this section, the State DOT shall meet all reporting requirements in § 490.107 for the entire performance period even if there is a change of nonattainment or maintenance area during that performance period.

(vii) If a State geographic boundary does not contain any part of nonattainment or maintenance areas for applicable criteria pollutants and precursors, as specified in § 490.803, 1 year before the State DOT Baseline Performance Period Report is due to FHWA, then that State DOT is not required to establish targets for Total Emissions Reduction measures for that performance period.

(viii) If the State geographic boundary, in paragraph (e)(9)(ii) of this section, does not contain any part of the nonattainment or maintenance area for an applicable criteria pollutant or precursor, as specified in § 490.803, 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA as described in paragraph (e)(9)(v) of this section, then that State DOT is not required to meet the

requirements in § 490.107 for the Total Emissions Reduction measure for that applicable criteria pollutant or precursor for the remainder of that performance period.

(f) *MPO establishment.* The MPOs shall establish targets for each of the performance measures identified in paragraph (c) of this section for the respective target scope identified in paragraph (d) of this section as follows:

(1) *Schedule.* The MPOs shall establish targets no later than 180 days after the respective State DOT(s) establishes their targets, as provided in paragraph (e)(1) of this section.

(i) The MPOs shall establish 4-year targets, described in paragraph (e)(4)(iv) of this section, for all applicable measures, described in paragraphs (c) and (d) of this section.

(ii) Except as provided in paragraph (f)(5)(vi) of this section, the MPOs shall establish 2-year targets, described in paragraph (e)(4)(iii) of this section for the CMAQ Traffic Congestion and Total Emissions Reduction measures, described in paragraphs (c) and (d) of this section as their applicability criteria described in paragraphs (f)(5)(i) and (ii) and (f)(6)(iii) of this section, respectively.

(iii) If an MPO does not meet the criteria described in paragraph (f)(5)(i), (f)(5)(ii), or (f)(6)(iii) of this section, the MPO is not required to establish 2-year target(s) for the corresponding measure(s).

(2) *Coordination.* The MPOs shall coordinate with relevant State DOT(s) on the selection of targets in accordance with 23 U.S.C. 134(h)(2)(B)(i)(II) to ensure consistency, to the maximum extent practicable.

(3) *Target establishment options.* For each performance measure identified in paragraph (c) of this section, except the CMAQ Traffic Congestion measures in paragraph (f)(5) of this section, and MPOs meeting the criteria under paragraph (f)(6)(iii) of this section for Total Emissions Reduction measure, the MPOs shall establish targets by either:

(i) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT target for that performance measure; or

(ii) Committing to a quantifiable target for that performance measure for their metropolitan planning area.

(4) *MPOs serving a multistate planning area.* Except as provided in the CMAQ Traffic Congestion measures in paragraph (f)(5) of this section, and MPOs meeting the criteria under paragraph (f)(6)(iii) of this section, for Total Emissions Reduction measure, MPOs with planning areas extending

across State boundaries shall follow these requirements for each performance measure identified in paragraph (c) of this section:

(i) For each measure, MPOs may choose different target establishment options, provided in paragraph (f)(3) of this section, for the portion of the planning area within each State.

(ii) If MPOs choose the option to agree to plan and program projects to contribute toward State DOT targets, in accordance with paragraph (f)(3)(i) of this section, for a measure, then they shall plan and program projects in support of State DOT targets for the portion of the planning area within each State.

(5) *Urbanized area specific targets.* The following requirements apply to establishing targets for the CMAQ Traffic Congestion measures in paragraph (c)(7) of this section, as their target scope provided in paragraph (d)(2) of this section:

(i) For the performance period that begins on January 1, 2018, MPOs shall establish targets for the CMAQ Traffic Congestion measures specified in § 490.707(a) and (b) when mainline highways on the NHS within their metropolitan planning area boundary cross any part of an urbanized area with a population more than 1 million, and that portion of their metropolitan planning area boundary also contains any portion of a nonattainment or maintenance area for any one of the criteria pollutants, as specified in § 490.703. If an MPO with mainline highways on the NHS within their metropolitan planning area boundary cross any part of an urbanized area with a population more than 1 million and that urbanized area contains any part of a nonattainment or maintenance area, for any one of the criteria pollutant as specified in § 490.703, outside of its metropolitan planning area boundary, then that MPO should coordinate with relevant State DOT(s) and MPO(s) in the target establishment process for the CMAQ Traffic Congestion measures specified in § 490.707.

(ii) Beginning with the performance period that begins on January 1, 2022, and all subsequent performance periods thereafter, MPOs shall establish targets for the CMAQ Traffic Congestion measures specified in § 490.707(a) and (b) when mainline highways on the NHS within their metropolitan planning area boundary cross any part of an urbanized area with a population more than 200,000, and that portion of their metropolitan planning area boundary also contains any portion of a nonattainment or maintenance area for any one of the criteria pollutants, as

specified in § 490.703. If an MPO with mainline highways on the NHS within their metropolitan planning area boundary cross any part of an urbanized area with a population more than 200,000 and that urbanized area contains any part of a nonattainment or maintenance area, for any one of the criteria pollutant as specified in § 490.703, outside of its metropolitan planning area boundary, then that MPO should coordinate with relevant State DOT(s) and MPO(s) in the target establishment process for the CMAQ Traffic Congestion measures specified in § 490.707.

(iii) If required to establish a target for the CMAQ Traffic Congestion measures, as described in paragraphs (f)(5)(i) and/or (ii) of this section, MPOs shall comply with the following:

(A) For each urbanized area, only one 2-year target and one 4-year target for the entire urbanized area shall be established regardless of roadway ownership.

(B) For each urbanized area, all State DOTs and MPOs that contain, within their respective boundaries, any portion of the NHS network in that urbanized area shall agree on one 2-year and one 4-year target for that urbanized area. The targets reported, in accordance with paragraphs (e)(5) and (f)(9) of this section, by the State DOTs and MPOs for that urbanized area shall be identical.

(C) Except as provided in paragraphs (f)(5)(iii)(F) and (f)(5)(v) of this section, MPOs shall meet all reporting requirements in § 490.107(c) for the entire performance period even if there is a change of population, NHS designation, or nonattainment/maintenance area during that performance period.

(D) The 1 million and 200,000 population thresholds, in paragraph (f)(5)(i) and (ii) of this section, shall be determined based on the most recent annual population estimates published by the U.S. Census available 1 year before the State DOT Baseline Performance Period Report is due to FHWA.

(E) NHS designations and urbanized areas, in paragraphs (f)(5)(i) and (ii) of this section, shall be determined from the data, contained in HPMS, 1 year before State DOT Baseline Performance Period Report is due to FHWA.

(F) The designation of nonattainment or maintenance areas, in paragraph (f)(5)(i) and (ii) of this section, shall be determined based on the effective date of U.S. EPA's designation under the NAAQS in 40 CFR part 81, as of the date 1 year before the State DOT Baseline Performance Period Report is due to

FHWA. The nonattainment and maintenance areas shall be revised if, on the date 1 year before the State DOT Mid Performance Period Progress Report in § 490.107(b)(2)(ii) is due to FHWA, the area is no longer in nonattainment or maintenance for a criteria pollutant included in § 490.703.

(iv) If an MPO does not meet the criteria specified in paragraph (f)(5)(i) or (ii) of this section at the time that is 1 year before when the State DOT Baseline Performance Period Report is due to FHWA, then that MPO is not required to establish targets for the CMAQ Traffic Congestion measure for that performance period.

(v) If the portion of the metropolitan planning area boundary within the urbanized area, in paragraph (f)(5)(i) or (ii) of this section, does not contain any part of a nonattainment or maintenance area for the applicable criteria pollutants, as specified in § 490.703, at the time that is 1 year before when the State DOT Mid Performance Period Progress Report is due to FHWA, as described in paragraph (f)(5)(iii)(F) of this section, then that MPO is not required to meet the requirements in § 490.107 for the CMAQ Traffic Congestion measures for that urbanized area for the remainder of that performance period.

(vi) The following requirements apply only to the first performance period and the PHED measure to assess traffic congestion in § 490.707(a):

(A) The MPOs shall not report 2-year targets, described in paragraph (f)(5)(iii)(A) of this section;

(B) The MPOs shall use the 2-year condition/performance in the State DOT Mid Performance Period Progress Report, described in § 490.107(b)(2)(ii)(A) as baseline condition/performance. The established baseline condition/performance shall be agreed upon and made collectively with relevant State DOTs; and

(C) The MPOs may, as appropriate, adjust their 4-year target(s). Adjusted 4-year target(s) shall be collectively developed and agreed upon with all relevant State DOT(s), as described in paragraph (f)(8) of this section.

(6) *Targets for the Total Emissions Reduction measure.* The following requirements apply to establishing targets for the measure in paragraph (c)(8) of this section:

(i) The MPO shall establish targets for each of the applicable criteria pollutants and precursors, specified in § 490.803, for which it is in nonattainment or maintenance, within its metropolitan planning area boundary.

(ii) The established targets, as specified in paragraph (e)(4) of this

section, shall reflect the anticipated cumulative emissions reduction to be reported in the CMAQ Public Access System required in § 490.809(a).

(iii) If any part of a designated nonattainment and maintenance area within the metropolitan planning area overlaps the boundary of an urbanized area with a population more than 1 million in population, as of 1 year before the State DOT Baseline Performance Period Report is due to FHWA, then that MPO shall establish both 2-year and 4-year targets for their metropolitan planning area. The population threshold shall be determined based on the most recent annual population estimates published by the U.S. Census available 1 year before the State DOT Baseline Performance Period Report is due to FHWA.

(iv) For the nonattainment and maintenance areas within the metropolitan planning area that do not meet the criteria in paragraph (f)(6)(iii) of this section, MPOs shall establish 4-year targets for their metropolitan planning area, as described in paragraph (f)(3) of this section.

(v) The designation of nonattainment or maintenance areas shall be determined based on the effective date of U.S. EPA's designation under the NAAQS in 40 CFR part 81, as of the date 1 year before the State DOT Baseline Performance Period Report is due to FHWA. The nonattainment and maintenance areas shall be revised if, on the date 1 year before the State DOT Mid Performance Period Progress Report in § 490.107(b)(2)(ii) is due to FHWA, the area is no longer in nonattainment or maintenance for a criteria pollutant included in § 490.803.

(vi) Except as provided in paragraphs (f)(6)(v) and (viii) of this section, MPOs shall meet all reporting requirements in § 490.107(c) for the entire performance period even if there is a change of nonattainment or maintenance area or population during that performance period.

(vii) If a metropolitan planning area boundary does not contain any part of nonattainment or maintenance areas for applicable criteria pollutants 1 year before when the State DOT Baseline Performance Period Report is due to FHWA, then that MPO is not required to establish targets for the Total Emissions Reduction measure for that performance period.

(viii) If the metropolitan planning area boundary, in paragraph (f)(6)(i) of this section, does not contain any part of a nonattainment or maintenance area for the applicable criteria pollutants, as specified in § 490.803, 1 year before the

State DOT Mid Performance Period Progress Report is due to FHWA, as described in paragraph (f)(6)(v) of this section, then that MPO is not required to meet the requirements in § 490.107 for the Total Emissions Reduction measure for that applicable criteria pollutant or precursor for the remainder of that performance period.

(7) *MPO response to State DOT target adjustment.* For the established targets in paragraph (f)(3) of this section, if the State DOT adjusts a 4-year target in the State DOT's Mid Performance Period Progress Report and if, for that respective target, the MPO established a target by supporting the State DOT target as allowed under paragraph (f)(3)(i) of this section, then the MPO shall, within 180 days, report to the State DOT whether it will either:

(i) Agree to plan a program of projects so that they contribute to the adjusted State DOT target for that performance measure; or

(ii) Commit to a new quantifiable target for that performance measure for its metropolitan planning area.

(8) *Target adjustment.* If the MPO establishes its target by committing to a quantifiable target, described in paragraph (f)(3)(ii) of this section or establishes target(s) for the Total Emissions Reduction measure required in paragraph (f)(6)(iii) of this section, then the MPOs may adjust its target(s) in a manner that is collectively developed, documented, and mutually agreed upon by the State DOT and MPO. Any adjustments made to 4-year targets, established for CMAQ Traffic Congestion measures in paragraph (f)(5)(i) or (ii) of this section, shall be collectively developed and agreed upon by all State DOTs and MPOs that include any portion of the NHS in the respective urbanized area applicable to the measure.

(9) *Reporting.* The MPOs shall report targets and progress toward the achievement of their targets as specified in § 490.107(c). After the MPOs establish or adjust their targets, the relevant State DOT(s) must be able to provide these targets to FHWA upon request.

§ 490.107 Reporting on performance targets.

(a) *In general.* All State DOTs and MPOs shall report the information specified in this section for the targets required in § 490.105.

(1) All State DOTs and MPOs shall report in accordance with the schedule and content requirements under paragraphs (b) and (c) of this section, respectively.

(2) For the measures identified in § 490.207(a), all State DOTs and MPO shall report on performance in accordance with § 490.213.

(3) State DOTs shall report using an electronic template provided by FHWA.

(b) *State Biennial Performance Report.* State DOTs shall report to FHWA baseline condition/performance at the beginning of a performance period and progress achievement at both the midpoint and end of a performance period. State DOTs shall report at an ongoing 2-year frequency as specified in paragraphs (b)(1) through (3) of this section.

(1) *Baseline Performance Period Report*—(i) *Schedule.* State DOTs shall submit a Baseline Performance Period Report to FHWA by October 1st of the first year in a performance period. State DOTs shall submit their first Baseline Performance Period Report to FHWA by October 1, 2018, and subsequent Baseline Performance Period Reports to FHWA by October 1st every 4 years thereafter.

(ii) *Content.* The State DOT shall report the following information in each Baseline Performance Period Report:

(A) *Targets.* 2-year and 4-year targets for the performance period, as required in § 490.105(e), and a discussion, to the maximum extent practicable, of the basis for each established target;

(B) *Baseline condition/performance.* Baseline condition/performance derived from the latest data collected through the beginning date of the performance period specified in § 490.105(e)(4)(i) for each target, required under paragraph (b)(1)(ii)(A) of this section;

(C) *Relationship with other performance expectations.* A discussion, to the maximum extent practicable, on how the established targets in paragraph (b)(1)(ii)(A) of this section support expectations documented in longer range plans, such as the State asset management plan required by 23 U.S.C. 119(e) and the long-range statewide transportation plan provided in part 450 of this chapter;

(D) *Urbanized area boundaries and population data for targets.* For the purpose of establishing additional targets for urbanized and non-urbanized areas in § 490.105(e)(3) and the urbanized area specific targets in § 490.105(e)(8), State DOTs shall document the boundary extent for all applicable urbanized areas based on information in HPMS;

(E) *Congestion at truck freight bottlenecks.* The State DOT shall document the location of truck freight bottlenecks within the State, including those identified in the National Freight Strategic Plan. If a State has prepared a

State Freight Plan under 49 U.S.C. 70202, within the last 2 years, then the State Freight Plan may serve as the basis for identifying truck freight bottlenecks;

(F) *Nonattainment and maintenance area for targets.* Where applicable, for the purpose of determining target scope in § 490.105(d) and any additional targets under § 490.105(e)(9)(iv), State DOTs shall describe the boundaries of U.S. EPA's designated nonattainment and maintenance areas, as described in §§ 490.103(c) and 490.105(e)(9)(v);

(G) *MPO CMAQ Performance Plan.* Where applicable, State DOTs shall include as an attachment the MPO CMAQ Performance Plan, described in paragraph (c)(3) of this section;

(H) *GHG metrics for the GHG measure.* Total tailpipe CO₂ emissions for the calendar year 2017, as described in § 490.511(f)(1) and total tailpipe CO₂ emissions for the 2 preceding calendar years of the year in which Baseline Performance Period Report is due to FHWA, as described in § 490.511(f)(2) for the GHG measure in § 490.507(b); and

(I) *Data collection method for the Percent of Non-SOV Travel measure.* Where applicable, State DOTs shall report the data collection method that is used to determine the Percent of Non-SOV Travel measure, in § 490.707(b), for each applicable urbanized area in the State, as provided in § 490.709(f)(2).

(2) *Mid Performance Period Progress Report—(i) Schedule.* State DOTs shall submit a Mid Performance Period Progress Report to FHWA by October 1st of the third year in a performance period. State DOTs shall submit their first Mid Performance Period Progress Report to FHWA by October 1, 2020, and subsequent Mid Performance Period Progress Reports to FHWA by October 1st every 4 years thereafter.

(ii) *Content.* The State DOT shall report the following information in each Mid Performance Period Progress Report:

(A) *2-year condition/performance.* The actual condition/performance derived from the latest data collected through the midpoint of the performance period, specified in § 490.105(e)(4), for each State DOT reported target required in paragraph (b)(1)(ii)(A) of this section;

(B) *2-year progress in achieving performance targets.* A discussion of the State DOT's progress toward achieving each established 2-year target in paragraph (b)(1)(ii)(A) of this section. The State DOT shall compare the actual 2-year condition/performance in paragraph (b)(2)(ii)(A) of this section, within the boundaries and limits documented in paragraphs (b)(1)(ii)(D)

and (E) of this section, with the respective 2-year target and document in the discussion any reasons for differences in the actual and target values;

(C) *Investment strategy discussion.* A discussion on the effectiveness of the investment strategies developed and documented in the State asset management plan for the NHS required under 23 U.S.C. 119(e);

(D) *Congestion at truck freight bottlenecks.* Discussion on progress of the State DOT's efforts in addressing congestion at truck freight bottlenecks within the State, as described in paragraph (b)(1)(ii)(F) of this section, through comprehensive freight improvement efforts of State Freight Plan or MPO freight plans; the Statewide Transportation Improvement Program and Transportation Improvement Program; regional or corridor level efforts; other related planning efforts; and operational and capital activities targeted to improve freight movement on the Interstate System. If a State has prepared a State Freight Plan under 49 U.S.C. 70202 within the previous 2 years, then the State Freight Plan may serve as the basis for addressing congestion at truck freight bottlenecks. If the State Freight Plan has not been updated since the previous State Biennial Performance Report, then an updated analysis of congestion at truck freight bottlenecks must be completed;

(E) *Target adjustment discussion.* When applicable, a State DOT may submit an adjusted 4-year target to replace an established 4-year target in paragraph (b)(1)(ii)(A) of this section. If the State DOT adjusts its target, it shall include a discussion on the basis for the adjustment and how the adjusted target supports expectations documented in longer range plans, such as the State asset management plan and the long-range statewide transportation plan. The State DOT may only adjust a 4-year target at the midpoint and by reporting the change in the Mid Performance Period Progress Report;

(F) *2-year significant progress discussion for the National Highway Performance Program (NHPP) targets and the National Highway Freight Program (NHFP) target.* State DOTs shall discuss the progress they have made toward the achievement of all 2-year targets established for the NHPP measures in § 490.105(c)(1) through (5) and the Freight Reliability measure in § 490.105(c)(6). This discussion should document a summary of prior accomplishments and planned activities that will be conducted during the remainder of the performance period to

make significant progress toward that achievement of 4-year targets for applicable measures;

(G) *Extenuating circumstances discussion on 2-year Targets.* When applicable, for 2-year targets for the NHPP or NHFP, a State DOT may include a discussion on the extenuating circumstance(s), described in § 490.109(e)(5), beyond the State DOT's control that prevented the State DOT from making 2-year significant progress toward achieving NHPP or NHFP target(s) in paragraph (b)(2)(ii)(F) of this section;

(H) *Applicable target achievement discussion.* If FHWA determined that a State DOT has not made significant progress toward the achievement of any 4-year NHPP or NHFP targets in the FHWA determination made after the State DOT submits the Full Performance Period Progress Report for the immediate prior performance period, then the State DOT shall include a description of the actions they will undertake to better achieve those targets as required under § 490.109(f). If FHWA determined under § 490.109(e) that the State DOT has made significant progress for immediate prior performance period's 4-year NHPP or NHFP targets, then the State DOT does not need to include this description for those targets;

(I) *MPO CMAQ Performance Plan.* Where applicable, State DOTs shall include as an attachment the MPO CMAQ Performance Plan, described in paragraph (c)(3) of this section; and

(J) *GHG metrics for the GHG measure.* Total tailpipe CO₂ emissions for 2 preceding calendar years of the year in which the Mid Performance Period Progress Report is due to FHWA, as described in § 490.511(f)(2), for the GHG measure in § 490.507(b).

(3) *Full Performance Period Progress Report—(i) Schedule.* State DOTs shall submit a progress report on the full performance period to FHWA by October 1st of the first year following the reference performance period. State DOTs shall submit their first Full Performance Period Progress Report to FHWA by October 1, 2022, and subsequent Full Performance Period Progress Reports to FHWA by October 1st every 4 years thereafter.

(ii) *Content.* The State DOT shall report the following information for each Full Performance Period Progress Report:

(A) *4-year condition/performance.* The actual condition/performance derived from the latest data collected through the end of the performance period, specified in § 490.105(e)(4), for

each State DOT reported target required in paragraph (b)(1)(ii)(A) of this section;

(B) *4-year progress in achieving performance targets.* A discussion of the State DOT's progress made toward achieving each established 4-year target in paragraph (b)(1)(ii)(A) or (b)(2)(ii)(E) of this section, when applicable. The State DOT shall compare the actual 4-year condition/performance in paragraph (b)(3)(ii)(A) of this section, within the boundaries and limits documented in paragraphs (b)(1)(ii)(D) and (E) of this section, with the respective 4-year target and document in the discussion any reasons for differences in the actual and target values;

(C) *Investment strategy discussion.* A discussion on the effectiveness of the investment strategies developed and documented in the State asset management plan for the NHS required under 23 U.S.C. 119(e);

(D) *Congestion at truck freight bottlenecks.* Discussion on progress of the State DOT's efforts in addressing congestion at truck freight bottlenecks within the State, as described in paragraphs (b)(1)(ii)(F) and (b)(2)(ii)(D) of this section;

(E) *4-year significant progress evaluation for applicable targets.* State DOTs shall discuss the progress they have made toward the achievement of all 4-year targets established for the NHPP measures in § 490.105(c)(1) through (5) and the Freight Reliability measure in § 490.105(c)(6). This discussion shall include a summary of accomplishments achieved during the performance period to demonstrate whether the State DOT has made significant progress toward achievement of 4-year targets for those measures;

(F) *Extenuating circumstances discussion on applicable targets.* When applicable, a State DOT may include discussion on the extenuating circumstance(s), described in § 490.109(e)(5), beyond the State DOT's control that prevented the State DOT from making a 4-year significant progress toward achieving NHPP or NHFP targets, described in paragraph (b)(3)(ii)(E) of this section;

(G) *Applicable target achievement discussion.* If FHWA determined that a State DOT has not made significant progress toward the achievement of any 2-year NHPP or NHFP targets in the biennial FHWA determination made after the State DOT submits the Mid Performance Period Progress Report for the performance period, then the State DOT shall include a description of the actions they will undertake to better achieve those targets as required under § 490.109(f). If FHWA determined in

§ 490.109(e) that the State DOT has made significant progress for the 2-year NHPP or NHFP targets for the performance period, then the State DOT does not need to include this description for those targets;

(H) *MPO CMAQ Performance Plan.* Where applicable, State DOTs shall include as an attachment the MPO CMAQ Performance Plan, described in paragraph (c)(3) of this section; and

(I) *GHG metrics for the GHG measure.* Total tailpipe CO₂ emissions for 2 preceding calendar years of the year in which the Full Performance Period Progress Report is due to FHWA, as described in § 490.511(f)(2), for the GHG measure in § 490.507(b).

(c) *MPO Report.* The MPOs shall establish targets in accordance with § 490.105 and report targets and progress toward the achievement of their targets in a manner that is consistent with the following:

(1) The MPOs shall report their established targets to their respective State DOT in a manner that is documented and mutually agreed upon by both parties.

(2) The MPOs shall report baseline condition/performance and progress toward the achievement of their targets in the system performance report in the metropolitan transportation plan in accordance with part 450 of this chapter.

(3) The MPOs serving a TMA and meeting criteria, specified in § 490.105(f)(6)(iii), shall develop a CMAQ performance plan as required by 23 U.S.C. 149(l). The CMAQ performance plan is not required when the MPO meets the criteria specified in § 490.105(f)(6)(vii) or (viii).

(i) The CMAQ performance plan shall be submitted to FHWA by the State DOT, and be updated biennially on the same schedule as the State Biennial Performance Reports.

(ii) For the CMAQ Traffic Congestion and Total Emissions Reduction measures in subparts G and H of this part, the CMAQ performance plan submitted with the State DOT's Baseline Performance Period Report to FHWA shall include:

(A) The 2-year and 4-year targets for the CMAQ Traffic Congestion measures, identical to the relevant State DOT(s) reported target under paragraph (b)(1)(ii)(A) of this section, for each applicable urbanized area;

(B) The 2-year and 4-year targets for the Total Emissions Reduction measure for the performance period;

(C) Baseline condition/performance for each MPO reported CMAQ Traffic Congestion targets, identical to the relevant State DOT(s) reported baseline

condition/performance under paragraph (b)(1)(ii)(B) of this section;

(D) Baseline condition/performance derived from the latest estimated cumulative emissions reductions from CMAQ projects for each MPO reported Total Emissions Reduction target; and

(E) A description of projects identified for CMAQ funding and how such projects will contribute to achieving the performance targets for these measures.

(iii) For the CMAQ Traffic Congestion and Total Emissions Reduction measures in subparts G and H of this part, the CMAQ performance plan submitted with the State DOT's Mid Performance Period Progress Report to FHWA shall include:

(A) 2-year condition/performance for the CMAQ Traffic Congestion measures, identical to the relevant State DOT(s) reported condition/performance under paragraph (b)(2)(ii)(A) of this section, for each applicable urbanized area;

(B) 2-year condition/performance derived from the latest estimated cumulative emissions reductions from CMAQ projects for each MPO reported Total Emissions Reduction target;

(C) An assessment of the progress of the projects identified in the CMAQ performance plan submitted with the Baseline Performance Period Report toward achieving the 2-year targets for these measures;

(D) When applicable, an adjusted 4-year target to replace an established 4-year target; and

(E) An update to the description of projects identified for CMAQ funding and how those updates will contribute to achieving the 4-year performance targets for these measures.

(iv) For the CMAQ Traffic Congestion and Total Emissions Reduction measures in subparts G and H of this part, the CMAQ performance plan submitted with the State DOT's Full Performance Period Progress Report to FHWA shall include:

(A) 4-year condition/performance for the CMAQ Traffic Congestion measures, identical to the relevant State DOT(s) reported condition/performance reported under paragraph (b)(3)(ii)(A) of this section, for each applicable urbanized area;

(B) 4-year condition/performance derived from the latest estimated cumulative emissions reductions from CMAQ projects for each MPO reported Total Emissions Reduction target; and

(C) An assessment of the progress of the projects identified in both paragraphs (c)(3)(ii)(C) and (c)(3)(iii)(D) of this section toward achieving the 4-year targets for these measures.

(4) If an MPO elected to establish a quantifiable target, as provided in

§ 490.105(f)(3)(ii), for the GHG measure in § 490.507(b), then that MPO shall report a description of its measure calculation method to its State DOT in a manner that is documented and mutually agreed upon by both the State DOT and the MPO.

§ 490.109 Assessing significant progress toward achieving the performance targets for the National Highway Performance Program and the National Highway Freight Program.

(a) *In general.* The FHWA will assess each of the State DOT targets separately for the NHPP measures specified in § 490.105(c)(1) through (5) and the Freight Reliability measure specified in § 490.105(c)(6) to determine the significant progress made toward the achievement of those targets.

(b) *Frequency.* The FHWA will determine whether a State DOT has or has not made significant progress toward the achievement of applicable targets as described in paragraph (e) of this section at the midpoint and the end of each performance period.

(c) *Schedule.* The FHWA will determine significant progress toward the achievement of a State DOT's NHPP and NHFP targets after the State DOT submits the Mid Performance Period Progress Report for progress toward the achievement of 2-year targets, and again after the State DOT submits the Full Performance Period Progress Report for progress toward the achievement of 4-year targets. The FHWA will notify State DOTs of the outcome of the determination of the State DOT's ability to make significant progress toward the achievement of its NHPP and NHFP targets.

(d) *Source of data/information.* (1) The FHWA will use the following sources of information to assess NHPP target achievement and condition/performance progress:

(i) Data contained within the HPMS on June 15th of the year in which the significant progress determination is made that represents conditions from the prior year for targets established for Interstate System pavement condition measures, as specified in § 490.105(c)(1);

(ii) Data contained within the HPMS on August 15th of the year in which the significant progress determination is made that represents conditions from the prior year for targets established for non-Interstate NHS pavement condition measures, as specified in § 490.105(c)(2);

(iii) The most recently available data contained within the NBI as of June 15th of the year in which the significant progress determination is made for

targets established for NHS bridge condition measures, as specified in § 490.105(c)(3);

(iv) Data contained within the HPMS on August 15th of the year in which the significant progress determination is made that represents performance from the prior year for targets established for the Travel Time Reliability measures, as specified in § 490.105(c)(4);

(v) On October 1st of the year in which the significant progress determination is made, the reported total tailpipe CO₂ emissions for the calendar year 2017 in the Baseline Performance Period Report, as described in § 490.107(b)(1)(ii)(I), and the reported total tailpipe CO₂ emissions in the State Biennial Performance Report, as described in § 490.107(b)(2)(ii)(J) or (b)(3)(ii)(I), in the year in which the significant progress determination is made for GHG measure in § 490.105(c)(5); and

(vi) Baseline condition/performance data contained in HPMS and NBI of the year in which the Baseline Period Performance Report is due to FHWA that represents baseline conditions/performances for the performance period for the measures in § 490.105(c)(1) through (4), and the HPMS data reported in the year in which Baseline Period Performance Report is due to FHWA and the total tailpipe CO₂ emissions reported in the Baseline Period Performance Report, as provided in § 490.107(b)(1)(ii)(I), for the GHG measure in § 490.105(c)(5).

(2) The FHWA will use the following sources of information to assess NHFP target achievement and condition/performance progress:

(i) Data contained within the HPMS on August 15th of the year in which the significant progress determination is made that represents performance from the prior year for targets established for the Freight Reliability measure, as specified in § 490.105(c)(6); and

(ii) Baseline condition/performance data contained in HPMS of the year in which the Baseline Period Performance Report is due to FHWA that represents baseline condition/performance for the performance period.

(e) *Significant progress determination for individual NHPP and NHFP targets—*(1) *In general.* The FHWA will biennially assess whether the State DOT has achieved or made significant progress toward each target established by the State DOT for the NHPP measures described in § 490.105(c)(1) through (5) and the Freight Reliability measure described in § 490.105(c)(6). The FHWA will assess the significant progress of each statewide target separately using the condition/

performance data/information sources described in paragraph (d) of this section. The FHWA will not assess the progress achieved for any additional targets a State DOT may establish under § 490.105(e)(3).

(2) *Significant progress toward individual NHPP and NHFP targets.* The FHWA will determine that a State DOT has made significant progress toward the achievement of each 2-year or 4-year applicable target if either:

(i) The actual condition/performance level is better than the baseline condition/performance; or

(ii) The actual condition/performance level is equal to or better than the established target.

(3) *Phase-in of new requirements.* The following requirements shall only apply to the first performance period and only to the Interstate System pavement condition targets and non-Interstate NHS Travel Time Reliability targets, described in § 490.105(e)(7):

(i) At the midpoint of the first performance period, FHWA will not make a determination of significant progress toward the achievement of 2-year targets for Interstate System pavement condition measures:

(ii) The FHWA will classify the assessment of progress toward the achievement of targets in paragraph (e)(3)(i) of this section as "progress not determined" so that they will be excluded from the requirement under paragraph (e)(2) of this section; and

(iii) The FHWA will not make a determination of significant progress toward the achievement of 2-year targets for the Non-Interstate NHS Travel Time Reliability measure.

(4) *Insufficient data and/or information.* The FHWA will determine that a State DOT has not made significant progress toward the achievement of an individual NHPP or NHFP target if:

(i) A State DOT does not submit a required report, individual target, or other information as specified in § 490.107 for the each of the measures in § 490.105(c)(1) through (6);

(ii) The data contained in HPMS do not meet the requirements under § 490.313(b)(4)(i) by the data extraction date specified in paragraph (d)(1) of this section for the each of the Interstate System pavement condition measures in § 490.105(c)(1);

(iii) The data contained in HPMS do not meet the requirements under § 490.313(b)(4)(i) by the data extraction date specified in paragraph (d)(2) of this section for the each of the non-Interstate NHS pavement condition measures in § 490.105(c)(2);

(iv) A State DOT reported data are not cleared in the NBI by the data extraction data specified in paragraph (d)(3) of this section for the each of the NHS bridge condition measures in § 490.105(c)(3); or

(v) The data were determined insufficient, as described in paragraphs (e)(4)(ii) through (iv) of this section, in the year in which the Baseline Period Performance Report is due to FHWA for the measures in § 490.105(c)(1) through (3).

(5) *Extenuating circumstances.* The FHWA will consider extenuating circumstances documented by the State DOT in the assessment of progress toward the achievement of NHPP and NHFP targets in the relevant State Biennial Performance Report, provided in § 490.107.

(i) The FHWA will classify the assessment of progress toward the achievement of an individual 2-year or 4-year target as “progress not determined” if the State DOT has provided an explanation of the extenuating circumstances beyond the control of the State DOT that prevented it from making significant progress toward the achievement of a 2-year or 4-year target and the State DOT has quantified the impacts on the condition/performance that resulted from the circumstances, which are:

(A) Natural or man-made disasters that caused delay in NHPP or NHFP project delivery, extenuating delay in data collection, and/or damage/loss of data system;

(B) Sudden discontinuation of Federal government furnished data due to natural and man-made disasters or sudden discontinuation of Federal government furnished data due to lack of funding; and/or

(C) New law and/or regulation directing State DOTs to change metric and/or measure calculation.

(ii) If the State DOT’s explanation, described in paragraph (e)(5)(i) of this section, is accepted by FHWA, FHWA will classify the progress toward achieving the relevant target(s) as “progress not determined,” and those targets will be excluded from the requirement in paragraph (e)(2) of this section.

(f) *Performance achievement.* (1) If FHWA determines that a State DOT has not made significant progress toward the achieving of NHPP targets, then the State DOT shall include as part of the next performance target report under 23 U.S.C. 150(e) [the Biennial Performance Report] a description of the actions the State DOT will undertake to achieve the targets related to the measure in which

significant progress was not achieved as follows:

(i) If significant progress is not made for either target established for the Interstate System pavement condition measures, § 490.307(a)(1) and (2), then the State DOT shall document the actions it will take to achieve Interstate Pavement condition targets;

(ii) If significant progress is not made for either target established for the Non-Interstate System pavement condition measures, § 490.307(a)(3) and (4), then the State DOT shall document the actions it will take to achieve Non-Interstate Pavement condition target;

(iii) If significant progress is not made for either target established for the NHS bridge condition measures, § 490.407(c)(1) and (2), then the State DOT shall document the actions it will take to achieve NHS bridge condition target;

(iv) If significant progress is not made for either target established for the Travel Time Reliability measures, § 490.507(a)(1) and (2), then the State DOT shall document the actions it will take to achieve the NHS travel time targets; and

(v) If significant progress is not made for the target established for the GHG measure described in § 490.507(b), then the State DOT shall document the actions it will take to achieve the target for the GHG measure.

(2) If FHWA determines that a State DOT has not made significant progress toward achieving the target established for the Freight Reliability measure in § 490.607, then the State DOT shall include as part of the next performance target report under 23 U.S.C. 150(e) [the Biennial Performance Report] the following:

(i) An identification of significant freight system trends, needs, and issues within the State.

(ii) A description of the freight policies and strategies that will guide the freight-related transportation investments of the State.

(iii) An inventory of truck freight bottlenecks within the State and a description of the ways in which the State DOT is allocating funding under title 23 U.S.C. to improve those bottlenecks.

(A) The inventory of truck freight bottlenecks shall include the route and milepost location for each identified bottleneck, roadway section inventory data reported in HPMS, Average Annual Daily Traffic (AADT), Average Annual Daily Truck Traffic (AADTT), Travel-time data and measure of delay, such as travel time reliability, or Average Truck Speeds, capacity feature causing the bottleneck or any other constraints

applicable to trucks, such as geometric constraints, weight limits or steep grades.

(B) For those facilities that are State-owned or operated, the description of the ways in which the State DOT is improving those bottlenecks shall include an identification of methods to address each bottleneck and improvement efforts planned or programed through the State Freight Plan or MPO freight plans; the Statewide Transportation Improvement Program and Transportation Improvement Program; regional or corridor level efforts; other related planning efforts; and operational and capital activities.

(iv) A description of the actions the State DOT will undertake to achieve the target established for the Freight Reliability measure in § 490.607.

(3) The State DOT should, within 6 months of the significant progress determination, amend its Biennial Performance Report to document the information specified in this paragraph to ensure actions are being taken to achieve targets.

§ 490.111 Incorporation by reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, FHWA must publish a notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the Federal Highway Administration, Office of Highway Policy Information (202–366–4631) 1200 New Jersey Avenue SE., Washington, DC 20590, www.fhwa.dot.gov and is available from the sources listed below. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(b) The Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, www.fhwa.dot.gov.

(1) Highway Performance Monitoring System (HPMS) Field Manual, IBR approved for §§ 490.103, 490.309, 490.311, and 490.319.

(2) Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation’s Bridges, includes: Errata Sheet for Coding Guide 06/2011, Report No. FHWA–PD–96–001, December

1995, IBR approved for §§ 490.409 and 490.411.

(c) The American Association of State Highway and Transportation Officials, 444 North Capitol Street NW., Suite 249, Washington, DC 20001, (202) 624-5800, www.transportation.org.

(1) AASHTO Standard M328-14, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Inertial Profiler, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(2) AASHTO Standard R57-14, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Operating Inertial Profiling Systems, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(3) AASHTO Standard R48-10 (2013), Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Determining Rut Depth in Pavements, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(4) AASHTO Standard R36-13, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Evaluating Faulting of Concrete Pavements, 2014, 34th/2014 Edition, IBR approved for § 490.309.

(5) AASHTO Standard R43-13, Standard Specification for Transportation Materials and Methods of Sampling and Testing, Standard Practice for Quantifying Roughness of Pavement, 2014, 34th/2014 Edition, IBR approved for § 490.311.

■ 3. Add subpart E to read as follows:

Subpart E—National Performance Management Measures To Assess Performance of the National Highway System

Sec.	
490.501	Purpose.
490.503	Applicability.
490.505	Definitions.
490.507	National performance management measures for system performance.
490.509	Data requirements.
490.511	Calculation of National Highway System performance metrics.
490.513	Calculation of National Highway System performance measures.

§ 490.501 Purpose.

The purpose of this subpart is to implement the requirements of 23 U.S.C. 150(c)(3)(A)(ii)(IV) and (V) to establish performance measures for State Departments of Transportation (State DOTs) and Metropolitan Planning Organizations (MPOs) to use to assess:

(a) Performance of the Interstate System; and

(b) Performance of the non-Interstate National Highway System (NHS).

§ 490.503 Applicability.

(a) The performance measures are applicable to those portions of the mainline highways on the NHS as provided in paragraphs (a)(1) and (2) of this section (and in more detail in § 490.507):

(1) The Travel Time Reliability measures in § 490.507(a) are applicable to all directional mainline highways on the Interstate System and non-Interstate NHS.

(2) The Greenhouse Gas (GHG) measure in § 490.507(b) is applicable to all mainline highways on the Interstate and non-Interstate NHS.

(b) [Reserved]

§ 490.505 Definitions.

All definitions in § 490.101 apply to this subpart. Unless otherwise specified in this subpart, the following definitions apply to this subpart:

Greenhouse gas (GHG) is any gas that absorbs infrared radiation (traps heat) in the atmosphere. Ninety-five percent of transportation GHG emissions are carbon dioxide (CO₂) from burning fossil fuel. Other transportation GHGs are methane (CH₄), nitrous oxide (N₂O), and hydrofluorocarbons (HFCs).

Level of Travel Time Reliability is a comparison, expressed as a ratio, of the 80th percentile travel time of a reporting segment to the “normal” (50th percentile) travel time of a reporting segment occurring throughout a full calendar year.

Normal Travel Time (or 50th percentile travel time) is the time of travel to traverse the full extent of a reporting segment which is greater than the time for 50 percent of the travel in a calendar year to traverse the same reporting segment.

Travel time cumulative probability distribution means a representation of all the travel times for a road segment during a defined reporting period (such as annually) presented in a percentile ranked order as provided in the travel time data set. The normal (50th percentile) and 80th percentile travel times used to compute the Travel Time Reliability measures may be identified by the travel time cumulative probability distribution.

§ 490.507 National performance management measures for system performance.

There are three performance measures to assess the performance of the Interstate System and the performance of the non-Interstate NHS for the purpose of carrying out the National

Highway Performance Program (referred to collectively as the NHS Performance measures).

(a) Two measures are used to assess reliability (referred to collectively as the Travel Time Reliability measures). They are:

(1) Percent of the person-miles traveled on the Interstate that are reliable (referred to as the Interstate Travel Time Reliability measure); and

(2) Percent of person-miles traveled on the non-Interstate NHS that are reliable (referred to as the Non-Interstate Travel Time Reliability measure).

(b) One measure is used to assess GHG emissions, which is the percent change in tailpipe CO₂ emissions on the NHS compared to the calendar year 2017 level (referred to as the GHG measure).

§ 490.509 Data requirements.

(a) Travel time data needed to calculate the Travel Time Reliability measures in § 490.507(a) shall come from the travel time data set, as specified in § 490.103(e).

(1) State DOTs, in coordination with MPOs, shall define reporting segments in accordance with § 490.103(f). Reporting segments must be contiguous so that they cover the full extent of the mainline highways of the NHS in the State.

(2) [Reserved]

(b) State DOTs shall not replace missing travel times when data are not available in the travel time data set (data not reported, or reported as “0” or null) as specified in § 490.511(b)(1)(v).

(c) AADT needed to calculate the Travel Time Reliability measures will be used, as reported to HPMS in June of the reporting year, to assign an annual volume to each reporting segment. Annual volume will be calculated as: Annual Volume = AADT × 365 days

(d) The average occupancy factors for the State and/or metropolitan area (as applicable) needed to calculate Travel Time Reliability measures shall come from the most recently available data tables published by FHWA unless using other allowed data source(s).

(e) If an NHS roadway is closed, the State DOT is not required to include those time periods for those segments of road in the calculations required for the Level of Travel Time Reliability (LOTTR) metric (see § 490.511(a)(1)).

(f) The FHWA will post on the FHWA Web site the tailpipe CO₂ emissions factors State DOTs and MPOs shall use in the calculation.

(g) Fuel sales information needed to calculate the GHG measure in § 490.507(b) shall come from either of the following two sources:

(1) The most recent final annual fuel sales data posted on the Web site by FHWA in Highway Statistics under “Motor Fuel Use (MF–21)” as of August 15th of the HPMS reporting year (<https://www.fhwa.dot.gov/policyinformation/statistics.cfm>); or

(2) The State DOT’s fuel sales data used to create the summary data included in FHWA’s MF–21, if it allows for a greater level of detail by fuel type. State DOTs shall make this data available to FHWA, upon request.

(h) Final annual vehicle miles traveled (VMT) needed to calculate the GHG measure in § 490.507(b) shall come from the most recently available data posted by FHWA in Highway Statistics in Table VM–3, “Federal-Aid Highway Travel” as of August 15th of the HPMS reporting year.

§ 490.511 Calculation of National Highway System performance metrics.

(a) Two performance metrics are required for the NHS Performance measures specified in § 490.507. These are:

(1) Level of Travel Time Reliability (LOTTR) for the Travel Time Reliability measures in § 490.507(a) (referred to as the LOTTR metric).

(2) Annual Total Tailpipe CO₂ Emissions on the NHS for the GHG

measure in § 490.507(b) (referred to as the GHG metric).

(b) The State DOT shall calculate the LOTTR metrics for each NHS reporting segment in accordance with the following:

(1) Data sets shall be created from the travel time data set to be used to calculate the LOTTR metrics. This data set shall include, for each reporting segment, a ranked list of average travel times for all traffic (“all vehicles” in NPMRDS nomenclature), to the nearest second, for 15 minute periods of a population that:

(i) Includes travel times occurring between the hours of 6 a.m. and 10 a.m. for every weekday (Monday–Friday) from January 1st through December 31st of the same year;

(ii) Includes travel times occurring between the hours of 10 a.m. and 4 p.m. for every weekday (Monday–Friday) from January 1st through December 31st of the same year;

(iii) Includes travel times occurring between the hours of 4 p.m. and 8 p.m. for every weekday (Monday–Friday) from January 1st through December 31st of the same year; and

(iv) Includes travel times occurring between the hours of 6: a.m. and 8: p.m. for every weekend day (Saturday–

Sunday) from January 1st through December 31st of the same year.

(2) The Normal Travel Time (50th percentile) shall be determined from each data set defined under paragraph (b)(1) of this section as the time in which 50 percent of the times in the data set are shorter in duration and 50 percent are longer in duration. The 80th percentile travel time shall be determined for each data set defined under paragraph (b)(1) of this section as the time in which 80 percent of the times in the data set are shorter in duration and 20 percent are longer in duration. Both the Normal and 80th percentile travel times can be determined by plotting the data on a travel time cumulative probability distribution graph or using the percentile functions available in spreadsheet and other analytical tools.

(3) Four LOTTR metrics shall be calculated for each reporting segment; one for each data set defined under paragraph (b)(1) of this section as the 80th percentile travel time divided by the 50th percentile travel time and rounded to the nearest hundredth.

(c) Tailpipe CO₂ emissions on the NHS for a given year are calculated as follows:

$$(\text{Tailpipe CO}_2 \text{ Emissions on NHS})_{\text{CY}} = \left(\sum_{t=1}^T (\text{Fuel Consumed})_t \times (\text{CO}_2 \text{ Factor})_t \right) \times \left(\frac{\text{NHS VMT}}{\text{Total VMT}} \right)$$

Where:

(Tailpipe CO₂ Emissions on NHS)_{CY} = Total tailpipe CO₂ emissions on the NHS in a calendar year (to the nearest thousand tons);

T = the total number of on-road fuel types;

t = an on-road fuel type;

(Fuel Consumed)_t = the quantity of total annual fuel consumed for on-road fuel type “t” (to the nearest thousand gallons);

(CO₂ Factor)_t = is the amount of CO₂ released per unit of fuel consumed for on-road fuel type “t”;

NHS VMT = annual total vehicle-miles traveled on NHS (to the nearest one million vehicle-miles); and

Total VMT = annual total vehicle-miles traveled on all public roads (to the nearest one million vehicle-miles).

(d) For the GHG measure listed in § 490.507(b), MPOs are granted additional flexibility in how they calculate the GHG metric. MPOs may use the MPO share of the State’s VMT as a proxy for the MPO share of CO₂ emissions, VMT estimates along with

MOVES² emissions factors, FHWA’s Energy and Emissions Reduction Policy Analysis Tool (EERPAT) model, or other method the MPO can demonstrate has valid and useful results for CO₂ measurement.

(e) Starting in 2018 and annually thereafter, State DOTs shall report the LOTTR metrics, defined in paragraph (b) of this section, in accordance with HPMS Field Manual by June 15th of each year for the previous year’s measures.

(1) Metrics are reported to HPMS by reporting segment. All reporting segments where the NPMRDS is used shall be referenced by NPMRDS TMC(s) or HPMS section(s). If a State DOT elects to use, in part or in whole, the equivalent data set, all reporting segment shall be referenced by HPMS section(s); and

(2) The LOTTR metric (to the nearest hundredths) for each of the four time periods identified in paragraphs (b)(1)(i) through (iv) of this section: the corresponding 80th percentile travel times (to the nearest second), the corresponding Normal (50th percentile) Travel Times (to the nearest second), and directional AADTs. If a State DOT does not elect to use FHWA supplied occupancy factor, as provided in § 490.507(d), that State DOT shall report vehicle occupancy factor (to the nearest tenth) to HPMS.

(f) Starting in 2018 and biennially thereafter, State DOTs shall report, as required in § 490.107, the GHG metrics, defined in paragraph (c) of this section. Specifically, the following GHG metric shall be reported in the State Biennial Performance Reports, as required in § 490.107:

(1) Total tailpipe CO₂ emissions, as specified in paragraph (c) of this section, generated by on-road sources travelling on the NHS (the GHG metric), and total on-road CO₂ emissions (the step in the calculation prior to

² MOVES (Motor Vehicle Emission Simulator) is EPA’s emission modeling system that estimates emissions for mobile sources at the national, county, and project level for criteria air pollutants, greenhouse gases, and air toxics. See <https://www.epa.gov/moves>.

computing the GHG metric), in each of the following calendar years:

- (i) 2017 (reported in 2018, unless FHWA states on its Web site, noted in § 490.509 (f), that there has been a change sufficient to warrant recalculation of the 2017 value); and
- (ii) The 2 years preceding the reporting years.

(2) [Reserved]

§ 490.513 Calculation of National Highway System performance measures.

(a) The NHS Performance measures in § 490.507 shall be calculated in accordance with this section by State DOTs and MPOs to carry out the Interstate System and non-Interstate NHS performance-related requirements

of this part, and by FHWA to make the significant progress determinations specified in § 490.109 and to report on system performance.

(b) The Interstate Travel Time Reliability measure specified in § 490.507(a)(1) shall be computed to the nearest tenth of a percent as follows:

$$100 \times \frac{\sum_{i=1}^R SL_i \times AV_i \times OF_j}{\sum_{i=1}^T SL_i \times AV_i \times OF_j}$$

Where:

R = total number of Interstate System reporting segments that are exhibiting an LOTTR below 1.50 during all of the time periods identified in § 490.511(b)(1)(i) through (iv);

I = Interstate System reporting segment “i”;

$$100 \times \frac{\sum_{i=1}^R SL_i \times AV_i \times OF_j}{\sum_{i=1}^T SL_i \times AV_i \times OF_j}$$

Where:

R = total number of non-Interstate NHS reporting segments that are exhibiting an LOTTR below 1.50 during all of the time periods identified in § 490.511(b)(1)(i) through (iv);

i = non-Interstate NHS reporting segment “i”;

SL_i = length, to the nearest thousandth of a mile, of non-Interstate NHS reporting segment “i”;

AV_i = total annual traffic volume to the nearest 1 vehicle, of the Interstate System reporting segment “i”;

j = geographic area in which the reporting segment “i” is located where a unique occupancy factor has been determined;

OF_j = occupancy factor for vehicles on the NHS within a specified geographic area within the State/Metropolitan planning area; and

SL_i = length, to the nearest thousandth of a mile, of Interstate System reporting segment “i”;

AV_i = total annual traffic volume to the nearest single vehicle, of the Interstate System reporting segment “i”;

J = geographic area in which the reporting segment “i” is located where a unique occupancy factor has been determined;

OF_i = occupancy factor for vehicles on the NHS within a specified geographic area within the State/Metropolitan planning area; and

T = total number of Interstate System reporting segments.

(c) The Non-Interstate Travel Time Reliability measure specified in § 490.507(a)(2) shall be computed to the nearest tenth of a percent as follows:

T = total number of non-Interstate NHS reporting segments.

(d) The GHG measure specified in § 490.507(b) shall be computed to the nearest tenth of a percent as follows:

$$\frac{(\text{Tailpipe CO}_2 \text{Emissions on NHS})_{CY} - (\text{Tailpipe CO}_2 \text{Emissions on NHS})_{2017}}{(\text{Tailpipe CO}_2 \text{Emissions on NHS})_{2017}} \times 100$$

Where:

(Tailpipe CO₂ Emissions on NHS)_{CY} = total tailpipe CO₂ emissions on the NHS in a calendar year (to the nearest thousand tons); and

(Tailpipe CO₂ Emissions on NHS)₂₀₁₇ = total tailpipe CO₂ emissions on the NHS in the calendar year 2017 (to the nearest thousand tons).

■ 4. Add subpart F to read as follows:

Subpart F—National Performance Management Measures To Assess Freight Movement on the Interstate System

Sec.

490.601 Purpose.

490.603 Applicability.

490.605 Definitions.

490.607 National performance management measures to assess freight movement on the Interstate System.

490.609 Data requirements.

490.611 Calculation of Truck Travel Time Reliability metrics.

490.613 Calculation of Freight Reliability measure.

§ 490.601 Purpose.

The purpose of this subpart is to implement the requirements of 23 U.S.C. 150(c)(6) to establish performance measures for State Departments of Transportation (State DOTs) and the Metropolitan Planning Organizations (MPOs) to use to assess the national freight movement on the Interstate System.

§ 490.603 Applicability.

The performance measures to assess the national freight movement are applicable to the Interstate System.

§ 490.605 Definitions.

The definitions in § 490.101 apply to this subpart.

§ 490.607 National performance management measures to assess freight movement on the Interstate System.

The performance measure to assess freight movement on the Interstate System is the: Truck Travel Time Reliability (TTTR) Index (referred to as the Freight Reliability measure).

§ 490.609 Data requirements.

(a) Travel time data needed to calculate the Freight Reliability measure in § 490.607 shall come from the travel time data set, as specified in § 490.103(e).

(b) State DOTs, in coordination with MPOs, shall define reporting segments in accordance with § 490.103(f). Reporting segments must be contiguous so that they cover the full extent of the directional mainline highways of the Interstate in the State.

(c) When truck travel times are not available in the travel time data set (data not reported, or reported as “0” or null) as specified in § 490.611(a)(1)(ii) for a given 15 minute interval, State DOTs shall replace the missing travel time with an observed travel time that represents all traffic on the roadway during the same 15 minute interval (“all vehicles” in NPMRDS nomenclature).

(d) If an NHS roadway is closed, the State DOT is not required to include those time periods for those segments of

road in the calculations required for the Freight Reliability metric/measure.

§ 490.611 Calculation of Truck Travel Time Reliability metrics.

(a) The State DOT shall calculate the TTTR Index metric (referred to as the TTTR metric) for each Interstate System reporting segment in accordance with the following:

(1) A truck travel time data set shall be created from the travel time data set to be used to calculate the TTTR metric. This data set shall include, for each reporting segment, a ranked list of average truck travel times, to the nearest second, for 15 minute periods of a 24-hour period for an entire calendar year that:

(i) Includes “AM Peak” travel times occurring between the hours of 6 a.m. and 10 a.m. for every weekday (Monday–Friday) from January 1st through December 31st of the same year;

(ii) Includes “Mid Day” travel times occurring between the hours of 10 a.m. and 4 p.m. for every weekday (Monday–Friday) from January 1st through December 31st of the same year;

(iii) Includes “PM Peak” travel times occurring between the hours of 4 p.m. and 8 p.m. for every weekday (Monday–Friday) from January 1st through December 31st of the same year;

(iv) Includes “Overnight” travel times occurring between the hours of 8 p.m. and 6 a.m. for every day (Sunday–Saturday) from January 1st through December 31st of the same year; and

(v) Includes “Weekend” travel times occurring between the hours of 6 a.m. and 8 p.m. for every weekend day (Saturday–Sunday) from January 1st through December 31st of the same year.

(2) The Normal Truck Travel Time (50th percentile) shall be determined from each of the truck travel time data sets defined under paragraph (a)(1) of this section as the time in which 50 percent of the times in the data set are shorter in duration and 50 percent are longer in duration. The 95th percentile truck travel time shall be determined from each of the truck travel time data sets defined under paragraph (a)(1) of this section as the time in which 95 percent of the times in the data set are shorter in duration. Both the Normal and 95th percentile truck travel times can be determined by plotting the data on a travel time cumulative probability distribution graph or using the percentile functions available in spreadsheet and other analytical tools.

(3) Five TTTR metrics shall be calculated for each reporting segment; one for each data set defined under paragraph (a)(1) of this section as the 95th percentile travel time divided by

the Normal Truck Travel Time and rounded to the nearest hundredth.

(b) Starting in 2018 and annually thereafter, State DOTs shall report the TTTR metrics, as defined in this section, in accordance with the HPMS Field Manual by June 15th of each year for the previous year’s Freight Reliability measures.

(1) All metrics shall be reported to HPMS by reporting segments. When the NPMRDS is used metrics shall be referenced by NPMRDS TMC(s) or HPMS section(s). If a State DOT elects to use, in part or in whole, the equivalent data set, all reporting segment shall be referenced by HPMS section(s).

(2) The TTTR metric shall be reported to HPMS for each reporting segment (to the nearest hundredths) for each of the five time periods identified in paragraphs (a)(1)(i) through (v) of this section; the corresponding 95th percentile travel times (to the nearest second) and the corresponding normal (50th percentile) travel times (to the nearest second).

§ 490.613 Calculation of Freight Reliability measure.

(a) The performance for freight movement on the Interstate in § 490.607 (the Freight Reliability measure) shall be calculated in accordance with this section by State DOTs and MPOs to carry out the freight movement on the Interstate System related requirements of this part, and by FHWA to make the significant progress determinations specified in § 490.109 and to report on freight performance of the Interstate System.

(b) The Freight Reliability measure shall be computed to the nearest hundredth as follows:

$$\frac{\sum_{i=1}^T (SL_i \times \max TTTR_i)}{\sum_{i=1}^T (SL_i)}$$

Where:

i = An Interstate System reporting segment;
 $\max TTTR_i$ = The maximum TTTR of the five time periods in paragraphs (a)(1)(i) through (v) of § 490.611, to the nearest hundredth, of Interstate System reporting segment “ i ”;

SL_i = Segment length, to the nearest thousandth of a mile, of Interstate System reporting segment “ i ”; and
 T = A total number of Interstate System reporting segments.

■ 5. Add subpart G to read as follows:

Subpart G—National Performance Management Measure for Assessing the Congestion Mitigation and Air Quality Improvement Program—Traffic Congestion

Sec.

490.701 Purpose.

490.703 Applicability.

490.705 Definitions.

490.707 National performance management measure for traffic congestion.

490.709 Data requirements.

490.711 Calculation of Peak Hour Excessive Delay metric.

490.713 Calculation of Traffic Congestion measures.

§ 490.701 Purpose.

The purpose of this subpart is to implement the requirements of 23 U.S.C. 150(c)(5)(A) to establish performance measures for State DOTs and the MPOs to use in assessing CMAQ Traffic Congestion for the purpose of carrying out the CMAQ program.

§ 490.703 Applicability.

The CMAQ Traffic Congestion performance measures are applicable to all urbanized areas that include NHS mileage and with a population over 1 million for the first performance period and in urbanized areas with a population over 200,000 for the second and all other performance periods, that are, in all or part, designated as nonattainment or maintenance areas for ozone (O₃), carbon monoxide (CO), or particulate matter (PM₁₀ and PM_{2.5}) National Ambient Air Quality Standards (NAAQS).

§ 490.705 Definitions.

All definitions in § 490.101 apply to this subpart. Unless otherwise specified, the following definitions apply in this subpart:

Excessive delay means the extra amount of time spent in congested conditions defined by speed thresholds that are lower than a normal delay threshold. For the purposes of this rule, the speed threshold is 20 miles per hour (mph) or 60 percent of the posted speed limit, whichever is greater.

Peak Period is defined as weekdays from 6 a.m. to 10 a.m. and either 3 p.m. to 7 p.m. or 4 p.m. to 8 p.m. State DOTs and MPOs may choose whether to use 3 p.m. to 7 p.m. or 4 p.m. to 8 p.m.

§ 490.707 National performance management measures for traffic congestion.

There are two performance measures to assess traffic congestion for the purpose of carrying out the CMAQ program (referred to collectively as the CMAQ Traffic Congestion measures. They are:

(a) Annual Hours of Peak Hour Excessive Delay (PHED) Per Capita (referred to as the PHED measure); and

(b) Percent of Non-SOV Travel.

§ 490.709 Data requirements.

(a) Travel time data needed to calculate the PHED measure in § 490.707(a) shall come from the travel time data set, as specified in § 490.103(e).

(b) State DOTs, in coordination with MPOs, shall define reporting segments in accordance with § 490.103(f). Reporting segments must be contiguous so that they cover the full extent of the directional mainline highways of the NHS in the urbanized area(s).

(c) State DOTs shall develop hourly traffic volume data for each reporting segment as follows:

(1) State DOTs shall measure or estimate hourly traffic volumes for Peak Periods on each weekday of the reporting year by using either paragraph (c)(1)(i) or (ii) of this section.

(i) State DOTs may use hourly traffic volume counts collected by continuous count stations and apply them to multiple reporting segments; or

(ii) State DOTs may use Annual Average Daily Traffic (AADT) reported to the HPMS to estimate hourly traffic volumes when no hourly volume counts exist. In these cases the AADT data used should be the most recently available, but not more than 2 years older than the reporting period (e.g., if reporting for calendar year 2018, AADT should be from 2016 or 2017) and should be split to represent the appropriate direction of travel of the reporting segment.

(2) State DOTs shall assign hourly traffic volumes to each reporting segment by hour (e.g., between 8 a.m. and 8:59 a.m.).

(3) State DOTs shall report the methodology they use to develop hourly traffic volume estimates to FHWA no later than 60 days before the submittal of the first Baseline Performance Period Report.

(4) If a State DOT elects to change the methodology it reported under paragraph (c)(3) of this section, then the State DOT shall submit the changed methodology no later than 60 days before the submittal of next State Biennial Performance Report required in § 490.107(b).

(5) If an NHS roadway is closed, the State DOT is not required to include those time periods for the segment of road in the calculation required for this metric and measure.

(d) State DOTs shall develop annual vehicle classification data for each reporting segment using data as follows:

(1) State DOTs shall measure or estimate the percentage of cars, buses, and trucks, relative to total AADT for each segment using either paragraph (d)(1)(i) or (ii) of this section.

(i) State DOTs may use annual traffic volume counts collected by continuous count stations to estimate the annual percent share of traffic volumes for cars, buses, and trucks for each segment; or

(ii) State DOTs may use AADT reported to the HPMS to estimate the annual percent share of traffic volumes for cars, buses, and trucks, where:

(A) Buses = value in HPMS Data Item "AADT_Single_Unit";

(B) Trucks = value in HPMS Data Item "AADT_Combination"; and

(C) Cars = subtract values for Buses and Trucks from the value in HPMS Data Item "AADT".

(iii) If a State DOT uses the data reported to the HPMS in paragraph (d)(1)(ii) of this section, then the data values should be split to represent the appropriate direction of travel of the reporting segment.

(2) State DOTs shall report the methodology they use to develop annual percent share of traffic volume by vehicle class to FHWA no later than 60 days before the submittal of the first Baseline Performance Period Report.

(3) If a State DOT elects to change the methodology it reported under paragraph (d)(2) of this section, then the State DOT shall submit the changed methodology no later than 60 days before the submittal of next State Biennial Performance Report required in § 490.107(b).

(e) State DOTs shall develop annual average vehicle occupancy (AVO) factors for cars, buses, and trucks in applicable urbanized areas using either method under paragraph (e)(1)(i) or (ii) of this section.

(1) State DOTs shall measure or estimate annual vehicle occupancy factors for cars, buses, and trucks in applicable urbanized areas.

(i) State DOTs shall use estimated annual vehicle occupancy factors for cars, buses, and trucks in urbanized areas provided by FHWA; and/or

(ii) State DOTs may use an alternative estimate of annual vehicle occupancy factors for a specific reporting segment(s) for cars, buses, and trucks in urbanized areas, provided that it is more specific than the data provided by FHWA.

(f) All State DOTs and MPOs contributing to the unified target for the applicable area as specified in § 490.105(d)(2) shall agree to using one of the methods specified in paragraph (f)(1)(i), (ii), or (iii) of this section to identify the data that will be used to determine the Percent of Non-SOV Travel for the applicable urbanized area.

(1) The data to determine the Percent of Non-SOV Travel measure shall be

developed using any one of the following methods.

(i) *Method A—American Community Survey.* Populations by predominant travel to commute to work may be identified from Table DP03 of the American Community Survey using the totals by transportation mode listed within the "Commuting to Work" subject heading under the "Estimate" column of the table. The "5 Year Estimate" DP03 table using a geographic filter that represents the applicable "Urban Area" shall be used to identify these populations. The Percent of Non-SOV Travel measure shall be developed from the most recent data as of August 15th of the year in which the State Biennial Performance Report is due to FHWA.

(ii) *Method B—local survey.* The Percent of Non-SOV Travel may be estimated from a local survey focused on either work travel or household travel for the area and conducted as recently as 2 years before the beginning of the performance period. The survey method shall estimate travel mode choice for the full urbanized area using industry accepted methodologies and approaches resulting in a margin of error that is acceptable to industry standards, allow for updates on at least a biennial frequency, and distinguish non-SOV travel occurring in the area as a percent of all work or household travel.

(iii) *Method C—system use measurement.* The volume of travel using surface modes of transportation may be estimated from measurements of actual use of each transportation mode. Sample or continuous measurements may be used to count the number of travelers using different surface modes of transportation. The method used to count travelers shall estimate the total volume of annual travel for the full urbanized area within a margin of error that is acceptable to industry standards and allows for updates on at least a biennial frequency. The method shall include sufficient information to calculate the amount of non-SOV travel occurring in the area as a percentage of all surface transportation travel. State DOTs are encouraged to report use counts to FHWA that are not included in currently available national data sources.

(2) State DOTs shall report the data collection method that is used to determine the Percent of Non-SOV Travel measure for each applicable urbanized area in the State to FHWA in their first Baseline Performance Period Report required in § 490.107(b)(1). The State DOT shall include sufficient detail to understand how the data are

collected if either Method B or Method C are used for the urbanized area. This method shall be used for the full performance period for each applicable urbanized area.

(3) If State DOTs and MPOs that contribute to an applicable urbanized area elect to change the data collection method reported under paragraph (f)(2) of this section, then each respective State DOT shall report this change in their next Baseline Performance Report required in § 490.107(b)(1). The new method reported as a requirement of this paragraph shall not be used until the beginning of the next performance period for the Baseline Performance Report in which the method was reported to be changed.

(g) Populations of urbanized areas shall be as identified based on the most recent annual estimates published by the U.S. Census available 1 year before the State DOT Baseline Performance Period Report is due to FHWA to identify applicability of the CMAQ Traffic Congestion measures in § 490.707(a) and (b) for each performance period, as described in § 490.105(e)(8)(iii)(D) and (f)(5)(iii)(D). For computing the PHED measure in § 490.713(b), the most recent annual

population estimate published by the U.S. Census, at the time when the State DOT Biennial Performance Period Report is due to FHWA shall be used.

(h) Nonattainment and maintenance area determinations for the CMAQ Traffic Congestion measures:

(1) The CMAQ Traffic Congestion measures apply to nonattainment and maintenance areas. Such areas shall be identified based on the effective date of U.S. EPA's designations under the NAAQS in 40 CFR part 81, as of the date 1 year before the State DOT Baseline Performance Period Report is due to FHWA.

(2) The nonattainment and maintenance areas to which the CMAQ Traffic Congestion measures applies shall be revised if, on the date 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA, the area is no longer in nonattainment or maintenance for a criteria pollutant included in § 490.703.

§ 490.711 Calculation of Peak Hour Excessive Delay metric.

(a) The performance metric required to calculate the measure specified in § 490.707(a) is Total Peak Hour Excessive Delay (person-hours)(referred to as the PHED metric). The following

paragraphs explain how to calculate this PHED metric.

(b) State DOTs shall use the following data to calculate the PHED metric:

(1) Travel times of all traffic ("all vehicles" in NPMRDS nomenclature) during each 15 minute interval for all applicable reporting segments in the travel time data set occurring for peak periods from January 1st through December 31st of the same year;

(2) The length of each applicable reporting segment, reported as required under § 490.709(b);

(3) Hourly volume estimation for all days and for all reporting segments where excessive delay is measured, as specified in § 490.709(c);

(4) Annual vehicle classification data for all days and for all reporting segments where excessive delay is measured, as specified in § 490.709(d); and

(5) Annual vehicle occupancy factors for cars, buses, and trucks for all days and for all reporting segments where excessive delay is measured, as specified in § 490.709(e).

(c) The State DOT shall calculate the "excessive delay threshold travel time" for all applicable travel time segments as follows:

Excessive Delay Threshold Travel Time_s

$$= \left(\frac{\text{Travel Time Segment Length}_s}{\text{Threshold Speed}_s} \right) \times 3,600$$

Where:

Excessive Delay Threshold Travel Time_s = the time of travel, to the nearest whole second, to traverse the Travel Time Segment at which any longer measured travel times would result in excessive delay for the travel time segment "s";

Travel Time Segment Length_s = total length of travel time segment to the nearest thousandth of a mile for travel time reporting segment "s"; and

Threshold Speed_s = the speed of travel at which any slower measured speeds would result in excessive delay for travel time reporting segment "s." As defined in § 490.705, the speed threshold is 20 miles per hour (mph) or 60 percent of the posted speed limit travel time reporting segment "s," whichever is greater.

(d) State DOTs shall determine the "excessive delay" for each 15 minute

bin of each reporting segment for every hour and every day in a calendar year as follows:

(1) The travel time segment delay (RSD) shall be calculated to the nearest whole second as follow:

$$RSD_{s,b} - \text{Excessive Delay Threshold Travel Time}_s \text{ and } RSD_{s,b} \leq 900 \text{ seconds}$$

Where:

RSD_{s,b} = travel time segment delay, calculated to the nearest whole second, for a 15-minute bin "b" of travel time reporting segment "s" for in a day in a calendar year. RSD(s)_b not to exceed 900 seconds;

Travel time_{s,b} = a measured travel time, to the nearest second, for 15-minute time bin "b" recorded for travel time reporting segment "s";

Excessive Delay Threshold Travel Time_s =

The maximum amount of time, to the nearest second, for a vehicle to traverse through travel time segment "s" before excessive delay would occur, as specified in paragraph (c) of this section;

b = a 15-minute bin of a travel time reporting segment "s"; and

s = a travel time reporting segment.

(2) Excessive delay, the additional amount of time to traverse a travel time segment in a 15-minute bin as compared to the time needed to traverse the travel time segment when traveling at the excessive delay travel speed threshold, shall be calculated to the nearest thousandths of an hour as follows:

$$\text{Excessive Delay}_{s,b} = \begin{cases} \frac{RSD_{s,b}}{3,600} & \text{when } RSD_{s,b} \geq 0 \\ \text{or} \\ 0 & \text{when } RSD_{s,b} < 0 \end{cases}$$

Where:

Excessive Delay_{s,b} = excessive delay, calculated to the nearest thousandths of an hour, for 15-minute bin “b” of travel time reporting segment “s”;

RSD_{s,b} = the calculated travel time reporting segment delay for fifteen minute bin “b” of a travel time reporting segment “s,” as described in paragraph (d)(1) of this section;
b = a fifteen minute bin of a travel time reporting segment “s”; and

s = a travel time reporting segment.

(e) State DOTs shall use the hourly traffic volumes as described in § 490.709(c) to calculate the PHED metric for each reporting segment as follows:

Total Excessive Delay_s

= AVO

$$\times \sum_{d=1}^{TD} \left\{ \sum_{h=1}^{TH} \left[\sum_{b=1}^{TB} \left(\text{Excessive Delay}_{s,b,h,d} \times \left(\frac{\text{hourly volume}}{4} \right)_{s,h,d} \right) \right] \right\}_d$$

Where:

Total Excessive Delay_s (in person-hours) = the sum of the excessive delay, to the nearest thousandths, for all traffic traveling through single travel time reporting segment “s” on NHS within an urbanized area, specified in § 490.703, accumulated over the full reporting year;

AVO = Average Vehicle Occupancy;

s = a travel time reporting segment;

d = a day of the reporting year;

TD = total number of days in the reporting year;

h = single hour interval of the day where the first hour interval is 12 a.m. to 12:59 a.m.;

TH = total number of hour intervals in day “h”;

b = 15-minute bin for hour interval “h”;

TB = total number of 15-minute bins where travel times are recorded in

the travel time data set for hour interval “h”;

Excessive Delay_{s,b,h,d} = calculated excessive travel time, in hundredths of an hour, for 15 minute bin (b), hour interval (h), day (d), and travel time segment (s), as described in paragraph (d)(2) of this section; and

$$\left(\frac{\text{hourly volume}}{4} \right)_{s,h,d}$$

Where the equation equals hourly traffic volume, to the nearest tenth, for hour interval “h” and day “d” that corresponds to 15-minute bin “b” and travel time reporting segment “s” divided by 4. For example, the 9 a.m. to 9:15 a.m. minute bin would be assigned one fourth of the hourly traffic volume for the 9 a.m. to 9:59 a.m. hour on the roadway in which travel time segment is included;

$$AVO = (P_C \times AVO_C) + (P_B \times AVO_B) + (P_T \times AVO_T)$$

Where:

P_C = the percent of cars as a share of total AADT on the segment as specified in § 490.709(d);

P_B = the percent of buses as a share of total AADT on the segment as specified in § 490.709(d);

P_T = the percent of trucks as a share of total AADT on the segment as specified in § 490.709(d);

AVO_C = the average vehicle occupancy of cars as specified in § 490.709(e);

AVO_B = the average vehicle occupancy of buses as specified in § 490.709(e); and

AVO_T = the average vehicle occupancy of trucks as specified in § 490.709(e).

(f) Starting in 2018 and annually thereafter, State DOTs shall report the PHED metric (to the nearest one hundredth hour) in accordance with HPMS Field Manual by June 15th of each year for the previous year’s PHED measures. The PHED metric shall be reported for each reporting segment. All reporting segments of the NPMRDS shall be referenced by NPMRDS TMC or HPMS section(s). If a State DOT elects to use, in part or in whole, the equivalent data set, all reporting segments shall be referenced by HPMS sections.

§ 490.713 Calculation of Traffic Congestion measures.

(a) The performance measures in § 490.707 shall be computed in accordance with this section by State DOTs and MPOs to carry out CMAQ traffic congestion performance-related requirements of this part and by FHWA to report on traffic congestion performance.

(b) The performance measure for CMAQ traffic congestion specified in § 490.707, Annual Hours of Peak Hour Excessive Delay Per Capita (the PHED measure), shall be computed to the nearest tenth, and by summing the PHED metrics of all reporting segments in each of the urbanized area, specified in § 490.703, and dividing it by the population of the urbanized area to produce the PHED measure. The equation for calculating the PHED measure is as follows:

Annual Hours of Peak Hour Excessive Delay per Capita

$$= \frac{\sum_{s=1}^T \text{Total Excessive Delays}_s}{\text{Total Population}}$$

Where:

Annual Hours of Peak Hour Excessive Delay per Capita = the cumulative hours of excessive delay, to the nearest tenth, experienced by all people traveling through all reporting segments during peak hours in the applicable urbanized area for the full reporting calendar year;

s = travel time reporting segment within an urbanized area, specified in § 490.703;

T = total number of travel time reporting segments in the applicable urbanized area;

Total Population = total hours of excessive delay in § 490.711(e) for all people traveling through travel time reporting segment “s” during a calendar year (as defined in § 490.711(f)); and

Total Population = the total population in the applicable urbanized area from the most recent annual population published by the U.S. Census at the time that the State Biennial Performance Period Report is due to FHWA.

(c) Calculation for the PHED measure, described in paragraph (b) of this section, and target establishment for the measure shall be phased-in under the

requirements in § 490.105(e)(8)(vi) and (f)(5)(vi).

(d) The performance measure for CMAQ traffic congestion specified in § 490.707(b), Percent of Non-SOV Travel, shall be computed as specified in paragraphs (d)(1) through (3) of this section corresponding to the method reported by the State DOT to collect travel data for the applicable area under § 490.709(f)(2).

(1) *Method A—American Community Survey.* The Percent of Non-SOV Travel shall be calculated to the nearest tenth of a percent using the following formula:

$$\text{Percent of Non-SOV Travel} = 100\% - \% \text{ SOV}$$

Where:

Percent of Non-SOV Travel = percent of commuting working population, to the nearest tenth of a percent, that predominantly do not commute by driving alone in a car, van, or truck,

including travel avoided by telecommuting; and

% SOV = percent estimate for “Car, truck, or van—drive alone”.

(2) *Method B—local survey.* The Percent of Non-SOV Travel shall be calculated using the data derived from local survey results as specified in § 490.709(f)(1)(ii). The Percent of Non-SOV Travel measure shall be calculated to represent travel that is not occurring by driving alone in a motorized vehicle, including travel avoided by telecommuting, as a percentage of all surface transportation occurring in the applicable area. The Percent of Non-SOV Travel measure shall be calculated to the nearest tenth of a percent.

(3) *Method C—system use measurement.* The Percent of Non-SOV Travel shall be calculated to the nearest tenth of a percent from the data collected from system use measurements as specified in § 490.709(f)(1)(iii) using the general form of the following formula:

$$\text{Percent of Non-SOV Travel} = 100 \times \left(\frac{\text{Volume}_{\text{non-sov}}}{(\text{Volume}_{\text{non-sov}}) + (\text{Volume}_{\text{sov}})} \right)$$

Where:

Percent of Non-SOV Travel = percentage of travel, to the nearest tenth of a percent, that is not occurring by driving alone in a motorized vehicle, including travel avoided by telecommuting

Volume_{non-sov} Volume = Annual volume of person travel occurring while driving alone in a motorized vehicle; and

Volume_{sov} = Annual volume of person travel occurring on modes other than driving alone in a motorized vehicle, calculated as:

$$\sum_{m=1}^t \text{Volume}_m$$

Where:

m = travel mode (modes other than driving alone in a motorized vehicle, including travel avoided by telecommuting);

Volume_m = annual volume of person travel for each mode, “m”; and

t = total number of modes that are not driving alone in a motorized vehicle.

■ 6. Add a new subpart H to read as follows:

Subpart H- National Performance Management Measures to Assess the Congestion Mitigation and Air Quality Improvement Program—On-Road Mobile Source Emissions

Sec.

490.801 Purpose.

490.803 Applicability.

490.805 Definitions.

490.807 National performance management measure for assessing on-road mobile source emissions for the purposes of the Congestion Mitigation and Air Quality Improvement Program.

490.809 Data requirements.

490.811 Calculation of Total Emissions Reduction measure.

§ 490.801 Purpose.

The purpose of this subpart is to implement the requirements of 23 U.S.C. 150(c)(5)(B) to establish performance measures for State DOTs and the MPOs to use in assessing on-road mobile source emissions.

§ 490.803 Applicability.

(a) The on-road mobile source emissions performance measure (called the Total Emissions Reduction- see

§ 490.807) is applicable to all States and MPOs with projects financed with funds from the 23 U.S.C. 149 CMAQ program apportioned to State DOTs for areas designated as nonattainment or maintenance for ozone (O₃), carbon monoxide (CO), or particulate matter (PM₁₀ and PM_{2.5}) National Ambient Air Quality Standards (NAAQS).

(b) This performance measure does not apply to States and MPOs that do not contain any portions of nonattainment or maintenance areas for the criteria pollutants identified in paragraph (a) of this section.

§ 490.805 Definitions.

All definitions in § 490.101 apply to this subpart. Unless otherwise specified in this subpart, the following definitions apply in this subpart:

On-road mobile source means, within this part, emissions created by all projects and sources financed with funds from the 23 U.S.C. 149 CMAQ program.

§ 490.807 National performance management measure for assessing on-road mobile source emissions for the purposes of the Congestion Mitigation and Air Quality Improvement Program.

The performance measure for the purpose of carrying out the CMAQ Program and for State DOTs to use to assess on-road mobile source emissions is “Total Emissions Reduction,” which is the 2-year and 4-year cumulative reported emission reductions, for all projects funded by CMAQ funds, of each criteria pollutant and applicable precursors (PM_{2.5}, PM₁₀, CO, VOC, and NOx) under the CMAQ program for which the area is designated nonattainment or maintenance.

§ 490.809 Data requirements.

- (a) The data needed to calculate the Total Emission Reduction measure shall come from the CMAQ Public Access System and includes:
- (1) The applicable nonattainment or maintenance area;
- (2) The applicable MPO; and

(3) The emissions reduction estimated for each CMAQ funded project for each of the applicable criteria pollutants and their precursors for which the area is nonattainment or maintenance.

- (b) The State DOT shall:
- (1) Enter project information into the CMAQ project tracking system for each CMAQ project funded in the previous fiscal year by March 1st of the following fiscal year; and
- (2) Extract the data necessary to calculate the Total Emissions Reduction measures as it appears in the CMAQ Public Access System on July 1st for projects obligated in the prior fiscal year.
- (c) Nonattainment and maintenance area determinations for the CMAQ Total Emissions Reduction measure:
- (1) The CMAQ Total Emissions Reduction measure applies to nonattainment and maintenance areas. Such areas shall be identified based on the effective date of U.S. EPA’s designations under the NAAQS in 40 CFR part 81, as of the date 1 year before

the State DOT Baseline Performance Period Report is due to FHWA.

(2) The nonattainment and maintenance areas to which the Total Emissions Reduction measure applies shall be revised if, on the date 1 year before the State DOT Mid Performance Period Progress Report is due to FHWA, the area is no longer in nonattainment or maintenance for a pollutant included in § 490.803.

§ 490.811 Calculation of Total Emissions Reduction measure.

- (a) The Total Emission Reductions performance measure specified in § 490.807 shall be calculated in accordance with this section by State DOTs and MPOs to carry out CMAQ on-road mobile source emissions performance-related requirements of this part.
- (b) The Total Emission Reductions measure for each of the criteria pollutant or applicable precursor for all projects reported to the CMAQ Public Access System shall be calculated to the nearest one thousandths, as follows:

Total Emission Reduction_p

$$= \sum_{i=1}^T \text{Daily Kilograms of Emission Reductions}_{p,i}$$

Where:

i = applicable projects reported in the CMAQ Public Access System for the first 2 Federal fiscal years of a performance period and for the entire performance period, as described in in § 490.105(e)(4)(i)(B);

p = criteria pollutant or applicable precursor: PM_{2.5}, PM₁₀, CO, VOC, or NOx;

Daily Kilograms of Emission Reductions_{p,i} = total daily kilograms, to the nearest one

thousandths, of reduced emissions for a criteria pollutant or an applicable precursor “p” in the in the first year the project is obligated;

T = total number of applicable projects reported to the CMAQ Public Access System for the first 2 Federal fiscal years of a performance period and for the entire performance period, as described in § 490.105(e)(4)(i)(B); and

Total Emission Reduction_p = cumulative reductions in emissions over 2 and 4 Federal fiscal years, total daily kilograms, to the nearest one thousandths, of reduced emissions for criteria pollutant or precursor “p.”

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Part VII

Department of Health and Human Services

42 CFR Part 2

Confidentiality of Substance Use Disorder Patient Records; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

42 CFR Part 2

[SAMHSA–4162–20]

RIN 0930–AA21

Confidentiality of Substance Use Disorder Patient Records

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (HHS) is issuing this final rule to update and modernize the Confidentiality of Alcohol and Drug Abuse Patient Records regulations and facilitate information exchange within new health care models while addressing the legitimate privacy concerns of patients seeking treatment for a substance use disorder. These modifications also help clarify the regulations and reduce unnecessary burden.

DATES: *Effective date:* This final rule is effective February 17, 2017.

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SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

- I. Executive Summary
 - A. Purpose of the Regulatory Action
 - B. Summary of the Major Provisions
 - C. Summary of Impacts
- II. Background
 - A. Significant Technology Changes
 - B. Statutory and Rulemaking History
- III. Overview of the Final Rule
- IV. Effective Date
- V. Discussion of Public Comments and Final Modifications to 42 CFR part 2
 - A. General Comments on the Proposed Rule
 1. General Feedback on the Proposed Rule
 - a. General Support for the Proposed Rule
 - b. General Opposition to the Proposed Rule
 2. The Proposed Rule Did Not Go Far Enough To Facilitate Information Exchange
 3. Final Rule Should Balance Patient Protections With Enhanced Information Exchange
 4. Part 2 Should Align With the Health Insurance Portability and Accountability Act
 - B. Statutory Authority (§ 2.1)
 - C. Reports of Violations (§ 2.4)
 - D. Definitions (§ 2.11)
 1. New Definitions
 - a. Part 2 Program
 - b. Part 2 Program Director
 - c. Substance Use Disorder
 - d. Treating Provider Relationship

- e. Withdrawal Management
2. Existing Definitions
 - a. Central Registry
 - b. Disclose or Disclosure
 - c. Maintenance Treatment
 - d. Member Program
 - e. Patient
 - f. Patient Identifying Information
 - g. Person
 - h. Program
 - i. Qualified Service Organization
 - j. Records
 - k. Treatment
3. Terminology Changes
4. Other Comments on Definitions
- E. Applicability (§ 2.12)
- F. Confidentiality Restrictions and Safeguards (§ 2.13)
 1. Delayed Implementation of List of Disclosures Provision
 2. Responsibilities Under the List of Disclosures Process
 3. Technological Challenges and Burden of the List of Disclosures Provision
 4. Recommendations to Further Protect Patient Privacy
 5. Other Comments and Recommendations on the List of Disclosures Provision
- G. Security for Records (§ 2.16)
- H. Disposition of Records by Discontinued Programs (§ 2.19)
- I. Notice to Patients of Federal Confidentiality Requirements (§ 2.22)
- J. Consent Requirements (§ 2.31)
 1. General Comments on Consent Requirements
 - a. General
 - b. Consent Form Validity Period
 - c. Technical Challenges to Proposed Consent Requirements
 - d. Requests for Exemptions and Exceptions
 - e. Commenter Recommendations
2. To Whom
 - a. General
 - b. Determination of Treating Provider Relationship
 - c. Requests for Clarification
 - d. Commenter Recommendations
 - e. Proposed Alternative Approach for “To Whom” Section
3. Amount and Kind
 - a. General
 - b. Impact of the Amount and Kind Requirement on Providers and Patients
- c. Required Substance Use Disorder Information on Consent Forms
- d. Requests for Clarification
 4. From Whom
 5. New Requirements
- K. Prohibition on Re-Disclosure (§ 2.32)
 1. General
 2. Impact of Re-Disclosure Prohibition on Patient Privacy and Patient Choice
 3. Disclosure of Information that May Indicate a Substance Use Disorder
 4. Technical Challenges in Preventing Unauthorized Re-Disclosure
 5. Requests for Clarification of the Re-Disclosure Prohibition
 6. Recommendations to Improve the Prohibition on Re-Disclosure
- L. Disclosures to Prevent Multiple Enrollments (§ 2.34)
- M. Medical Emergencies (§ 2.51)
 1. General
 2. Definition of “Bona Fide Medical Emergency”

3. Documentation of Medical Emergency
4. Other Comments on Medical Emergency
 - N. Research (§ 2.52)
 1. General
 2. Suggestions for Improvement of the Research Provisions
3. HIPAA and HHS Common Rule Requirements
4. Data Linkages
5. Multi-Payer Claims Database
- O. Audit and Evaluation (§ 2.53)
- P. Other Public Comments on the Proposed Rule
 1. Requests to Extend the Public Comment Period
 2. Rulemaking Process
 3. Implementation Timeline and Other Barriers to Implementation
 4. Educational Opportunities
 5. Increased Enforcement
 6. Other Miscellaneous Comments on the Proposed Rule
- VI. Rulemaking Analyses
 - A. Paperwork Reduction Act
 - B. Regulatory Impact Analysis
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Federalism (Executive Order 13132)

Acronyms

- ACO Accountable Care Organization
 ABAM American Board of Addiction Medicine
 ADAMHA Alcohol, Drug Abuse and Mental Health Administration
 APCD All Payer Claims Database
 ARRA American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5)
 ASAM American Society of Addiction Medicine
 ATR Access to Recovery
 C-CDA Consolidated-Clinical Document Architecture
 CCD Continuity of Care Document
 CCLF Claim and Claim Line Feed
 CCO Coordinated Care Organization
 CFR Code of Federal Regulations
 CHIP Children’s Health Insurance Program
 CMS Centers for Medicare & Medicaid Services
 CPCMH Certified Patient-Centered Medical Home
 DS4P Data Segmentation for Privacy
 EHR Electronic Health Record
 EQRO External Quality Review Organization
 FAQ Frequently Asked Question
 FAX Facsimile
 FDA Food and Drug Administration
 FR Federal Register
 HHS Department of Health and Human Services
 HIE Health Information Exchange
 HIO Health Information Organization
 HIPAA Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191)
 HITECH Health Information Technology for Economic and Clinical Health Act of 2009 (Pub. L. 111–5, title XIII of division A and title IV of division B)
 HITPC Health Information Technology Privacy Committee
 IG Implementation Guide
 IRB Institutional Review Board
 IT Information Technology

MCO Managed Care Organization
 MPCD Multi-Payer Claims Database
 NCQA National Committee for Quality Assurance
 NPRM Notice of Proposed Rulemaking
 N-SSATS National Survey of Substance Abuse Treatment Services
 OHRP Office for Human Research Protections
 OMB Office of Management and Budget
 ONC Office of the National Coordinator for Health Information Technology
 PDMP Prescription Drug Monitoring Program
 PPS Performing Provider System
 QE Qualified Entity
 QSO Qualified Service Organization
 QSOA Qualified Service Organization Agreement
 RFA Regulatory Flexibility Act
 RHIO Regional Health Information Organization
 SAMHSA Substance Abuse and Mental Health Services Administration
 SBIRT Screening, Brief Intervention, and Referrals for Treatment
 S&I Standards and Interoperability
 TEDS Treatment Episode Data Set
 U.S.C. United States Code
 USAO United States Attorney's Office
 VA Department of Veterans Affairs

I. Executive Summary

A. Purpose of the Regulatory Action

The laws and regulations governing the confidentiality of substance use disorder records were written out of great concern about the potential use of substance use disorder information against individuals, causing individuals with substance use disorders not to seek needed treatment. The disclosure of records of individuals with substance use disorders has the potential to lead to a host of negative consequences, including: Loss of employment, loss of housing, loss of child custody, discrimination by medical professionals and insurers, arrest, prosecution, and incarceration. The purpose of the regulations at title 42 of the Code of Federal Regulations (CFR) part 2 (42 CFR part 2) is to ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment. Now, more than 29 years since the part 2 regulations were last substantively amended, this final rule makes policy changes to the regulations to better align them with advances in the U.S. health care delivery system while retaining important privacy protections.

Need for Regulatory Action

The last substantive update to these regulations was in 1987. Over the last 29 years, significant changes have occurred

within the U.S. health care system that were not envisioned by the current (1987) regulations, including new models of integrated care that are built on a foundation of information sharing to support coordination of patient care, the development of an electronic infrastructure for managing and exchanging patient information, and a new focus on performance measurement within the health care system. SAMHSA wants to ensure that patients with substance use disorders have the ability to participate in, and benefit from health system delivery improvements, including from new integrated health care models while providing appropriate privacy safeguards. These new integrated models are foundational to HHS's delivery system reform goals of better care, smarter spending, and healthier people.

Legal Authority for Regulatory Action

This final rule revises 42 CFR part 2, Confidentiality of Alcohol and Drug Abuse Patient Records regulations. The authorizing statute, Title 42, United States Code (U.S.C.) 290dd–2, protects the confidentiality of the records containing the identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with the performance of any federally assisted program or activity relating to substance abuse (now referred to as substance use disorder) education, prevention, training, treatment, rehabilitation, or research. Title 42 of the CFR part 2 was first promulgated in 1975 (40 FR 27802) and last substantively updated in 1987 (52 FR 21796).

B. Summary of the Major Provisions

Proposed modifications to 42 CFR part 2 were published as a Notice of Proposed Rulemaking (NPRM) on February 9, 2016 (81 FR 6988). After consideration of the public comments received in response to the NPRM, SAMHSA is issuing this final rule amending 14 major provisions of 42 CFR part 2, as follows:

Statutory authority for confidentiality of substance use disorder patient records (§ 2.1) combines old § 2.1 (Statutory authority for confidentiality of drug abuse patient records), and § 2.2 (Statutory authority for confidentiality of alcohol abuse patient records) and deleting references to 42 U.S.C. 290ee–3 and 42 U.S.C. 290dd–3, as these U.S.C. sections were omitted by Public Law 102–321 and combined and renamed into Section 290dd–2, Confidentiality of records. Because SAMHSA combined former §§ 2.1 and

2.2 into § 2.1, we redesignated §§ 2.2 through 2.5 accordingly.

Reports of violations (§ 2.4) revises the requirement for reporting violations of these regulations by methadone programs (now referred to as opioid treatment programs) to the Food and Drug Administration (FDA) because the authority over these programs was transferred from the FDA to the Substance Abuse and Mental Health Services Administration (SAMHSA) in 2001.

Definitions (§ 2.11) revises some existing definitions, adds new definitions of key terms that apply to 42 CFR part 2, and consolidates all but one of the definitions that are currently in other sections into § 2.11 (e.g., the definition of “Minor” previously found in § 2.14(a)). We revised the definitions of “Central registry,” “Disclose or disclosure,” “Maintenance treatment,” “Member program,” “Patient,” “Patient identifying information,” “Person,” “Program,” “Qualified service organization (QSO),” “Records,” and “Treatment.” We also added definitions of “Part 2 program,” “Part 2 program director,” “Substance use disorder,” “Treating provider relationship,” and “Withdrawal management,” some of which replaced existing definitions. In addition, SAMHSA revised the regulatory text to use terminology in a consistent manner. The following definitions were not revised substantively: “Diagnosis,” “Informant,” “Minor,” “Third-party payer,” and “Undercover agent.”

Applicability (§ 2.12) continues to apply the 42 CFR part 2 regulations to a program that is federally assisted and holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment. Most changes to the applicability of the part 2 regulations result from SAMHSA's decision not to finalize one of its proposed changes to the definition of “Program” (*see* § 2.11, *Definitions*). Whereas the NPRM definition of “Program” included, under certain conditions, “general medical practices” in addition to “general medical facilities,” the definition in this final rule is limited to “general medical facilities.” However, consistent with the NPRM, the definition of “Program” continues to use the term “general medical facility” rather than both “general medical facility” and “general medical care facility” that were used interchangeably in the 1987 final rule definition of “Program.” For example, an identified unit within a general medical facility is subject to part 2 if it holds itself out as providing, and provides, substance use disorder

diagnosis, treatment, or referral for treatment. In addition, if the primary function of medical personnel or other staff in a general medical facility is the provision of such services and they are identified as providing such services, they are considered a "Program" and, thus, subject to part 2. This final rule revises § 2.12(d)(2)(i)(C) so that restrictions on disclosures also apply to individuals or entities who receive patient records from other lawful holders of patient identifying information, such that patient records subject to the part 2 regulations include substance use disorder records maintained by part 2 programs, as well as those records in the possession of "other lawful holders of patient identifying information."

Confidentiality restrictions and safeguards (§ 2.13) adds a requirement that, upon request, patients who have included a general designation in the "To Whom" section of their consent form (*see* § 2.31) must be provided a list of entities (referred to as a List of Disclosures) to which their information has been disclosed pursuant to the general designation.

Security for records (§ 2.16) clarifies that this section requires both part 2 programs and other lawful holders of patient identifying information to have in place formal policies and procedures addressing security, including sanitization of associated media, for both paper and electronic records.

Disposition of records by discontinued programs (§ 2.19) addresses both paper and electronic records. SAMHSA also added requirements for sanitizing associated media.

In Section I., Notice to Patients of Federal Confidentiality Requirements (§ 2.22), SAMHSA clarifies that the written summary of federal law and regulations may be provided to patients in either paper or electronic format. SAMHSA also revised § 2.22 to require the statement regarding the reporting of violations include contact information for the appropriate authorities.

Consent requirements (§ 2.31) permits, in certain circumstances, a patient to include a general designation in the "To Whom" section of the consent form, in conjunction with requirements that the consent form include an explicit description of the amount and kind of substance use disorder treatment information that may be disclosed. SAMHSA decided not to finalize its proposed changes to the "From Whom" section, but did make minor updates to the terminology in the text. SAMHSA also revised § 2.31 to require the part 2 program or other

lawful holder of patient identifying information to include a statement on the consent form when using a general designation in the "To Whom" section of the consent form that patients have a right to obtain, upon request, a list of entities to which their information has been disclosed pursuant to the general designation (*see* § 2.13). In addition, SAMHSA revised § 2.31 to permit electronic signatures to the extent that they are not prohibited by any applicable law.

In Section K., Prohibition on Re-disclosure (§ 2.32), SAMHSA clarifies that the prohibition on re-disclosure only applies to information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, such as indicated through standard medical codes, descriptive language, or both, and allows other health-related information shared by the part 2 program to be re-disclosed, if permissible under other applicable laws.

Disclosures to prevent multiple enrollments (§ 2.34) modernizes the terminology and definitions and moves the definitions to § 2.11 (Definitions).

Medical emergencies (§ 2.51) revises the medical emergency exception to make it consistent with the statutory language and to give providers more discretion to determine when a "bona fide medical emergency" exists.

Research (§ 2.52) revises the research exception to permit data protected by 42 CFR part 2 to be disclosed to qualified personnel for the purpose of conducting scientific research by a part 2 program or any other individual or entity that is in lawful possession of part 2 data if the researcher provides documentation of meeting certain requirements related to other existing protections for human research. SAMHSA also revised § 2.52 to address data linkages to enable researchers holding part 2 data to obtain linkages to other datasets, provided that appropriate safeguards are in place as outlined in section 2.52.

Audit and evaluation (§ 2.53) modernizes the requirements to include provisions governing both paper and electronic patient records. SAMHSA also revised § 2.53 to permit an audit or evaluation necessary to meet the requirements of a Centers for Medicare & Medicaid Services (CMS)-regulated accountable care organization (CMS-regulated ACO) or similar CMS-regulated organization (including a CMS-regulated Qualified Entity (QE)), under certain conditions.

The other sections in 42 CFR part 2 that are not referenced above are not

addressed in this final rule nor were they discussed in the NPRM because SAMHSA is maintaining their content substantively unchanged from the 1987 final rule.

C. Summary of Impacts

In the first year that the final rule is in effect, we estimate that the total costs associated with updates to 42 CFR part 2 will be roughly \$70,691,000. In year two we estimate that costs will be \$17,680,000, and increase annually as a larger share of entities implement List of Disclosures requirements and respond to disclosure requests. Over the 10-year period of 2016–2025, the total undiscounted cost of the part 2 changes will be about \$241 million in 2016 dollars. When future costs are discounted at 3 percent or 7 percent per year, the total costs become approximately \$217,586,000 or \$193,098,000, respectively. These costs are presented in the tables below.

Costs associated with the 42 CFR part 2 final rule, include: updates to health IT system costs, costs for staff training and updates to training curricula, costs to update patient consent forms, costs associated with providing patients a list of entities to which their information has been disclosed pursuant to a general designation on the consent form (*i.e.*, the List of Disclosures requirement), and implementation costs associated with the List of Disclosures requirements. We assumed that costs associated with modifications to existing health IT systems, staff training costs associated with updating staff training materials, and costs to update consent forms will be one-time costs the first year the final rule is in effect and will not carry forward into future years. Staff training costs other than those associated with updating training materials are assumed to be ongoing annual costs to part 2 programs, also beginning in the first year that the final rule is in effect. The List of Disclosures costs are assumed to be ongoing annual costs to entities named on a consent form that disclose patient identifying information to their participants under the general designation. Costs associated with the List of Disclosures provision are limited to implementation costs for entities that chose to upgrade their health IT systems in order to comply with the List of Disclosures requirements. Several provisions in the final rule reference other lawful holders of patient identifying information in combination with part 2 programs. These other lawful holders must comply with part 2 requirements with respect to information they maintain that is covered by part 2 regulations. However,

because this group is not clearly defined with respect to the range of organizations it may include, we are unable to include estimates regarding the number and type of these organizations and are only including part 2 programs in this analysis.

The benefits of modernizing the part 2 regulations is to increase opportunities for individuals with substance use disorders to participate in new and emerging health and health care models and health information technology (IT). The final rule will facilitate the sharing of information within the health care system to support new models of integrated health care which, among other things, improve patient safety while maintaining or strengthening privacy protections for individuals seeking treatment for substance use disorders. Moreover, as patients are allowed, in certain circumstances, to include a general designation in the "To Whom" section of the consent form, we anticipate there will be more individuals with substance use disorders participating in organizations that facilitate the exchange of health information (*e.g.*, health information exchanges (HIEs)) and organizations that coordinate care (*e.g.*, ACOs and coordinated care organizations (CCOs)), leading to increased efficiency and quality in the provision of health care for this population. In addition, the revisions to the research provision (§ 2.52) will allow additional scientific research to be conducted that will facilitate continual quality improvement of part 2 programs and the important services they offer.

II. Background

A. Significant Technology Changes

Since the promulgation of 42 CFR part 2, significant technology changes have impacted the delivery of health care. The Office of the National Coordinator for Health Information Technology (ONC) was established as an office within HHS under Executive Order 13335 on April 27, 2004. Subsequently, on February 17, 2009, the Health Information Technology for Economic and Clinical Health Act (HITECH Act) of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5) expanded the Department's health IT work, including the expansion of ONC's authority and the provision of federal funds for ONC's activities consistent with the development of a nationwide health IT infrastructure. This work included the certification of health IT; the authorization of CMS' Electronic Health Record (EHR) Incentive Program, including payments

to eligible providers for the adoption and meaningful use of certified EHR technology; and numerous other federal agencies' programs—all of which served the objective of ensuring patient health information is secure, private, accurate, and available where and when needed. SAMHSA's role in encouraging the use of health IT by behavioral health (substance use disorder and mental health) providers, included: (1) Collaborating with ONC to develop two sets of Frequently Asked Questions (FAQs) and convening a number of stakeholder meetings to provide guidance on the application of 42 CFR part 2 to HIE models; (2) a one-year pilot project with five state HIEs to support the exchange of health information among behavioral health and physical health providers; and (3) the Data Segmentation for Privacy (DS4P) initiative within ONC's Standards and Interoperability (S&I) Framework facilitated:

- The development of standards to improve the interoperability of EHRs containing sensitive information that must be protected to a greater degree than other health information due to 42 CFR part 2 and similar state laws,
 - six DS4P Implementation Guide (IG) use case pilot projects including the Department of Veterans Affairs (VA)/SAMHSA Pilot that implemented all the DS4P use cases and passed all conformance tests, and
 - the development of the application branded Consent2Share, an open-source health IT solution based on DS4P which assists in consent management and data segmentation. Consent2Share is currently being used by the Prince Georges County (Maryland) Health Department to manage patient consent directives while sharing substance use disorder information with an HIE.
- Despite SAMHSA's efforts, some stakeholders continued to request modernization of 42 CFR part 2 out of concern that part 2, as written in the current (1987) regulation, continues to be a barrier to the integration of substance use disorder treatment and physical health care. As noted below, SAMHSA plans to release shortly an updated version of Consent2Share with improved functionality and ability to meet List of Disclosures requirements.

B. Statutory and Rulemaking History

The Confidentiality of Alcohol and Drug Abuse Patient Records regulations, 42 CFR part 2, implement Section 543 of the Public Health Service Act, 42 U.S.C. 290dd–2, as amended by Section 131 of the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act (ADAMHA

Reorganization Act), Public Law 102–321 (July 10, 1992). The regulations were promulgated as a final rule on July 1, 1975 (40 FR 27802). In 1980, the Department invited public comment on 15 substantive issues arising out of its experience interpreting and implementing the regulations (45 FR 53). More than 450 public responses to that invitation were received and taken into consideration in the preparation of a 1983 NPRM (48 FR 38758). Approximately 150 comments were received in response to the NPRM and were taken into consideration in the preparation of the final rule released on June 9, 1987 (52 FR 21798).

The Department published an NPRM again in the **Federal Register** (FR) on August 18, 1994 (59 FR 42561), which proposed a clarification of the definition of "Program" in the regulations. Specifically, the Department proposed to clarify that, as to general medical care facilities, these regulations cover only specialized individuals or units in such facilities that hold themselves out as providing and provide alcohol or drug abuse (now referred to as substance use disorder) diagnosis, treatment, or referral for treatment and which are federally assisted, directly or indirectly. On May 5, 1995, the final rule was released (60 FR 22296).

SAMHSA posted a document in the FR on May 12, 2014, (79 FR 26929) announcing a public Listening Session planned for June 11, 2014, to solicit feedback on the Confidentiality of Alcohol and Drug Abuse Patient Records regulations, 42 CFR part 2. SAMHSA accepted written comments until June 25, 2014. The Listening Session comments are posted on the SAMHSA Web site at <http://www.samhsa.gov/about-us/who-we-are/laws-regulations/public-comments-confidentiality-regulations>.

Prompted by the need to update and modernize the Confidentiality of Alcohol and Drug Abuse Patient Records regulations at 42 CFR part 2, on February 9, 2016, SAMHSA published an NPRM that proposed revisions to the part 2 regulations and requested public input on the proposed changes during a 60-day public comment period (81 FR 6988). Although raised in the Listening Session public comments, SAMHSA decided not to address issues pertaining to e-prescribing and Prescription Drug Monitoring Programs (PDMPs) in the NPRM because they were not ripe for rulemaking at the time due to the state of technology and because the majority of part 2 programs are not prescribing controlled substances electronically. As noted in the NPRM, SAMHSA intends to monitor developments in this area to

see whether further action may be warranted in the future. SAMHSA received 376 public comment submissions on the part 2 NPRM. The comments received were detailed, thoughtful, and reflective of the complex issues addressed and balanced in the part 2 regulations. This final rule reflects SAMHSA's thorough consideration of all substantive issues raised in the public comments in response to its proposals in the NPRM.

III. Overview of the Final Rule

In this final rule, the Department finalizes the modifications to the Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR part 2, including renaming it "Confidentiality of Substance Use Disorder Patient Records." The modifications modernize the rule by facilitating electronic exchange of substance use disorder information for treatment and other legitimate health care purposes while ensuring appropriate confidentiality protections for records that might identify an individual, directly or indirectly, as having or having had a substance use disorder.

Overview of Public Comments

We received 376 public comments from medical health care providers; behavioral health care providers; combined medical/behavioral health care providers; HIEs, ACOs, CCOs, and certified patient-centered medical homes (CPCMHs), sometimes called health homes; third-party payers; privacy/consumer advocates; medical health care provider associations; behavioral health care provider associations; accrediting organizations; researchers; individuals (with no stated affiliation); attorneys (with no stated affiliation); HIT vendors; and state/local governments. The comments ranged from general support or opposition to the proposed provisions to very specific questions or comments regarding the proposed rules.

Some comments were outside the scope of or inconsistent with SAMHSA's legal authority regarding the confidentiality of substance use disorder patient records. Likewise, other comments did not pertain to specific proposals made by SAMHSA in the NPRM. In some instances, commenters raised policy or operational issues that are best addressed through subregulatory guidance that SAMHSA will consider issuing subsequent to this final rule. Consequently, SAMHSA did not address these comments in this final rule.

Commenters have also provided SAMHSA with informative feedback on

how lawful holders, including third-party payers and others within the healthcare industry, use health data or hire others to use health data on their behalf to provide operational services such as independent auditing, legal services, claims processing, plan pricing and other functions that are key to the day-to-day operation of entities subject to this rule. We have previously clarified in responses to particular questions that contracted agents of individuals and/or entities may be treated as the individual/entity. Questions raised by commenters during this rulemaking have, however, highlighted varying interpretations of the current (1987) rule's restrictions on lawful holders and their contractors' and subcontractors' use and disclosure of part 2-covered data for purposes of carrying out payment, health care operations, and other health care related activities. In consideration of this feedback and given the critical role that third-party payers, other lawful holders, and their contractors and subcontractors play in the provision of health care services, SAMHSA is issuing a supplemental notice of proposed rulemaking (SNPRM) to seek further comments and information on this matter.

IV. Effective Date

In this final rule, SAMHSA has established a single effective date of 30 days after the publication of the final rule, or February 17, 2017. On this date, the revised 42 CFR part 2 will replace the 1987 version of part 2 in the CFR and all part 2 programs and other lawful holders of patient identifying information must comply with all aspects of the regulations. In the NPRM, SAMHSA proposed that, with the exception of § 2.13(d), part 2 programs and other lawful holders of patient identifying information would have to comply with applicable requirements of the revised part 2 regulations beginning 30 days after the publication of the final rule. See Section V.D.3 below for a discussion of "other lawful holders." We proposed that entities would not have to comply with the List of Disclosures requirements of § 2.13(d) until two-years after the effective date of the final rule. As explained below, because the right to obtain, upon request, a List of Disclosures is only available to patients who use a general designation in the "To Whom" section of the consent form, entities must only have the technical capability to provide the List of Disclosures if they take advantage of the general designation provision. Therefore, SAMHSA has revised the effective date from that

proposed to avoid confusion. However, signed consent forms in place prior to the effective date of this final rule will be valid until they expire. Nonetheless, part 2 programs may update signed consent forms consistent with the final rule, prior to the effective date of the final rule if they so choose. Consents obtained after the effective date will need to comply with the final rule, regardless of whether the consents involve patient identifying information obtained prior to or after the effective date of this final rule.

Public Comments

One commenter urged that the final rule allow for implementation of the research provision (§ 2.52) immediately or shortly after the rule takes effect. Several commenters raised concerns about how to interpret the two-year delayed implementation of List of Disclosures and whether the general designation will be used during that period.

SAMHSA Response

SAMHSA acknowledges commenters' confusion regarding the proposed two-year delayed compliance date for the List of Disclosures requirements. After considering the public comments received on this point, SAMHSA realized that such a two-year delayed compliance date for the requirements of § 2.13(d) is not helpful. As explained in the "To Whom" section of the part 2-compliant consent requirements (see Section V.J.2 below), an entity that serves as an intermediary (e.g., HIE, ACO, CCO) must comply with the List of Disclosures provision in order to disclose information pursuant to a general designation provided on the consent form (see § 2.31(a)(4)(iii)(B)(3)(i)). Therefore, an entity that serves as an intermediary would be prohibited from electing to disclose information pursuant to a general designation without the ability to comply with the List of Disclosures requirement. It would not make sense to implement a two-year delayed compliance date for the List of Disclosures requirements at § 2.13(d) because the only reason an entity that serves as an intermediary would have to comply with the List of Disclosures requirements would be if they wanted to disclose information pursuant to general designations that have been included in the "To Whom" section of the patient consent form, which requires alerting patients to the fact that they have a right to request a list of entities to which their information has been disclosed (per § 2.13(d)). Thus, an entity that serves as an intermediary is prohibited from

disclosing information pursuant to a general designation without having the capability to comply with the List of Disclosures requirements. For these reasons, it is not advisable to include a two-year delayed compliance date for the List of Disclosures provision. Some entities that serve as intermediaries as described by § 2.31(a)(4)(iii)(B) may elect never to disclose information pursuant to a general designation and, thus, would not need to comply with the List of Disclosures requirement. Those that choose to disclose information pursuant to general designations must ensure the capability to comply with the List of Disclosures requirements at § 2.13(d) before they disclose the information pursuant to a general designation. But there is no timeframe in which they need to comply; only the condition that if they choose to have the option of disclosing information pursuant to a general designation on a consent form, they must also be capable of providing a List of Disclosures upon request per § 2.13(d).

Regarding the suggestion to allow for implementation of the Research provision § 2.52 immediately after the final rule takes effect, SAMHSA declines to make this change. For clarity regarding part 2 compliance, the 1987 part 2 final rule remains in effect until the effective date for the 2016 part 2 regulations established in this final rule. Because of the revised definitions that impact the research provision, it would create unnecessary confusion to make effective § 2.52 before the rest of the final rule.

V. Discussion of Public Comments and Final Modifications to 42 CFR Part 2

In this section of the final rule, SAMHSA explains the finalized revisions to the part 2 regulations and responds to public comments received. If a part 2 CFR section is not addressed below, it is because SAMHSA did not propose changes to that part 2 provision and that this final rule maintains the existing language in that section. However, SAMHSA notes that in addition to the revisions discussed below, SAMHSA has made other technical, non-substantive, and nomenclature changes to various part 2 provisions. Those changes are reflected in the regulatory text at the end of this rule.

A. General Comments on the Proposed Rule

1. General Feedback on the Proposed Rule

a. General Support for the Proposed Rule

Public Comments

Many commenters expressed general support for the proposed rule, with some noting that the proposed rule would preserve the confidentiality rights of substance use disorder patients while facilitating the sharing of health information; would ensure that patients with a substance use disorder participate in, and benefit from, new integrated health care models without fear of putting themselves at risk of adverse consequences; would help reduce the stigma associated with substance use disorder; and would provide patients comfort in knowing they have control of their record.

Several commenters expressed general support for the NPRM's proposed part 2 changes to enhance integrated care and information exchange. Multiple commenters, with some stressing the need for patient privacy protections, suggested that integrated networks of care between medical and behavioral health services is current best practice and will benefit patients. Two commenters implied general support. The first of these two commenters stated that the current practice of keeping paper substance use records separate from the EHR system increases work required to maintain records, creates redundancies, and could contribute to providers missing critical information needed for treating patients. The second commenter stated that the current (1987) part 2 regulations are out of step with the health care system's rapid adoption of EHRs, its capacity to quickly exchange information (e.g., HIEs), the federal privacy and security regulations (Health Insurance and Portability and Accountability Act [HIPAA] and HITECH) governing these EHRs and exchanges, and the increasing treatment of patients' substance use in health care systems not covered by existing part 2 regulations, but by HIPAA.

Another commenter expressed support for the facilitation of electronic exchange of substance use disorder treatment information where the confidentiality protections historically afforded patients by part 2 are maintained.

A few commenters stated that the proposal would help patients with substance use disorders benefit from emerging care models that require

enhanced health information exchange for better care coordination (e.g., CPCMHS, ACOs).

SAMHSA Response

SAMHSA appreciates the support for updating the regulations. This final rule is intended to modernize the part 2 regulations by facilitating the electronic exchange of substance use disorder information for treatment and other legitimate health care purposes while ensuring appropriate confidentiality protections for records that might identify an individual, directly or indirectly, as having or having had a substance use disorder. Many new integrated care models rely on interoperable health IT and these proposed changes are expected to support the integration of substance use disorder treatment into primary and other specialty care, improving the patient experience, clinical outcomes, and patient safety while at the same time ensuring patient choice, confidentiality, and privacy. Due to its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA.

b. General Opposition to the Proposed Rule

Public Comments

Some commenters expressed general opposition to the proposed rule, with some arguing that it would eliminate the right of patients to protect and control personal health information; would introduce complexity, not simplification; and would maintain the stigma surrounding drug use. One commenter warned the proposed rule would create concessions to institutional stakeholders, both providers and researchers, who find the consent requirements inconvenient and burdensome.

Many commenters requested that part 2 remain unchanged, with some stating that loosening part 2 regulations would dissuade substance use disorder patients from seeking help out of fear of how their information could be used against them or that the proposed regulations would not offer the intended protection.

Some commenters asserted that maintaining a separate set of confidentiality restrictions aimed solely at substance use disorder providers and patients perpetuates the discrimination associated with substance use disorder and ultimately negatively impacts patients and the care they receive, suggesting that issues of substance use disorder information confidentiality

should be part of the broader general medical care confidentiality regulations. Others argued that the fear of discrimination is a real problem for many individuals suffering from a substance use disorder and being able to receive treatment without worrying that personal information will be leaked is crucial in helping these people get the help they need so that they can return to their communities as contributing members of society.

SAMHSA Response

SAMHSA wants to ensure that patients with substance use disorders have the ability to participate in, and benefit from, new and emerging health care models that promote integrated care and patient safety while respecting the legitimate privacy concerns of patients seeking treatment for a substance use disorder due to the potential for discrimination, harm to their reputations and relationships, and serious civil and criminal consequences. This approach is consistent with the intent of the governing statute (42 U.S.C. 290dd–2) and regulations at 42 CFR part 2, which is to protect the confidentiality of substance use disorder patient records. SAMHSA has added more flexibility to some of the consent provisions, including a range of “To Whom” consent options that includes the current (1987) “To Whom” consent requirement, but still retained core part 2 protections, including the prohibition on re-disclosure as well as requiring the “Amount and Kind” section of the consent form to include how much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed. Changes to the research provision also enable patients to benefit from advanced research protocols while still complying with part 2 protections regarding patient confidentiality. However, with these conflicting comments, as well as all other comments, SAMHSA was guided by the governing statute in developing the final rule, which restricts disclosure without consent other than under a small number of exceptions

2. The Proposed Rule Did Not Go Far Enough To Facilitate Information Exchange

Public Comments

Several commenters suggested that the proposed part 2 revisions did not go far enough to facilitate information exchange and data sharing. For example, some commenters asserted that the proposed regulations would

maintain previous barriers and create additional barriers that impede the sharing of information exchange and care coordination necessary to effectively treat patients who seek care in a variety of settings. A few commenters said the proposed part 2 revisions go beyond the protections intended by the statutory requirements in 42 U.S.C. 290dd–2 and suggested that the proposed changes would continue to decrease access to substance use disorder treatment and the achievement of positive health outcomes.

Citing concerns about people with substance use disorders who visit multiple health care providers to obtain medication, one commenter advocated that substance use disorder health care records should be accessible to all health care facilities for the sole purpose of better treating and rehabilitating these patients.

Other commenters requested further clarification on the regulations to ensure that coordination of care happens smoothly for all patients, especially those at the highest need of coordination, without unnecessary barriers. Citing a 2010 report from the President’s Council of Advisors on Science and Technology, a couple of commenters urged SAMHSA to initiate a broad conversation among other HHS agencies to develop a granular data specification standard that enables patients to be in full control of all their health data, not just part 2 data.

Citing technological barriers, a commenter asserted that additional changes to part 2 are necessary to allow for technological solutions for sharing data. One commenter said new funding for HIEs permitted by recent CMS guidance could be maximized by more substantial revisions to part 2 that would encourage the inclusion of substance use disorder providers in HIEs. Expressing uncertainty as to whether data segmentation can be implemented effectively absent clear standards, a commenter expressed concern the result would be a two-tier system of how substance use disorder data are defined both by payers and by local and state jurisdictions that has the effect of having substance use disorder data exchanged differently depending on if the patient received services within or beyond the veil of part 2 regulation.

Some commenters suggested that the current (1987) part 2 regulation and the proposed revisions maintain a status quo of segregated substance use disorder information with minimal benefits to patients, high compliance costs, and deterrence for organizations to provide substance use treatment. Some of these

commenters said the part 2 regulations keep the substance use disorder treatment system isolated from general health care providers and reduce access to substance use disorder treatment being added by general health care organizations, which, due to administrative burden and liability fears, are less likely to add substance use disorder treatment. A few of these commenters asserted that the part 2 regulations have unintended consequences, including disadvantaging persons with a substance use disorder and treatment providers because of the burdens associated with constantly updating expiring consents. One of these commenters said that the burdens caused by the part 2 regulations are particularly costly because patients with substance use disorder are among the highest cost utilizers in the health care system.

Some commenters asserted that maintaining a separate set of confidentiality restrictions aimed solely at substance use disorder providers and patients perpetuates the stigma associated with substance use disorder and ultimately negatively impacts patients and the care they receive, suggesting that issues of substance use disorder information confidentiality should be part of the broader general medical care confidentiality regulations.

Some commenters expressed concern that the proposed part 2 revisions did not address information exchange issues associated with specific types of health care services delivery, including integrated delivery systems operating with a behavioral health organization unit or department; organizations that include affiliated entities, such as jointly held and operated hospital-based systems and health insurance plans; risk-based Medicaid managed care; social service programs integrated with publicly financed health delivery systems; and combined behavioral health service delivery.

One commenter urged SAMHSA to include the release of previous substance use disorder treatment information from insurance companies to part 2 programs as disclosure permitted without consent under part 2. Another commenter expressed concern that SAMHSA did not propose an allowance under part 2 regarding appropriate disclosures by a health plan for the coordination of a health plan member’s care.

Expressing concern that the proposed part 2 revisions do not address many of the issues on which SAMHSA has issued guidance with respect to health information networks, a commenter asserted that such guidance is outdated

and creates unintended obstacles to the desired exchange of information on patients with substance use disorders.

SAMHSA Response

The governing statute (42 U.S.C. 290dd-2) and regulations at 42 CFR part 2 protect the confidentiality of substance use disorder patient records. Consistent with the governing statute, SAMHSA wants to ensure that patients with substance use disorders have the ability to participate in, and benefit from new and emerging health care models which promote integrated care and patient safety while respecting the legitimate privacy concerns of patients seeking treatment for a substance use disorder due to the potential for discrimination, harm to their reputations and relationships, and serious civil and criminal consequences. Toward that end, SAMHSA held a Listening Session on June 11, 2014, to solicit feedback on the Confidentiality of Alcohol and Drug Abuse Patient Records regulations. All the feedback received from the Listening Session was considered and helped to inform the development of the proposed and final rules. In addition, SAMHSA collaborated with its federal partner experts in developing this final rule.

Information exchange is addressed in both the applicability provision (§ 2.12) and the consent requirements provision (§ 2.31), among other places in this final rule. SAMHSA has added more flexibility to the "To Whom" section of the consent form, which will give patients the option to release their records to past, current, and/or future treating providers. In addition, § 2.13 requires a part 2-compliant consent form must list the date, event, or condition upon which the consent will expire, if not revoked before. Thus, it is not sufficient under part 2 for a consent form to merely state that that disclosures will be permitted until the consent is revoked by the patient. It is, however, permissible for a consent form to specify the event or condition that will result in revocation, such as having its expiration date be "upon my death." The Applicability provision includes: "The restrictions on disclosure in these regulations do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of patients with substance use disorders if the communications are within a part 2 program; or between a part 2 program and an entity that has direct administrative control over the program."

With this rulemaking, SAMHSA has attempted to facilitate the electronic exchange of substance use disorder treatment records while ensuring patient privacy. SAMHSA acknowledges that many EHRs and HIEs are experiencing technical barriers to segmenting or redacting substance use disorder treatment data. As a result, SAMHSA has spent several years supporting the continued development of the Consent2Share application, an open-source health IT solution based on DS4P, which assists in both consent management and data segmentation. It is designed to integrate with existing EHR and HIE systems via the developed standards. Consent2Share enables electronic implementation of various sensitive health information disclosure policies by applying the information-sharing rules needed to constrain the disclosure of sensitive data according to patient preferences. SAMHSA, in conjunction with ONC and other federal partners, also continues to support the development of data standards and IGs to further reduce technical barriers in the field.

Finally, SAMHSA has added additional information from previously issued FAQ guidance to the preamble discussion in this final rule, such as information about medical emergencies and "holds itself out," and plans to issue additional subregulatory guidance after publication of the final rule.

3. Final Rule Should Balance Patient Protections With Enhanced Information Exchange

Public Comments

Numerous commenters emphasized that the part 2 revisions must balance patient protections with enhanced information exchange and data sharing.

Some commenters suggested that patient confidentiality should not be compromised by any updates to the part 2 regulations, reasoning that the stigma associated with having or having had a substance use disorder and the fear that this information may be used against an individual would lead them to not seek treatment. To this end, a few of these commenters cautioned SAMHSA to remain diligent in the oversight of these regulations to ensure that the information is only being conveyed to the appropriate parties with the sole intent to improve patient care. Other commenters emphasized that sharing patient information should be solely for necessary medical purposes. Another commenter argued that the interest in integrating mental health care with physical health care should not result in the erosion or elimination of the heightened privacy protections that are

essential for effective mental health treatment.

A few commenters urged SAMHSA to ensure that the final rule respects patient choice for privacy in the treatment of sensitive information like substance use disorder treatment records, including the right to control how their records are disclosed, even for health and payment purposes. A commenter said the proposed part 2 changes have substantially weakened the privacy protections surrounding the sharing of a patient's substance use treatment data. One commenter stated that before an individual's health data can be accessed, there should be a specific, legitimate reason, and a careful review of the patient's set of permissions. In addition to suggesting that mental health and substance abuse records be blocked from view by any providers or staff not directly involved in the care and treatment of a patient, a commenter asserted that a patient has the right to have substance abuse and/or mental health treatment records blocked from view by even their primary care provider or nurses.

A couple of commenters asserted that it is both necessary and technologically possible to integrate substance use disorder and other health care information and effectively exchange substance use treatment data while maintaining the core protections of part 2, including consent requirements and the prohibition on re-disclosure.

Emphasizing the importance of patient confidentiality and privacy, a few commenters asserted that sacrificing the dignity and well-being of a person seeking help for a substance use disorder in the name of convenience, administrative efficiency, and research is a poor way to achieve the well-being of either the person in need or the community. One of these commenters recommended that SAMHSA delay the part 2 changes until the technology is available to protect persons with substance use disorder.

Another commenter encouraged a cautious, step-wise approach to making substance use treatment records more integrated with general medical records. This commenter expressed concern that making treatment records more accessible to other providers would exacerbate the stigmatization of substance use disorder, particularly among pregnant women, which could lead to these individuals not seeking treatment for their substance use disorder or prenatal care.

SAMHSA Response

SAMHSA reiterates its intent to ensure that patients with substance use

disorders have the ability to participate in, and benefit from new and emerging health care models which promote integrated care and patient safety while respecting the legitimate privacy concerns of patients seeking treatment for a substance use disorder due to the potential for discrimination, harm to their reputations and relationships, and serious civil and criminal consequences. This approach is consistent with the intent of the governing statute (42 U.S.C. 290dd-2) and regulations at 42 CFR part 2, which is to protect the confidentiality of substance use disorder patient records.

In response to the commenters who cautioned SAMHSA to remain diligent in the oversight of these regulations, SAMHSA has the statutory authority to promulgate 42 CFR part 2, but the Department of Justice retains the authority for enforcing 42 CFR part 2. Reports of violation of these regulations may be directed to the United States Attorney for the judicial district in which the violation occurs. The report of any violations of these regulations by an opioid treatment program may be directed to United States Attorney for the judicial district in which the violation occurs as well as the SAMHSA office for opioid treatment program oversight. SAMHSA has oversight of opioid treatment programs through 42 CFR part 8. Related to oversight and compliance education, SAMHSA expects to issue FAQs as it has done in the past and develop other subregulatory guidance such as education and outreach materials.

SAMHSA has added more flexibility to some of the consent provisions but still retained core part 2 protections, including prohibition on re-disclosure as well as consent options that would continue to give patients significant control. For example, the "To Whom" section of the consent form includes an option permitting a general designation under certain circumstances. However, SAMHSA retained the option of listing the name(s) of the individual(s) to whom a disclosure is made. In addition, any disclosure made under these regulations must comply with the "Amount and Kind" of information to be disclosed and the purpose of the disclosure, as provided on a part 2-compliant consent form. Furthermore, § 2.13(a) limits the information to be disclosed to that information which is necessary to carry out the purpose of the disclosure. Moreover, a patient has the option to withhold consent to disclosure of any of their substance use disorder information.

SAMHSA is aware that technology adoption is an ongoing process and that

many behavioral health providers have yet to adopt electronic health records as incentive payments have been unavailable for such purposes for these providers under the HITECH Meaningful Use Program. In addition, paper records are still used today in some part 2 programs and shared through facsimile (FAX). Therefore, in spite of advances in technology, some stakeholders are concerned that part 2, as currently written, continues to be a barrier to the integration of substance use disorder treatment and physical health care. Rather than waiting for the development and adoption of technology, SAMHSA decided to issue these final regulations to ensure that patients with substance use disorders have the ability to participate in, and benefit from new and emerging health care models which promote integrated care and patient safety while respecting the legitimate privacy concerns of patients seeking treatment for a substance use disorder due to the potential for discrimination, harm to their reputations and relationships, and serious civil and criminal consequences. SAMHSA understands the importance of not compromising patient protection, and has, in § 2.13(d) of these final regulations, required an entity that serves as an intermediary (upon request) to provide a List of Disclosures made pursuant to the general designation option. Further, as discussed later in this preamble, the general designation option may not be used until there is technical capability to provide the required List of Disclosures.

4. Part 2 Should Align With the Health Insurance Portability and Accountability Act

Public Comments

Many commenters expressed that part 2 should be aligned with HIPAA. Some commenters specifically mentioned various areas for HIPAA alignment, including the consent form; Business Associate Agreement standards; treatment, payment, and health care operations; patient-requested restrictions on disclosure; de-identification standards, medical emergencies; research; the definition of "Patient identifying information;" HIPAA penalties contained in the HITECH Act; and re-disclosure provisions. Many commenters asserted that aligning the regulations with HIPAA would help to strike an appropriate balance between protecting sensitive patient health information while providing coordinated, quality care. Many commenters urged SAMHSA to align part 2 with HIPAA to broaden

the allowable sharing of data for purposes of care coordination and patient safety.

Numerous commenters urged that substance use disorder records and treatments should be held to the same level of privacy as all other health records. Other commenters raised the concern of equal access, stating that individuals with substance use disorder should have the same access to the benefits of increased care coordination as individuals without substance use disorder.

Commenters encouraged the broader harmonization of part 2, HIPAA, and HITECH into a single uniform set of standards applicable for all personal health information, including substance use disorder treatment and payment.

Some commenters asserted that HIPAA is sufficient to protect patient privacy and part 2 is no longer necessary. Some commenters also asserted that part 2 also predates the development of EHR and HIEs, and there is pressing need to reconsider these rules in light of more recent technological and legal developments. Some commenters expressed concern that complying with both part 2 and HIPAA would lead to undue administrative burden and management issues across the continuum of patient care.

A commenter recommended that SAMHSA should add the same release requirements for substance use disorder treatment as is required for psychotherapy notes under HIPAA, which are restricted from release without the client's consent. According to the commenter, this would give substance use disorder patients protections with Business Associates Agreements (instead of additional rules and forms for Qualified Service Organization Agreements [QSOAs]), notification upon breach requirements, and other rights already afforded persons receiving medical and mental health care.

Several commenters said part 2 should be as consistent as possible with HIPAA, except for the prohibition on use for investigation, prosecution, or criminal charges.

SAMHSA Response

SAMHSA noted the many comments from a wide range of commenters that requested that SAMHSA align part 2 provisions with HIPAA where possible. In some instances, SAMHSA has attempted to do so in this final rule to the extent the change was permissible under 42 U.S.C. 290dd-2. At the same time, part 2 and its governing statute are separate and distinct from HIPAA and

its implementing regulations. Because of its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA.

In response to comments about alignment of this regulation with HIPAA, SAMHSA has aligned the interpretation the definition of “Patient identifying information” with HIPAA to the extent feasible. In addition, SAMHSA revised Security for records (§ 2.16) to more closely align with HIPAA.

B. Statutory Authority (§ 2.1)

SAMHSA is adopting this section as proposed. SAMHSA has combined what was §§ 2.1 (Statutory authority for confidentiality of drug abuse patient records) and 2.2 (Statutory authority for confidentiality of alcohol abuse patient records) and renamed the new § 2.1, Statutory authority for confidentiality of substance use disorder patient records. We have re-designated §§ 2.2 through 2.5 accordingly. In the new § 2.1, SAMHSA has deleted references to 42 U.S.C. 290ee–3 and 42 U.S.C. 290dd–3. Sections 290dd–3 and 290ee–3 were omitted by Public Law 102–321 and combined and renamed into Section 290dd–2, Confidentiality of records. In addition, we have deleted references to laws and regulations that have been repealed in § 2.21.

Public Comments

One commenter urged SAMHSA to assess whether existing statutory authority is adequate to modernize part 2 regulatory requirements to keep pace with existing laws and industry developments while also protecting privacy, and to discuss necessary statutory changes in the final rule. Further, the commenter recommended that SAMHSA encourage Congress to convene public hearings to evaluate proposals for statutory changes and delay issuing a final rule if pending legislative proposals are enacted that change the legal landscape for substance use disorder information and related protections.

A commenter urged SAMHSA to address the congressional action that may be needed to effectively expand the ability to provide coordinated services, such as including health and human services agencies’ field staff clearly into the definition of treatment terms. A few commenters suggested that the statutory authority underlying the part 2 regulations (42 U.S.C. 290dd–2) should be revised. Another commenter asserted that the 1992 confidentiality statute should be reformed to afford patients greater protections against unlawful

disclosure of their substance use disorder treatment, limit the use of information shared for non-health purposes, provide meaningful enforcement and penalties, and more effectively prevent discrimination. Another commenter recommended that modifications should be made to HIPAA to incorporate special protections and limitations for substance use information and that the part 2 regulations should be rescinded. If the intent of the part 2 changes is to prevent inappropriate adverse consequences from the disclosure of substance use disorder health data, a commenter suggested that those specific adverse consequences should be targeted with legislation reform, rather than providing a blanket privacy allowance that hides medical information from providers.

SAMHSA Response

SAMHSA does not have the authority to repeal or revise the governing statute for the regulations codified at 42 CFR part 2 nor any other statute, as that power is given to Congress. The part 2 authorizing statute, 42 U.S.C. 290dd–2, gives the Secretary broad authority to carry out the confidentiality provisions therein, but to promulgate requirements to: (1) Carry out the purposes of the legislation; (2) prevent its circumvention or evasion; and (3) facilitate its compliance. These part 2 revisions were drafted to further these three purposes while, to the extent allowable under the legislation, permitting disclosure and use to increase access to treatment and improve treatment services. The intent of the part 2 regulations and its governing statute (42 U.S.C. 290dd–2) is to protect the confidentiality of substance use disorder patient records. Because individuals seeking treatment for substance use disorders may experience a host of negative consequences, including discrimination, harm to their reputations and relationships, and possibly serious civil and criminal consequences should information regarding their treatment be improperly disclosed, there is a specific need for strong privacy protections for substance use disorder records.

C. Reports of Violations (§ 2.4)

SAMHSA is adopting this section as proposed. We have revised the requirement of reporting violations of these regulations by a methadone program to the FDA (§ 2.5(b)). The authority over methadone programs (now referred to as opioid treatment programs) was transferred from the FDA to SAMHSA in 2001 (66 FR 4076). Suspected violations of 42 CFR part 2 by

opioid treatment programs may be reported to the U.S. Attorney’s Office for the judicial district in which the violation occurred, as well as the SAMHSA office responsible for opioid treatment program oversight.

Public Comments

SAMHSA received no public comments on this section. This section of the final rule is adopted as proposed.

D. Definitions (§ 2.11)

SAMHSA has consolidated all of the definitions in 42 CFR part 2, with the exception the definition of the term “Federally assisted,” into a single section at § 2.11. SAMHSA has retained the definition of the term “Federally assisted” in § 2.12 (Applicability) for the purpose of clarity because it is key to understanding the applicability of the part 2 regulations. SAMHSA is adopting these structural changes as proposed in the NPRM. Specific definitions are discussed in the sections below. If a part 2 definition is not addressed below, it is because SAMHSA did not propose or make substantive changes to that definition. However, as discussed below, SAMHSA updated the terms in those definitions, as appropriate (e.g., to replace “program” with “part 2 program,” and when “alcohol abuse” and “drug abuse” were used collectively to replace it with “substance use disorder”). The definitions in the regulatory text of this final rule reflect these changes.

1. New Definitions

a. Part 2 Program

SAMHSA is adopting this definition as proposed. SAMHSA defines a “Part 2 program” as “a federally assisted program (federally assisted as defined in § 2.12(b) and program as defined in § 2.11). See § 2.12(e)(1) for examples.” We have retained the examples provided in § 2.12(e)(1) of the current (1987) regulations, with minor clarifications in § 2.12(e)(1), because they explain the part 2 applicability and coverage. SAMHSA has replaced the term “program” with “part 2 program,” where appropriate. For example, we have revised the definition of QSO, including replacing “program” with “part 2 program,” which is discussed in depth below (see Section V.D.2.i., Existing Definitions). We also replaced “program” with “part 2 program” in several other definitions, while making no additional changes.

While a couple of commenters purported to address the proposed definition of “Part 2 program,” the nature of their comments made clear that their underlying concern was how

SAMHSA defined “Program” for purposes of part 2. For this reason, these comments are addressed in the discussion of the definition of “Program” below (see Section V.D.2.h).

b. Part 2 Program Director

SAMHSA is adopting this definition as proposed, except for a non-substantive technical edit. Because of the addition of the “Part 2 program” definition, we have defined a “Part 2 program director” as:

- In the case of a part 2 program that is an individual, that individual; and
- In the case of a part 2 program that is an entity, the individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer of the part 2 program.

We have deleted the definition of “Program Director.”

Public Comments

SAMHSA received no public comments on this definition. This section of the final rule is adopted as proposed.

c. Substance Use Disorder

SAMHSA is adopting this definition as proposed, except to remove the final sentence, “Also referred to as substance abuse.” Throughout this rule, SAMHSA made revisions to refer to alcohol abuse and drug abuse collectively as “substance use disorder” but, when referring to the part 2 governing statute, we use “substance abuse” since that is the term used in 42 U.S.C. 290dd–2. SAMHSA also uses the term “substance abuse” when discussing public comments and other publications that use that term. For consistency, SAMHSA also revised the title of 42 CFR part 2 from “Confidentiality of Alcohol and Drug Abuse Patient Records” to “Confidentiality of Substance Use Disorder Patient Records.” SAMHSA has replaced “alcohol or drug abuse” with “substance use disorder” in several definitions.

While SAMHSA has deleted the definitions of “Alcohol abuse” and “Drug abuse,” we continued to use the terms “alcohol abuse” and “drug abuse” when referring to 42 U.S.C. 290dd–3 and 42 U.S.C. 290ee–3 (omitted by Pub. L. 102–321 and combined and renamed into Section 290dd–2), respectively, because they are the terms used in the statutes.

SAMHSA is defining the term “Substance use disorder” in such a manner as to cover substance use disorders that can be associated with altered mental status that has the

potential to lead to risky and/or socially prohibited behaviors, including, but not limited to, substances such as, alcohol, cannabis, hallucinogens, inhalants, opioids, sedatives, hypnotics, anxiolytics, and stimulants. In addition, the “Substance use disorder” definition clarifies that, for the purposes of these regulations, the term excludes both tobacco and caffeine.

Public Comments

Several commenters expressed support for the newly defined term “substance use disorder” to replace references to alcohol and drug abuse. One commenter requested that SAMHSA clarify the scope of substance use disorder and what constitutes substance use treatment. Another commenter suggested that, in the definition of substance use disorder, protected data should be directly related to an objective measure, such as information related to specific payment or clinical diagnosis codes submitted in connection with reimbursement for services.

SAMHSA Response

The final rule adopts the definition of substance use disorder as proposed, except that the parenthetical of the proposed definition is not adopted in the final rule. Use of the term is consistent with recognized classification manuals, current diagnostic lexicon, and commonly used descriptive terminology. Moreover, SAMHSA declines to define substance use disorder treatment by specific billing or diagnostic codes in the final rule as these codes are subject to frequent revision.

d. Treating Provider Relationship

SAMHSA is modifying the proposed definition of “Treating provider relationship” slightly to account for the situation of involuntary commitment and other situations where a patient is diagnosed, evaluated and/or treated, but may not have actually consented to such care, as discussed in greater detail below. In summary, a treating provider relationship means that, regardless of whether there has been an actual in-person encounter:

- A patient is, agrees to, or is legally required to be diagnosed, evaluated, and/or treated, or agrees to accept consultation, for any condition by an individual or entity; and
- The individual or entity undertakes or agrees to undertake diagnosis, evaluation, and/or treatment of the patient, or consultation with the patient, for any condition.

As explained in the NPRM, the term “agrees” as used in the definition does not necessarily imply a formal written agreement. An agreement might be evidenced, among other things, by making an appointment or by a telephone consultation.

It is also important to note that, based on the definition of treating provider relationship, SAMHSA considers an entity to have a treating provider relationship with a patient if the entity employs or privileges one or more individuals who have a treating provider relationship with the patient.

Public Comments

A few commenters expressed support for the proposed definition of “treating provider relationship.” One commenter supported the definition and added that this type of relationship could be a result of any action taken to schedule, refer, or order services that are related to health services to be provided in the future.

Other commenters provided suggestions to improve the definition, including specifying entities involved in identifying, evaluating, and referring for treatment any persons in need of substance use disorder services; adding related services, including social services, and consultation; accounting for patients who cannot agree or consent to the relationship; and clarifying that an individual’s designated treating provider is also a treating provider for part 2 purposes, even before the patient’s first appointment. A few commenters requested that HIEs, health plans, and organizations that provide care coordination be added to the definition, or that comparable definitions be provided for these entities.

A few commenters objected to the consent requirements limiting recipients to entities with a “treating provider relationship,” and suggested that the requirement be eliminated, or the term be redefined to include entities that provide care management. A few commenters also disagreed with the interpretation that equates making an appointment with an agreement to diagnose or treat.

Some commenters raised a number of questions about the definition, including whether the definition applies to each hospital in a system or to the system as a whole; whether the definition applies to Medicaid managed care programs with mandatory enrollment; whether a care coordination entity can form a treating provider relationship with an individual; and whether ancillary providers, such as laboratories, pharmacies, therapists,

counselors, or mental health specialists, fall within the definition of treating provider relationship.

SAMHSA Response

A treating provider relationship, as defined in this final rule, begins when an individual seeks or receives health-related assistance from an individual or entity who may provide assistance. However, the relationship is clearly established when the individual or entity agrees to undertake diagnosis, evaluation, and/or treatment of the patient, or consultation with the patient, and the patient agrees to be treated, whether or not there has been an actual in-person encounter between the individual or entity and the patient. When a patient is not regarded as being legally competent under the laws of their jurisdiction, such as when a patient is subject to an involuntary commitment (*i.e.*, formally committed for behavioral health treatment by a court, board, commission, or other legal authority), a treating provider relationship may be established when a patient is, agrees to, or is legally required to be provided consultation, diagnosis, evaluation, and/or treatment by an individual or entity. A treating provider relationship may be established whether or not there has been an actual in-person encounter between the individual or entity and patient. A treating provider relationship with a patient may be established by any member of the health care team as long as the relationship meets the definition of "Treating provider relationship." SAMHSA believes that further specification in this definition is unnecessary.

e. Withdrawal Management

SAMHSA is adopting this definition as proposed. SAMHSA has removed the definition of "Detoxification treatment" and replaced it with the definition of the currently acceptable term "Withdrawal management" as indicated in the American Society of Addiction Medicine (ASAM) Principles of Addiction Medicine, 5th edition.¹

Public Comments

One commenter supported replacing the term "Detoxification treatment" with the term "Withdrawal management."

SAMHSA Response

SAMHSA appreciates this support.

2. Existing Definitions

a. Central Registry

SAMHSA is adopting this definition as proposed. SAMHSA has updated the definition of "Central registry" to incorporate currently accepted terminology.

Public Comments

One commenter stated that the NPRM preamble described the proposed revisions to the definition of "central registry" as changes to "update terminology to make the definition clearer," rather than detailing the proposed changes to the definition, so there was insufficient information for public comment.

SAMHSA Response

Exact language for the definition of "central registry" was provided in the NPRM regulation text and is being adopted as proposed.

b. Disclose or Disclosure

SAMHSA is modifying the proposed definition of "Disclose" to specifically cover diagnosis, treatment, and referral for treatment for substance use disorder, as follows: "*Disclose* means to communicate any information identifying a patient as being or having been diagnosed with a substance use disorder, having or having had a substance use disorder, or being or having been referred for treatment of a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person." We have updated terminology and made the definition clearer. SAMHSA has defined only one word, "Disclose," since it is implied that the same definition applies to other forms of the word.

Public Comments

A commenter encouraged SAMHSA to develop guidance and promote standards adoption for the identification of part 2 data so that the implementation and applicability of concrete restrictions and obligations can be applied to the disclosure of such data. Another commenter urged coordination between the definitions of "disclosure" of a substance use disorder and a current or former "patient," because someone may have a past substance use disorder but may not have been a former patient. A commenter stated that the NPRM preamble described the proposed revisions to the definition of "disclosure" as changes to "update terminology and make the definition clearer," rather than detailing

the proposed changes to the definition, so there was insufficient information for public comment. SAMHSA Response

With regard to developing subregulatory guidance and promoting standards adoption, SAMHSA is an organizational member of Health Level 7 (HL7) and is working to ensure that health IT standards support the needs of behavioral health treatment patients and providers. SAMHSA has supported the creation of several HL7 standards, including the Composite Privacy Consent Directive Domain Analysis Model to capture the requirement of states and federal agencies. Those requirements were reflected in the IG for Clinical Document Architecture Release 2 (CDA R2) to provide a standard-based electronic representation of a consent to support the management of consent directives and policies.

In response to comments urging coordination between the definition of "disclosure" and a current or former patient, SAMHSA has expanded the definition of "disclose" to include any information identifying a patient as "being or having been diagnosed with a substance use disorder, having or having had a substance use disorder, or being or having been referred for treatment of a substance use disorder." Exact language for the definition of "disclosure" was provided in the NPRM regulatory text and is being adopted as proposed. We note that to the extent an individual may have had a past substance use disorder diagnosis, but never sought or received diagnosis, treatment, or referral for substance use disorder treatment, the definition of patient would not cover such individual and the part 2 regulations would not apply to that individual's health information unless and until the individual is a patient as defined in these regulations.

c. Maintenance Treatment

SAMHSA is modifying this definition from what was proposed by replacing the term "pharmacotherapy" with the phrase "long-term pharmacotherapy" for purposes of clarity to read as follows: "*Maintenance treatment* means long-term pharmacotherapy for individuals with substance use disorders that reduces the pathological pursuit of reward and/or relief and supports remission of substance use disorder-related symptoms." As compared to the 1987 final rule definition of "Maintenance treatment," SAMHSA updated terminology in the definition and moved it from § 2.34 to § 2.11.

¹ ASAM Principles of Addiction Medicine, 5th edition, 2014, Richard Ries et al., editor. <http://www.asam.org/quality-practice/essential-textbooks/principles-of-addiction-medicine> (last accessed Aug. 1, 2016).

Public Comments

A commenter stated that the NPRM preamble described the proposed revisions to the definition of “maintenance treatment” as changes to “update terminology and make the definition clearer,” rather than detailing the proposed changes to the definition, so there was insufficient information for public comment.

SAMHSA Response

Exact language for the proposed definition of “maintenance treatment” was provided in the NPRM regulation text at 81 FR 7014.

d. Member Program

In response to comments received, SAMHSA has revised the definition of “Member program,” by replacing a reference to a specific geographic distance, so it reads as follows: “*Member program* means a withdrawal management or maintenance treatment program which reports patient identifying information to a central registry and which is in the same state as that central registry or is in a state that participates in data sharing with the central registry of the program in question.”

Public Comments

A commenter asserted that the 125-mile distance to a state border limitation contained within the definition of “member program” does not adequately recognize the geographic realities of states with significant rural and frontier areas, and the commenter strongly suggested that it be eliminated.

SAMHSA Response

In response to the comment, SAMHSA has removed the distance from the definition to address the concerns about rural areas and replaced it with “is in a state that participates in data sharing with the central registry of the program in question.” We removed the distance requirement from the definition of “Member program” to reflect that in some states (*e.g.*, with rural areas) the distance from the border of the state in which the central registry is located may exceed 125 miles.

e. Patient

SAMHSA is adopting this definition as proposed. To emphasize that the term “Patient” refers to both current and former patients, SAMHSA has revised the definition as follows: “*Patient* means any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program. *Patient* includes any individual who, after

arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual’s eligibility to participate in a part 2 program. This definition includes both current and former patients.”

Public Comments

One comment opposed the inclusion of former patients in the definition because retrospective outcome studies would be difficult to conduct because many patients relocate or their contact information becomes otherwise unobtainable for purposes of obtaining consent to disclose and use patient identifying information. One commenter opposed including in the definition individuals who “applied for” but did not receive a diagnosis and also asked who makes the identification of an individual with a substance use disorder. Another commenter suggested that the definition should include individuals participating in prevention programs and recovery support programs. A commenter asked whether the definition includes an individual who has been involuntarily committed to a program for treatment and suggested that the final rule clarify that such an individual is considered a patient and entitled to part 2’s protections.

SAMHSA Response

Regarding the opposition to including former patients in the definition of “Patient” because retrospective outcome studies would be difficult to conduct, this concern appears to be based on a misunderstanding that a consent requires a specific expiration date. A part 2-compliant consent form must list the date, event, or condition upon which the consent will expire, if not revoked before. Therefore, it would be permissible for a consent form to specify the event or condition that will result in revocation, such as having its expiration date be “upon my death.” Consequently, it is possible for researchers to obtain consents that would permit retrospective outcome studies.

Regarding the inclusion of “applied for” in the definition of “Patient,” this definition has not changed from that included in the 1987 final rule except to replace “alcohol and drug abuse” with “substance use disorder.” SAMHSA declines to make the recommended change since no other concerns regarding the inclusion of “applied for” have been received in over 29 years. Patients who are involuntarily committed to participating in or receiving substance use disorder

services from a part 2 program are covered by the definition. SAMHSA declines to accept the suggestion that the definition should be expanded to cover patients in prevention programs as such programs are not covered by the definition of a part 2 program.

f. Patient Identifying Information

SAMHSA is modifying the definition as proposed to: (1) Clarify that SAMHSA intends for the identifiers listed in the HIPAA Privacy Rule at 45 CFR 164.514(b)(2)(i) that are not already included in the definition of patient identifying information to meet the “or similar information” standard; (2) delete the word “publicly” from the phrase “can be determined with reasonable accuracy either directly or by reference to other publicly available information”; and (3) to revise the last sentence as follows: for internal use only by the part 2 program, if that number does not consist of, or contain numbers (such as a social security, or driver’s license number) that could be used to identify a patient with reasonable accuracy from sources external to the part 2 program.”

SAMHSA intends for the identifiers listed in the HIPAA Privacy Rule at 45 CFR 164.514(b)(2)(i) that are not already included in the definition of “Patient identifying information” to meet the following clause: “or similar information.” Those HIPAA Privacy Rule identifiers are:

- (1) Name;
- (2) All geographic subdivisions smaller than a [s]tate, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census:
 - (i) The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people; and
 - (ii) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000;
- (3) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
- (4) Telephone numbers;
- (5) Fax numbers;
- (6) Electronic mail addresses;
- (7) Social security numbers;
- (8) Medical record numbers;
- (9) Health plan beneficiary numbers;

- (10) Account numbers;
- (11) Certificate/license numbers;
- (12) Vehicle identifiers and serial numbers, including license plate numbers;
- (13) Device identifiers and serial numbers;
- (14) Web Universal Resource Locators (URLs);
- (15) Internet Protocol (IP) address numbers;
- (16) Biometric identifiers, including finger and voice prints;
- (17) Full face photographic images and any comparable image; or
- (18) Any other unique identifying number, characteristic, or code.

Public Comments

A few commenters urged that the definition of “Patient identifying information” be aligned with the “protected health information,” including the patient identifiers, under HIPAA. One commenter recommended that telephone numbers and email addresses should be mentioned because they are accessible by electronic means. Another commenter suggested that SAMHSA delete the reference to publicly available information; use a phrase such as, “information with respect to which there is a reasonable basis to believe that the information can be used to identify the individual”; and mention other identifiers assigned to an individual, including credit card numbers, driver’s license numbers, and automobile license numbers.

SAMHSA Response

The HIPAA Privacy Rule, at 45 CFR 164.514(b)(2)(i), enumerates 18 identifiers that make health information individually identifiable. SAMHSA considers any of these identifiers to be patient identifying information either because SAMHSA has explicitly listed the identifier in the definition of patient identifying information in 42 CFR part 2 or because SAMHSA considers the identifier to be ‘similar information’ (See § 2.11 Definitions). Also as suggested, SAMHSA has deleted the word “publicly” from the phrase “can be determined with reasonable accuracy either directly or by reference to other publicly available information;”

g. Person

SAMHSA is adopting this definition as proposed. SAMHSA has revised the definition of “Person” to clearly indicate that “Person” is also referred to as individual or entity.

Public Comments

A commenter urged SAMHSA to recognize an “Affiliated Covered Entity”

under HIPAA as an “entity” in the definition of “Person.” Another commenter asked that the definition specify that it includes limited liability companies. A commenter suggested removing the redundant parenthetical at the end of the proposed definition.

SAMHSA Response

SAMHSA has determined that no change is needed in response to the comments; the definition covers any legal entity. SAMHSA declines to delete the clarifying parenthetical at the end of the definition since the terms “individual” and “entity” are more intuitive than the term “person,” as defined in these regulations.

h. Program

SAMHSA decided not to finalize its proposed changes to the definition of “Program,” but did make minor updates to the terminology in the text. We are, however, finalizing certain other minor changes to the proposed definition to update terminology so that it is consistent with current best practice.

First, SAMHSA moved the reference to examples from the definition of “Program” to the definition of “Part 2 program.”

Second, we retain the language changes from drug and/or alcohol abuse to substance use disorder.

Finally, as stated in the NPRM, SAMHSA clarifies that paragraph (1) of the definition of “Program” would not apply to “general medical facilities”. However, paragraphs (2) and (3) of the definition of “Program” would apply to “general medical facilities.”

Public Comments

A few commenters expressed support for the revised definition of “Program.”

However, many commenters generally opposed the proposed revision to the definition of “Program.” The reasons primarily related to interpretations that SAMHSA did not intend to imply. Many commenters asked that SAMHSA not call out general medical practices as a separate category of provider excluded from paragraph one but included in paragraphs two and three of the definition of program.

Some commenters requested clarification in various areas, including the meaning and examples of “holds itself out;” determining “primary function;” treatment of behavioral health clinics and community mental health centers; roles of general medical or dental practices that engage in screening, brief intervention, and referrals for treatment (SBIRT) activities, and co-located substance abuse/mental health counselors; whether covered part

2 facilities provide some, primarily provide, or only provide substance use disorder diagnosis, treatment, and referral to treatment; physicians who prescribe buprenorphine products and pharmacies that fill those prescriptions; a general psychiatric unit that also provides substance use disorder treatment; and offering patients integrated behavioral health care in a primary care setting.

Some commenters suggested limiting programs to those that meet a minimum standard, are specifically licensed, credentialed, or accredited, such as state licensure. Several commenters asked that SAMHSA provide an exception for pharmacists and pharmacies or dentists. Lastly, a commenter said the rule should include rehabilitation centers as medical facilities.

SAMHSA Response

Based on the number and type of comments received regarding including general medical practices in the Program definition, SAMHSA has decided not to finalize the general medical practices language in the final rule. The number and type of comments led SAMHSA to believe separating out general medical practices from general medical facilities was more confusing than clarifying. Most commenters indicated a belief that SAMHSA was expanding the definition of program to include individuals and entities that had not previously been covered. As we’ve previously noted in our publicly available FAQ guidance, a practice comprised of primary care providers could be considered a “general medical facility and be subject to 42 CFR part 2 if they are both “federally assisted” and meet the definition of a program under 42 CFR 2.11. Nevertheless, consistent with the definition of a “program”:

1. If a provider is *not* a general medical care facility, then the provider meets the part 2 definition of a “Program” if it is an individual or entity who holds itself out as providing, *and* provides substance use disorder diagnosis, treatment, or referral for treatment.

2. If the provider is an identified unit within a general medical facility, it is a “Program” if it holds itself out as providing, *and* provides, substance use disorder diagnosis, treatment, or referral for treatment.

3. If the provider consists of medical personnel or other staff in a general medical facility, it is a “Program” if its primary function is the provision of substance use disorder diagnosis, treatment, or referral for treatment *and* is identified as such specialized medical personnel or other staff by the general medical facility.

SAMHSA’s FAQ guidance further addresses the issue of what constitutes a general medical facility. This FAQ

guidance clarifies that, while the term “general medical care facility” is not defined in the definitions section of 42 CFR 2.11, hospitals, trauma centers, or federally qualified health centers would generally be considered “general medical care” facilities. Therefore, primary care providers who work in such facilities would only meet part 2’s definition of a program if (1) they work in an identified unit within such general medical facility that holds itself out as providing, and provides, substance use disorder diagnosis, treatment or referral for treatment, or (2) the primary function of the provider is substance use disorder diagnosis, treatment or referral for treatment and they are identified as providers of such services. In addition, a practice comprised of primary care providers could be considered a “general medical facility.” As such, only an identified unit within that general medical care facility which holds itself out as providing *and* provides substance use disorder diagnosis, treatment or referral for treatment would be considered a “program” under the definition in the part 2 regulations. Medical personnel or staff within that facility whose primary function is the provision of those services and who are identified as such providers would also qualify as a “program” under the definition in the part 2 regulations. Other units or practitioners within that general medical care facility would not meet the definition of a part 2 program unless such units or practitioners also hold themselves out as providing and provide substance use disorder diagnosis, treatment or referral for treatment.

SAMHSA also clarifies that the program definition does not categorically exclude buprenorphine providers. However, holding a waiver to prescribe buprenorphine or holding a waiver and prescribing buprenorphine as part of primary care practice also does not lead to categorical inclusion of providers in the definition of a part 2 program; such determinations are fact-specific. Also, a health care provider that does not otherwise meet the definition of a part 2 program would not become a program simply because they provided screening, brief intervention, and/or referral to treatment within the context of general health care. SBIRT is discussed in further detail under Section V.E (Applicability) below.

Regarding comments on the meaning of “primary function,” SAMHSA did not propose a definition of “primary function” because it has not historically received many, if any, questions on its meaning.

Consistent with previously published FAQ guidance, we reiterate that “Holds itself out” means any activity that would lead one to reasonably conclude that the individual or entity provides substance use disorder diagnosis, treatment, or referral for treatment, including but not limited to:

- Authorization by the state or federal government (e.g. licensed, certified, registered) to provide, and provides, such services,
- Advertisements, notices, or statements relative to such services, or
- Consultation activities relative to such services.

i. Qualified Service Organization

SAMHSA is adopting the definition of “Qualified Service Organization” as proposed. SAMHSA has revised the definition of QSO to include population health management in the list of examples of services a QSO may provide. SAMHSA also revised the term “medical services” as listed in the examples of permissible services offered by a QSO to clarify that it is limited to “medical staffing services.” SAMHSA made this revision to emphasize that QSOs should not be used to avoid obtaining patient consent.

Public Comments

A large number of commenters supported the proposed QSO definition, particularly the addition of “population health management.” Many commenters requested a clarification or a narrow definition of “population health management.”

SAMHSA Response

SAMHSA provided guidance in the NPRM preamble regarding what constitutes population health management services. Specifically, population health management refers to increasing desired health outcomes and conditions through monitoring and identifying individual patients within a group. To achieve the best outcomes, providers must supply proactive, preventive, and chronic care to all of their patients, both during and between encounters with the health care system. For patients with substance use disorders, who often have comorbid conditions, proactive, preventive, and chronic care is important to achieving desired outcomes. Any QSO executed between a part 2 program and an organization providing population health management services would be limited to the office(s) or unit(s) responsible for population health management in the organization (e.g., the ACO, CCO, CPCMH, or managed care organization [MCO]), not the entire

organization and not its participants (e.g., case managers, physicians, addiction counselors, hospitals, and clinics). However, the presence of a QSO does not preclude disclosures of patient identifying information to other individuals within these organizations based on a valid part 2-compliant consent.

Public Comments

Some commenters requested clarification about the definition, such as whether an HIE could be considered a QSO; whether the definition, which includes “an individual,” can include members of the covered entity’s workforce; and whether public health management staff can share part 2 information with case managers.

A few commenters expressed opposition to the proposed definition of QSO, asserting that patient consent should be obtained before making a disclosure of substance use disorder information to multiple entities. Another commenter warned that under the definition, it would be difficult to track which part 2 patients may or may not be within a population health program at any given time.

SAMHSA Response

The NPRM as well as the current (1987) definition of QSO uses the term person. Person is defined in the current (1987) regulations as: “*Person* means an individual, partnership, corporation, federal, state or local government agency, or any other legal entity.” The NPRM definition proposed a parenthetical: “(also referred to as individual or entity).” Because both the 1987 regulations and the NPRM definition of person includes both individuals and entities, the definition of the term QSO has always included both individual and entities, the definition of the term QSO has always included individuals, as well as entities.

Whether the QSO definition applies to members of an entity’s workforce and case managers depends on whether they meet the definition of QSO as defined in § 2.11 because such determinations are fact-specific. An individual or entity who does not meet the definition of a QSO may, however, meet the definition of “Treating provider relationship” for the purposes of obtaining consent. Likewise, care coordination was not added to the list of examples of permissible services offered by a QSO because care coordination has a patient treatment component.

Under the part 2 governing statute, patient records pertaining to the patient’s substance use disorder may be shared only with the prior written

consent of the patient or as permitted under the part 2 statute, regulations, or guidance. However, the regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this statute, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Regarding the concern about disclosing to multiple entities under a QSOA, as noted above, any QSOA executed between a part 2 program and an organization providing population health management services would be limited to the office(s) or unit(s)/entity(ies) responsible for population health management for the organization (e.g., the ACO, CCO, CPCMH, or MCO), not the entire organization and not its participants (e.g., case managers, physicians, addiction counselors, hospitals, and clinics).

Public Comments

Commenters provided various suggestions to improve the definition. Several commenters said the definition should be expanded to permit a multi-party agreement for multi-directional sharing of information. Commenters said the description of the provision should address overlapping requirements of HIPAA and part 2 with respect to contractual agreements and services such as data processing and billing. A commenter said facilitating entities should be able to enter into QSO agreements with participating providers to perform quality improvement activities. Another commenter said the QSO exception to restrictions on disclosure should apply to third-party payers and other holders of part 2 information, and the definition should include other functions to support improved care delivery.

SAMHSA Response

Part 2 and its implementing statute are much more restrictive than HIPAA. Because 42 CFR part 2 and its governing statute are separate and distinct from HIPAA, the part 2 regulations use different terminology than used in HIPAA. However, SAMHSA aligned policy with HIPAA where possible.

Because a QSOA is a two-way agreement between a part 2 program and the entity providing the part 2 program and an individual or entity providing a service to a part 2 program, agreements between more than those two parties (e.g. multi-party agreements) are prohibited. A QSOA cannot be used to

avoid obtaining patient consent in the treatment context.

As stated previously in this preamble, SAMHSA is issuing an SNPRM to seek further comments and information on the disclosure to and use of part 2 information by the contractors and subcontractors of third-party payers and other lawful holders for purposes of payment, health care operations, and other health care related activities before establishing any appropriate restrictions on disclosures to them.

Public Comments

Commenters generally expressed opposition to the change of “medical services” to “medical staffing services” in the definition. A commenter expressed opposition to the interpretation that the QSO agreement executed between a part 2 program and an organization that provided population health management services would be limited to a specific office(s) or unit(s) within the organization that is/are tasked with carrying out such services.

SAMHSA Response

SAMHSA has revised the term “medical services” as listed in the examples of permissible services offered by a QSO to clarify that it is limited to “medical staffing services.” SAMHSA proposed to make this revision to emphasize that QSOAs should not be used to avoid obtaining patient consent. Accordingly, a QSOA could be used by a part 2 program to contract with a provider of on-call coverage services (previously clarified in FAQ guidance) or other medical staffing services but could not be used to disclose John Doe’s patient identifying information to his primary care doctor for the purpose of treatment (other than that provided under a QSOA for medical staffing services). However, an individual or entity who is prohibited from providing treatment to an individual patient under a QSOA may still meet the requirements of having a treating provider relationship (as that term is defined in § 2.11) with respect to the consent requirements in § 2.31.

With respect to the comment regarding an organization providing population health management services, a QSOA is a two-way agreement between a part 2 program and the entity providing the service. We reiterate that disclosures by a QSO pursuant to a QSOA executed between a part 2 program and an organization that provides population health management services would be limited to a specific office(s) or unit(s)/entity(ies) that is/are tasked with carrying out such services

for the organization. SAMHSA believes this is a needed safeguard to limit disclosures to that which is reasonably necessary to carry out services under the QSOA.

Public Comments

Many commenters expressed opposition to the exclusion of “care coordination” from the QSO definition or requested clarification for the meaning of “care coordination.” Some commenters specifically requested adding care coordination to the list of services a QSO may provide, reasoning that it would facilitate integrated substance use disorder, health, and mental health services. The commenters asserted that the addition would benefit patients’ health, safety, and quality of life while maintaining confidentiality protections.

SAMHSA Response

In the NPRM, SAMHSA clarified that an individual or entity is prohibited from providing treatment to an individual patient under a QSOA. SAMHSA has revised the term “medical services” as listed in the examples of permissible services offered by a QSO to clarify that it is limited to “medical staffing services.” SAMHSA proposed to make this revision to emphasize that QSOAs should not be used to avoid obtaining patient consent. Accordingly, a QSOA could be used by a part 2 program to contract with a provider of on-call coverage services (previously clarified in FAQ guidance) or other medical staffing services, but could not be used to disclose John Doe’s patient identifying information to his primary care doctor for the purpose of treatment (other than that provided under a QSOA for medical staffing services). For this reason, care coordination and medication management, both of which have a treatment component, were not added to the list of examples of permissible services offered by a QSO. However, an individual or entity who is prohibited from providing treatment to an individual patient under a QSOA may still meet the requirements of having a treating provider relationship (as that term is defined in § 2.11) with respect to the consent requirements in § 2.31.

Regarding the request to clarify the meaning of “care coordination” and how it differs from “population health management,” because SAMHSA decided not to include care coordination in the examples of permissible services under the definition of a QSO, we did not define the term “care coordination” in the NPRM and, therefore, decline to do so

in this final rule. Population health management refers to increasing desired health outcomes and conditions through monitoring and identifying patients within a group.

j. Records

SAMHSA has revised the proposed definition. As suggested by commenters, SAMHSA has modified the definition of “Records” by adding “created by” and a parenthetical with examples to read as follows: “Records means any information, whether recorded or not, created by, received, or acquired by a part 2 program relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts). For the purpose of these regulations, records include both paper and electronic records.” SAMHSA revised the definition of “Records” to include any information, whether recorded or not, which includes verbal communications, created, received or acquired by a part 2 program relating to a patient. The revised definition makes clear that, for the purpose of the part 2 regulations, records include both paper and electronic records.

Public Comments

A commenter remarked that the proposed definition of “records” does not address “identifiability,” asserting that information that is not individually identifiable, that is not reasonably capable of being re-identified, or that is aggregate may not need to be covered by the definition of record. Regarding the phrase “whether recorded or not” in the proposed definition, a couple of commenters requested guidance on what constitutes “unrecorded information.”

SAMHSA Response

SAMHSA clarifies that unrecorded information includes verbal communications and is still considered part of the record. To add further clarity to the definition, SAMHSA has revised the definition of “Records” from the proposed language by adding examples (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts). SAMHSA also added the phrase “created by” to clarify that “records” includes information received, acquired, or created by a part 2 program relating to a patient. Regarding “identifiability,” identification is addressed in the term “Patient identifying information,” not in the definition of “Record.” The definition of records is just that and does not address information that may be disclosed.

k. Treatment

SAMHSA is adopting the proposed definition of “Treatment.” SAMHSA has deleted the term “management” from the “Treatment” definition.

Public Comments

A few commenters opposed the proposed removal of the term “management” from the definition of “treatment” because the narrower definition would decrease information sharing and have a chilling effect on care coordination. A couple of commenters urged that “treatment” should be limited to care of the substance use disorder and not be extended to include care of other medical conditions secondary to or that arose because of the substance use disorder. One commenter suggested that “care” should be defined as it is used in the definition of “treatment.”

SAMHSA Response

SAMHSA removed the term “management” from the definition of “Treatment” because in today’s health care environment, “management” has a much broader meaning than it did when the regulations were last revised. Treatment is not limited to care of the substance use disorder because patients with a substance use disorder often have comorbid conditions.

3. Terminology Changes

SAMHSA is adopting the changes proposed in this section, as described in the NPRM. In addition to changes to several definitions, SAMHSA is also implementing several terminology changes intended to ensure consistency in the use of terms throughout the regulations and to increase the understandability of the rule. First, we made revisions to consistently refer to law enforcement as “law enforcement agencies or officials.” Secondly, SAMHSA revised the part 2 regulations to use the term “entity” instead of “organization” wherever possible. Thirdly, SAMHSA clarifies that, for the purposes of this regulation, the term “written” includes both paper and electronic documentation. Fourthly, we use the phrase “part 2 program or other lawful holder of patient identifying information” to refer to a part 2 program or other individual or entity that is in lawful possession of patient identifying information. A “lawful holder” of patient identifying information is an individual or entity who has received such information as the result of a part 2-compliant patient consent (with a prohibition on re-disclosure notice) or as a result of one of the exceptions to the consent requirements in the statute

or implementing regulations and, therefore, is bound by 42 CFR part 2.

Public Comments

One commenter requested clarification about what entities are considered “lawful holders” of patient identifying information in the context of complex health care systems. For example, would the parent company of a health care system, each specific hospital, or each entity affiliated with the health care system be considered a “lawful holder”?

Another commenter urged that the term “other lawful holder” should be clearly defined in the final rule.

SAMHSA Response

A “lawful holder” of patient identifying information is an individual or entity who has received such information as the result of a part 2-compliant patient consent (with a prohibition on re-disclosure notice) or as permitted under the part 2 statute, regulations, or guidance and, therefore, is bound by 42 CFR part 2. SAMHSA cannot determine what entities are “lawful holders” because such determinations are fact-specific. In addition, SAMHSA determined that it was not feasible to define all lawful holders of information so has not included a definition in the rule. As explained in the NPRM, examples of “lawful holders” include a patient’s treating provider, a hospital emergency room, an insurance company, an individual or entity performing an audit or evaluation, or an individual or entity conducting scientific research. This list provided in the NPRM was intended only as an illustrative example of who could be a lawful holder.

4. Other Comments on Definitions

Public Comments

Many commenters expressed general support for the proposed clarification of definitions. Some commenters sought new definitions for terms including HIE; recipient; population health management and care coordination; population health; re-disclosure; law enforcement agency or official; repository; and scientific research.

Several commenters addressed the “alternative approach” discussed in the NPRM for allowing disclosure to treating providers by requesting the addition of a definition for “organization” to § 2.11. Commenters generally supported a clear definition of “organization” to allow for the exchange of part 2 information. One commenter, however, opposed relying upon a definition rather than specifying the process for consent in the rule itself.

SAMHSA Response

SAMHSA did not propose definitions for the terms suggested and has decided not to pursue the “alternative approach” since that approach as written received no support and only 2 commenters supported the “alternative approach with suggested revisions.” Based on comments received, the agency has addressed disclosures to treating providers within this rule’s consent requirements.

E. Applicability (§ 2.12)

SAMHSA is adopting this section as proposed. In addition to the revisions to the definition of “Program” and the addition of a definition for “Part 2 program” mentioned above, SAMHSA has revised § 2.12(d)(2)(i)(C) so that restrictions on disclosures also apply to individuals or entities who receive patient records from other lawful holders of patient identifying information (see § 2.11, Terminology Changes). Patient records subject to these regulations include patient records maintained by part 2 programs, as well as those records in the possession of “other lawful holders of patient identifying information.” SAMHSA may issue additional subregulatory guidance addressing the applicability section, as deemed necessary, after publication of the final rule.

Public Comments

A few commenters supported the proposed applicability provisions. Some commenters cited relevant preamble language but remained uncertain about who qualifies as a part 2 provider. Several commenters requested greater clarification in identifying part 2 coverage, including whether the provisions apply to various models of integrated behavioral health and primary care; mixed-use facilities that provide primary care and behavioral health services or mental health and substance use treatment; certified community behavioral health centers that do not necessarily “primarily” furnish substance abuse services but rather provide a comprehensive approach to care; embedded behavioral health information within an acute care record; a medical facility providing several distinct books of business, of which only one receives federal assistance; pharmacies; dentists; Drug Addiction Treatment Act (DATA 2000)-waived physicians; employee assistance programs that may include substance use assessment and counseling; a provider who bills Medicaid and Medicare but is not otherwise a

“federally assisted program;” and confidential information related to safety and incident reporting. A commenter requested clarification about the definition of “direct administrative control” in the proposed provision related to exceptions for communications within a part 2 program. A commenter urged consideration for reporting by programs to a public health registry and suggested advantages of such a requirement.

Some commenters requested applicability exemptions. Some commenters requested exclusions for employee assistance programs; Medicaid overutilization control programs; and plans with integrated care delivery models. Some commenters requested exemptions to consent for communications between a QSO and a part 2 program or third-party payer (*e.g.*, Medicaid) and between a part 2 program. One commenter requested clarification that consent and disclosure requirements would not apply when the patient directs electronic disclosure for a consumer health application. A commenter requested clarification that services are only covered under part 2 if the personnel are identified as providing substance use disorder treatment outside the organization to the general public. Commenters favored an exception for reporting of child abuse and elder abuse. A few commenters mentioned certain concerns related to the proposed rule. A commenter argued that the proposed rule would do little to simplify requirements for providers, and this may result in providers not documenting substance use disorder-related information in medical records. Other commenters opposed the lack of protections in the proposal and warned that the rule would impose constraints and burdens on providing a patient’s behavioral health data and impede information sharing. A commenter stated that general health care organizations that hire an employee with substance use disorder expertise would be considered a covered entity, so they may be discouraged from integrating substance use disorder services into their operation. Similarly, hospital emergency departments may be discouraged from hiring staff with specialized experience in substance use disorders. One commenter expressed concern that the rule may extend protection not just to records for substance use disorder treatment, but also to medical conditions and medications that allow an inference that the patient has a substance use disorder. One commenter argued that any substance use record should be

protected from unauthorized disclosure for criminal justice investigations. Expressing support for the continued protection of substance use disorder records from disclosure and use in criminal investigations except under certain conditions, a commenter said that while HIPAA and other laws also provide similar protections, part 2 has more stringent due process and court order provisions.

One commenter argued that the proposed rule exceeds the underlying statutory requirements in 42 U.S.C. 290dd–2 by expanding protections of substance use information and establishing penalties. Another commenter mentioned that the HITECH revisions to HIPAA already require general medical facilities to utilize enhanced security measures to protect the confidentiality and privacy of patient’s health records.

A few commenters advocated that the safeguards applied to protected health information (as defined under HIPAA) for all other health conditions could apply for substance use disorder-related information.

One commenter urged a focus on the actual information that requires protection, as opposed to the origin of the treatment records. Similarly, another commenter expressed disappointment that SAMHSA rejected the option to redefine the applicability of part 2 based on the type of substance use disorder treatment services, rather than the type of provider.

Several commenters suggested exceptions to the applicability of part 2 regulations. One commenter said SAMHSA should create a due diligence exception to allow a part 2 program’s records to be reviewed in the event of a proposed sale of the part 2 facility. Another commenter said SAMHSA should include an exception to allow disclosure of part 2 records in connection with the seeking of a grant or much needed funding for substance abuse patients. A commenter said SAMHSA should create a payment exception that would allow part 2 programs to submit information to governmental or commercial payers without the patient’s prior authorization.

Other commenters stated that exceptions should be added for the purpose of seeking involuntary commitment of an individual who poses a likelihood of serious harm to self or others by reason of a substance use disorder, in accordance with applicable provisions of state law and subject to appropriate terms regarding the continued confidentiality of such data. Another commenter stated that the rule

should specifically permit continued data collection of substance use disorder by state agencies. Another commenter stated that an exception limited disclosures to law enforcement and other appropriate parties in the event a committed patient escapes from a treatment facility, and to other part 2 programs and appropriate state agencies as necessary for purposes of discharge planning or transferring a patient without consent.

SAMHSA Response

With respect to the comments recommending aligning with HIPAA, SAMHSA has attempted to do so in this final rule to the extent the change was permissible under 42 U.S.C. 290dd-2. At the same time, part 2 and its governing statute are separate and distinct from HIPAA and its implementing regulations. Because of its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA.

As stated in the preamble discussion of the applicability (§ 2.12) in the NPRM, SAMHSA considered options for defining what information is covered by part 2, including defining covered information based on the type of substance use disorder treatment services provided instead of the type of facility providing the services. SAMHSA however, rejected that approach because more substance use disorder treatment services are occurring in general health care and integrated care settings, which typically are not covered under the current (1987) regulations. Providers who in the past offered only general or specialized health care services (other than substance use disorder services) now, on occasion, provide substance use disorder treatment services, but only as incident to the provision of general health.

The definitions of “Part 2 program” and “Program” are critical to applicability. These terms are defined in § 2.11. The response to comments on the definition of program in this final rule further clarifies coverage. Holding a waiver to prescribe buprenorphine or holding a waiver and prescribing buprenorphine as part of primary care practice does not lead to categorical inclusion of providers in the definition of a part 2 program; such determinations are fact-specific. The same concept applies whenever determining applicability.

With respect to comments on part 2 coverage, although the statute may not be explicit with regard to certain provisions in 42 CFR part 2, the statute

directs the Secretary to prescribe regulations to carry out the purpose of the statute, which may include definitions and may provide for such safeguards and procedures that in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. For various models of integrated behavioral health, SAMHSA strives to facilitate information exchange within new health care models while addressing the legitimate privacy concerns of patients seeking treatment for a substance use disorder. These concerns include, but are not limited to, the potential for loss of employment, loss of housing, loss of child custody, discrimination by medical professionals and insurers, arrest, prosecution, and incarceration.

The response to comments on the definition of program in this final rule further clarifies coverage.

SBIRT is a cluster of activities designed to identify people who engage in risky substance use or who might meet the criteria for a formal substance use disorder. Clinical findings indicate that the overwhelming majority of individuals screened in a general medical setting do not have a substance use disorder and do not need substance use disorder treatment. A health care provider that does not otherwise meet the definition of a part 2 program would not become a part 2 program simply because they provide SBIRT within the context of general health care.

For behavioral health facilities, SAMSHA notes that federally qualified health centers, community mental health centers, and behavioral health clinics meeting the definition of a part 2 program must comply with 42 CFR part 2 and those that do not meet the definition of part 2 program do not have to comply with 42 CFR part 2 unless they become a lawful holder of patient identifying information because they received patient identifying information via consent (along with a notice of prohibition on re-disclosure) or as permitted under the part 2 statute, regulations, or guidance. Rather than offer definitions or outline an exhaustive list of entities that could meet the definition of a part 2 program, we prefer to offer illustrative examples in the explanation of applicability provision of these regulations (*see* § 2.12(e)(1)). SAMHSA has not received questions in the past concerning the definition of general medical facility.

Regarding the question of part 2 applicability when a patient directs electronic disclosure for a consumer health application, the NPRM preamble

discussion of lawful holder in the Terminology Changes section stated: “A patient who has obtained a copy of their records or a family member who has received such information *from a patient* would not be considered a ‘lawful holder’ of patient identifying information in this context.”

Information disclosed by a part 2 program or a lawful holder of patient identifying information is covered by 42 CFR part 2 and requires patient consent unless disclosure is otherwise permitted under the part 2 statute or regulations. Therefore, it is permissible for a *patient to disclose* information to a personal health record or similar consumer health application but if a part 2 program or lawful holder of patient identifying information discloses that information to the personal health record or other similar consumer application on behalf of the patient, consent would be required.

Regarding patient records and Medicaid overutilization control programs, the prohibition on re-disclosure (§ 2.32) applies to information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, such as indicated through standard medical codes, descriptive language, or both, and allows other health-related information shared by the part 2 program to be re-disclosed, if not prohibited by any other applicable laws. Under the current statutory authority, patient records pertaining to substance use disorder may be shared only with the prior written consent of the patient or as permitted under the part 2 statute and implementing regulations. In addition, the authorizing statute specifically enumerates the areas of non-applicability, which includes the reporting under state law of incidents of suspected child abuse and neglect to appropriate state and local authorities. Therefore, SAMHSA did not adopt this requested change. Regarding elder abuse, if a program determines it is important to report elder abuse, disabled person abuse, or a threat to someone’s health or safety, or if the laws in a program’s state require such reporting, the program must make the report anonymously, or in a way that does not disclose that the person making the threat is a patient in the program or has a substance use disorder, or obtain a court order if time allows.

Some commenters asked about the applicability of the part 2 regulations to various facilities or entities, such as rehabilitation facilities, dentists, and pharmacies. In summary, if a provider is not a general medical facility or does

not hold itself out as providing, and provides, substance use disorder diagnosis, treatment or referral for treatment, it would not meet the first section of the definition of “Program.” If the provider is either not an identified unit within a general medical facility that holds itself out as providing, or does not provide, substance use disorder diagnosis, treatment, or referral for treatment, it does not meet the second section of the definition of “Program.” If the provider either does not consist of medical personnel or other staff in a general medical facility whose primary function is the provision of substance use disorder diagnosis, treatment, or referral for treatment or is not identified as such specialized medical personnel or other staff by the general medical facility, it does not meet the third section of the definition of “Program.” Whether embedded behavioral health information is covered by 42 CFR part 2 depends on several factors: First, only patient identifying information is subject to part 2 protections. If the acute care facility meets the definition of a part 2 program and the information would identify, directly or indirectly an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, the information is subject to part 2 protections; and if the acute care facility received the patient identifying information via a valid part 2 consent (with a notice of prohibition on re-disclosure) or as otherwise permitted under the part 2 statute or regulations, the information is subject to part 2 protections.

With respect to pharmacies, when they receive prescriptions directly from part 2 programs, the patient identifying information related to those prescriptions is subject to 42 CFR part 2 confidentiality restrictions (as indicated by the accompanying prohibition on re-disclosure notice). Pharmacies that receive paper prescriptions directly from patients (and do not receive a prohibition on re-disclosure notice) are, therefore, not subject to the part 2 confidentiality restrictions. However, if the pharmacy or pharmacist meets the definition of a part 2 program, they must comply with the part 2 regulations.

In response to the commenter’s request for clarification that services are only covered under part 2 if the personnel are identified as providing substance use disorder treatment outside the organization to the general public, the third section of the definition of program uses the term “personnel” to state that medical personnel or other staff in a general

medical facility whose primary function is the provision of substance use disorder diagnosis, treatment or referral for treatment and who are identified as such providers. This section of the definition of program does not include the phrase “holds itself out” as do the first two sections of the definition of program. In the third section of the definition, the medical personnel or other staff must be identified as such specialized medical personnel or other staff by the general medical facility.

Although commenters requested an exclusion for employee assistance programs, the regulation text at § 2.12(d)(1) states: “Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as providing, and provide substance use disorder diagnosis, treatment, or referral for treatment.

Commenters requested an exemption for communications between a part 2 program and another entity under common ownership or control, but SAMHSA declines to make the requested change. However, as stated in the regulatory text (§ 2.12(c)(3)) restrictions on disclosure in these regulations do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of patients with substance use disorders if the communications are:

- (i) Within a part 2 program; or
- (ii) Between a part 2 program and an entity that has direct administrative control over the program.”

SAMHSA declines to add the various suggested exceptions to the applicability of the part 2 regulations, and encourages all stakeholders to consult with legal counsel to ensure compliance with 42 CFR part 2, as well as any other applicable federal, state, or local laws or regulations. SAMHSA is limited by statute to the specific exceptions listed in the law; it cannot, therefore, add exceptions. As stated previously, SAMHSA is authorized to promulgate regulations and to provide such safeguards and procedures necessary to carry out the purposes of the authorizing statute. SAMHSA has endeavored to strike an appropriate balance between the important privacy protections afforded patients with substance use disorders and the necessary exchange of information to improve treatment outcomes for these individuals.

F. Confidentiality Restrictions and Safeguards (§ 2.13)

SAMHSA is modifying this section slightly from that proposed in the NPRM by adding a paragraph clarifying responsibility for the List of Disclosures requirement. As discussed in the proposal, because SAMHSA is revising the consent requirements to allow a general designation in certain circumstances, we have revised § 2.13 by adding a paragraph (d), which requires that, upon request, patients who have included a general designation in the “To Whom” section of their consent form must be provided, by the entity that serves as an intermediary, a list of entities to which their information has been disclosed pursuant to the general designation (List of Disclosures).

The new § 2.13(d) specifies that patient requests for a list of entities to which their information has been disclosed must be in writing. Consistent with the NPRM, we consider “written” to include both paper and electronic documentation. The list is limited to disclosures made within the past 2 years.

Further, entities named on the consent form that disclose information pursuant to a patient’s general designation (entities that serve as intermediaries as described in § 2.31(a)(4)(iii)(B)) must respond to requests for a List of Disclosures in 30 or fewer days of receipt of the request.

1. Delayed Implementation of List of Disclosures Provision

Public Comments

Several commenters raised concerns about how to interpret the two-year delayed implementation of List of Disclosures and whether the general designation will be used during that period. A commenter expressed concern about the immediate implementation of the general designation while the right of patients to obtain a List of Disclosures is postponed for two years.

Other commenters stated that, based on the NPRM language, HIEs will not be able to take advantage of a general designation on the consent form until they have the ability to comply with the List of Disclosures requirement.

Commenters said SAMHSA needs to clarify that the duty to begin collecting and storing disclosures under the general designation begins two years after the effective date of the final rule and not before.

A commenter recommended that the right to obtain a list of those who have received the patient’s information should be implemented simultaneously

with any other revisions to the part 2 regulation. Another commenter said SAMSHA should implement the List of Disclosures requirement within 90 days.

SAMHSA Response

SAMHSA clarifies that the general designation on a consent form may not be used until entities have the ability to comply with the List of Disclosures provision. However, SAMHSA has removed the two-year delayed compliance date for the List of Disclosures provision for the reasons discussed in Section IV above.

2. Responsibilities Under the List of Disclosures Process

Public Comments

Commenters said SAMHSA should allow non-treating entities, that do not have a treating provider relationship with the patient whose information is being disclosed and serve as intermediaries named on the consent form, to release the List of Disclosures to the facility where the patient receives care (or the part 2 program), rather than to the patient directly. One commenter said because this process, in which the patient/consumer requests and receives the List of Disclosures from the site where they receive care/part 2 program, rather than from the HIE, resembles the process currently being used to meet HIPAA disclosure requirements, it could be implemented without requiring additional burdens on HIEs. Since most HIEs are not patient-facing, commenters stated that there are typically not policies or procedures in place for interacting with patients directly, particularly for patient authentication, and suggested it be done at the provider level, and that the patient communication be maintained at the part 2 program level.

Other commenters said SAMHSA does not specify what responsibility, if any, the part 2 program has to coordinate or verify the compliance of the CCO or HIE with the List of disclosures. One commenter said if SAMHSA intends for the part 2 program to have any responsibilities beyond this, then it should obtain additional feedback from part 2 programs before proposing any new obligations. Some commenters appeared to assume the part 2 program was responsible for the List of Disclosures and requested that SAMHSA modify the requirement to impose the duty directly upon the HIE, ACO, CCO, or research institution to provide the listing to the patient, rather than the part 2 program.

A commenter said SAMSHA should clarify what entities must be included

on the List of Disclosures when the entity is part of a complex healthcare system.

Another commenter said the absence of requiring disclosure of individual names undermines the intent of the List of Disclosures and undermines the purpose of expanding the “To Whom” provision and the patient’s incentive or willingness to consent to a general designation. The commenter said the provision must be very explicit in disclosing those agencies or individuals that will receive the patients’ medical information.

SAMHSA Response

Regarding the suggestion to allow entities that serve as intermediaries as described by § 2.31(a)(4)(iii)(B) to release the List of Disclosures to the facility where the patient receives care (or the part 2 program) or with the providers to whom the disclosure was made, rather than directly to the patient, SAMHSA has decided to retain the NPRM language and proposed responsibilities because the party making the disclosure under the general designation should be accountable for that disclosure. SAMHSA has clarified in paragraph § 2.31(d)(3) that the part 2 program is not responsible for complying with the List of Disclosures requirement; the entity that serves as an intermediary, as described in § 2.31(a)(4)(iii)(B), is responsible for compliance with the List of Disclosures requirement.

SAMHSA plans to issue subregulatory guidance that clarifies how the patient may request the List of Disclosures from intermediaries as described by § 2.31(a)(4)(iii)(B).

On the responsibility of part 2 providers to comply with the List of Disclosures requirement, SAMHSA agrees with the commenters that more clarity is needed. In the circumstance in which a patient provides a general designation in the “To Whom” part of a consent form, the part 2 program may not know to whom the disclosures have been made by the entity that serves as an intermediary. As such, the List of Disclosures provision requires that: The entity named on the consent form that discloses information pursuant to a patient’s general designation (the entity that serves as an intermediary, as described in § 2.31(a)(4)(iii)(B)) must: (i) Respond in 30 or fewer days of receipt of the written request; and (ii) Provide, for each disclosure, the name(s) of the entity(ies) to which the disclosure was made, the date of the disclosure, and a brief description of the patient identifying information disclosed. Further, paragraph (d)(3) clarifies that

the part 2 program is not responsible for complying with § 2.13(d).

In response to the request for clarification on what entities must be listed on the List of Disclosures and suggestion that individuals (rather than entities with whom such individuals are affiliated) must be listed, SAMHSA clarifies that the List of Disclosures must include a list of the entities to which the information was disclosed pursuant to a general designation. Individuals who received patient identifying information pursuant to the general designation on a consent form should be included on the List of Disclosures based on an entity affiliation, such as the name of their practice or place of employment. However, if entities that are required to comply with the List of Disclosures requirement wish to include individuals on the List of Disclosures, in addition to the required data elements which are outlined in § 2.13(d)(2)(ii), nothing in this rule prohibits it.

SAMHSA considered requiring both individuals and entities to be included on the List of disclosures but, after reviewing the Health Information Technology Privacy Committee’s (HITPC’s) recommendations (https://www.healthit.gov/sites/faca/files/PSTT_Transmittal010914.pdf), decided to require, at a minimum, a list of entities. These recommendations addressed the HITECH requirement that HIPAA covered entities and business associates account for disclosures for treatment, payment, and health care operations made through an EHR. The Transmittal Letter recommended, “that the content of the disclosure report be required to include only an entity name rather than a specific individual as proposed in the NPRM.” In addition, the Transmittal Letter noted that the Organization for Economic Cooperation and Development (OECD) principles, the Fair Credit Reporting Act, and the Privacy Act of 1974 do not require that the names of individuals be provided. The HITPC, a committee established by the American Recovery and Reinvestment Act of 2009 in accordance with the Federal Advisory Committee Act (FACA), provides recommendations on health IT policy issues to the ONC for consideration. The HITPC gave a broad charge to its Privacy & Security Tiger Team (Tiger Team) “to provide recommendations on how to implement the requirements of the HITECH Act of 2009 for covered entities and business associates to account for disclosures for treatment, payment and health care operations made through an EHR. In the referenced Transmittal Letter, the HITPC did not focus on 42 CFR part 2,

however, given the similarities of the issues and the importance of the lessons the Tiger Team learned, SAMHSA was persuaded by the Tiger Team's discussion.

3. Technological Challenges and Burden of the List of Disclosures Provision

Public Comments

Public Comments

Many commenters argued that entities may not be equipped to maintain and provide a List of Disclosures. A few commenters expressed general concern about the burden associated with the List of Disclosures provision. Several commenters added that the burden is disproportionate to the anticipated benefit. Other commenters specified areas of burden, including administering consents; developing a tracking system; manually reviewing or auditing all records; and transmitting information by U.S. mail. Some comments mentioned the operational impact of the provision, including the impact on existing business practices; uncertainty about interoperability with additional systems; and operationalizing a different approach for HIPAA. One commenter argued that HIPAA already provides sufficient protections through the requirement for tracking and providing an accounting of certain disclosures. Another commenter expressed concern that there are varying levels of technical resources available for compliance with the rule.

A commenter warned that one component of the Affordable Care Act is its focus on sharing of certain medical information and the proposed regulation may prevent realization of that goal. Similarly, another commenter said, if HIEs are included in the disclosure request, entities would be left with the choice of either not sending this information, which would then not be available in emergent situations, or not complying with this requirement. Another commenter said creating additional accounting requirements, without further clarification on the interoperability of such EHR systems, can create a state of continuous uncertainty and flux, deterring investment into substance use disorder treatment programs within integrated care networks.

Some commenters stated that the proposed provision conflicts with existing HIPAA accounting of disclosure requirements or state laws. Other commenters said it would be administratively burdensome to implement, particularly in light of the fact that the health information technology industry is still waiting for

OCR to determine how it will address the HITECH changes to HIPAA accounting of disclosures.

For the above reasons, some commenters urged SAMHSA not to include the List of Disclosures provision in the final rule; delay promulgating until OCR decides how it will approach the HITECH provisions concerning the HIPAA accounting of disclosures requirement; and engage with OCR, providers, and vendors to fully understand the implications of such a requirement before establishing an implementation date for the List of Disclosures requirement.

SAMHSA Response

SAMHSA is including the List of Disclosures requirement in the final rule to balance the flexibility of allowing a general designation in the "To Whom" section of the consent form against the protection of patient privacy. We understand commenter concerns about the technical feasibility of implementing the List of Disclosures requirement. However, there is no timeframe in which part 2 programs and lawful holders need to comply with the List of Disclosures requirements; only the condition that if they choose to have the option to disclose information pursuant to a general designation on the "To Whom" part of the consent form, they must also be capable of providing a List of Disclosures upon request per § 2.13(d). Because the general designation is not mandated on a consent form, this allows entities time to develop and test the technology needed for compliance with the List of Disclosures requirements or to decide not to disclose information pursuant to a general designation and not implement technology needed for compliance with the List of Disclosures provision.

Public Comments

A commenter said the List of Disclosures will impose a complex burden upon all parties involved in the disclosure and receipt of substance use disorder treatment, asserting that the disclosing party—if it is not a part 2 program—would need to know that the information being disclosed is subject to the part 2 requirements. The commenter said there may be a question of whether this type of disclosure would be prohibited per the Prohibition on re-disclosure provision, and this becomes more complex if further disclosures or re-disclosures take place.

SAMHSA Response

SAMHSA responds that the entity that serves as an intermediary should be

provided a copy of the part 2-compliant consent form or the pertinent information on the consent form necessary for the intermediary to comply with the signed consent. The providers with a treating provider relationship with the patient whose information is being disclosed would be aware of the part 2 protections because the disclosure would also be accompanied by the prohibition on re-disclosure notice.

Public Comments

A commenter said SAMHSA has not addressed whether there will be a cost to the patient for obtaining a List of Disclosures. If patients will be required to pay a fee for this list of disclosures, the commenter said SAMHSA should establish a reasonable fee for the provision of the List of Disclosures.

SAMHSA Response

SAMHSA strongly encourages entities to provide the List of Disclosures at no charge to the patient.

4. Recommendations To Further Protect Patient Privacy

Public Comments

A commenter said SAMHSA should require the List of Disclosures to include all disclosures of the patient's health information, whether such disclosure was made pursuant to a consent form, QSOA, medical emergency, or any other means. Similarly, another commenter stated that, when a record of all uses and disclosures already exists, a program should be required to make that record available to a patient upon request. Other commenters asserted that the List of Disclosures should be presented to the patient at the time the consent is signed, rather than after the disclosures have been made. A commenter said patients should also be given the option, at the time of signing, to cross out entities to whom they do not want their information disclosed. Also, a commenter said patients should be informed of changes to the list that may now have access to their information.

Some commenters expressed concern that the List of Disclosures would be limited to disclosures made within the past two years, which does not allow the patient to learn about past data breaches. Some commenters recommended expanding the time period to five years or not including a time limit.

SAMHSA Response

In response to these concerns and recommendations about increasing patient privacy rights, SAMHSA

clarifies that the List of Disclosures provision was proposed in the NPRM as a way to balance the revision to the consent form allowing a more general designation in the “To Whom” section, which is optional. The List of Disclosures provision is limited to information disclosed pursuant to the general designation by the entity that serves as the intermediary, but these entities as well as part 2 programs are not prohibited from providing patients with all available information. Patients will have the right to request this List of Disclosures and have it produced in a timely fashion; however, SAMHSA has chosen not to require entities to provide this information at the time of patient consent as this would be impossible because disclosure of the patient’s information has not occurred at that point. SAMHSA also emphasizes that patients are not required to use a general designation in the “To Whom” section of the consent form. Therefore, patients can limit disclosures by a more concrete specification (*i.e.*, named individual(s)).

In response the comments on expanding the time period that the List of Disclosures covers, this final rule’s provision to limit the List of Disclosures to those made within the last two years does not preclude an entity that serves as an intermediary from providing the patient with a list covering disclosures made for periods greater than two years.

Public Comments

A commenter said SAMHSA should not include the sample language for a request for a List of Disclosures under the general designation in the final rule because HIPAA has shown that entities construe such sample language as mandates to use the sample language, thereby making it more difficult for an individual to request such information, and hindering their ability to obtain such information contrary to the intent of the proposed rule. The commenter suggested that SAMHSA, as part of this rule or in subregulatory guidance at a later date, recommend that certain criteria be included as part of an individual’s request for such disclosures.

SAMHSA Response

SAMHSA did not intend for the sample language for a request for a list of disclosures provided in the NPRM to be construed as a requirement for requesting a List of Disclosures, but rather to assist patients in making such a request. SAMHSA is retaining the sample language in this rule.

Public Comments

A commenter asserted that states can set a higher standard than part 2, but the NPRM language would lead the patient to think that they could get information via unencrypted email. The commenter suggested the provision be modified to indicate that responses sent to the patient electronically may be sent by unencrypted email at the request of the patient “so long as it is not prohibited by applicable law.” In addition, the commenter said the final rule should require patients to be notified that there may be some level of risk that the information in an unencrypted email could be read by a third party. In addition, the commenter said the rule should state that, if patients are notified of the risks and still prefer unencrypted email, the patient has the right to receive the information in that way, and entities are not responsible for unauthorized access of the information while in transmission to the patient based on the patient’s request.

SAMHSA Response

The language regarding unencrypted email transmissions appears in the NPRM preamble only and acknowledges both encrypted and unencrypted email as acceptable modes of transmission. The language goes on to say: “Responses sent to the patient electronically may be sent by encrypted transmission (*e.g.*, encrypted email or portal), or by unencrypted email at the request of the patient, so long as the patient has been informed of the potential risks associated with unsecured transmission. Patients should be notified that there may be some level of risk that the information in an unencrypted email could be read by a third party. If patients are notified of the risks and still prefer unencrypted email, the patient has the right to receive the information in that way, and entities are not responsible for unauthorized access of the information while in transmission to the patient based on the patient’s request. Before using an unsecured method to respond to a request for a list of disclosures, an entity should take certain precautions, such as checking an email address for accuracy before sending it or sending an email alert to the patient for address confirmation to avoid unintended disclosures.” SAMHSA does not intend to be prescriptive regarding how the information is relayed to the patient or to preempt applicable state law that may prohibit unencrypted transmission (see § 2.20).

Public Comments

A commenter said the NPRM abandoned the current statement that the rule does not restrict a disclosure that “an identified individual is not and has never been a patient.” The commenters said the new approach militates against fishing by third parties.

SAMHSA Response

SAMHSA agrees with the commenter that prohibiting a disclosure that “an identified individual is not and has never been a patient” mitigates against fishing by third parties. In the NPRM, SAMHSA proposed to remove the concept from § 2.13(c)(2) that the regulations do not restrict a disclosure that an identified individual is not and never has been a patient and has retained this position in the final rule.

Public Comments

Commenters made other recommendations relating to the proposed List of Disclosures requirement focused on generally improving patients’ rights, including suggestions to keep information confidential; notify when a treating provider has accessed the patient’s confidential information; ensure patient-approved information sharing; provide a process by which an individual can raise a complaint; and disclose to patients in plain language.

SAMHSA Response

SAMHSA acknowledges and shares the commenters’ concerns with patient privacy. We believe that the List of Disclosures requirement as proposed in the NPRM is adequate to inform patients of how their information has been shared in the event that they provided a general designation in the “To Whom” portion of their consent. SAMHSA encourages entities to provide the information associated with a List of Disclosures in plain language and with sufficient specificity so that patients understand the List of Disclosures, including the brief description of the patient identifying information disclosed.

5. Other Comments and Recommendations on the List of Disclosures Provision

Public Comments

One commenter recommended that SAMHSA allow consent to include a description of HIE as a function to support patient care, and exclude this function from the information disclosure accounting [List of Disclosure] requirement.

A commenter recommended that SAMHSA offer additional guidance on best practices and make infrastructure grants available to create the necessary modifications within providers' EHRs or other consent tracking systems.

Some commenters made other suggestions. For example, a commenter requested that SAMHSA define "in writing" and "written requests" as those terms are used in the List of Disclosures provision (§ 3.13(d)). Another commenter urged SAMHSA to explore options to reduce the cost of the List of Disclosures provision and further clarify how the enhanced protection of substance use disorder treatment information can be consistent and interoperable with other health systems.

SAMHSA Response

As for the request to define "in writing" and "written requests" as those terms are used in the List of Disclosures provision, in the NPRM preamble discussion of Terminology Changes, SAMHSA explained that for the purposes of this regulation, we also propose that the term "written" include both paper and electronic documentation.

The consent requirements (§ 2.31) include the option of including in the "To Whom" section of the consent form the name of an entity that does not have a treating provider relationship with the patient whose information is being disclosed (and is not a third-party payer that requires patient identifying information for the purposes of reimbursement for the services rendered by the part 2 program) and either the name(s) of an individual participant(s); or the name(s) of an entity participant(s) that has a treating provider relationship with the patient whose information is being disclosed; or a general designation of an individual or entity participant(s) or class of participant(s) who has a treating provider relationship with the patient whose information is being disclosed. Any HIE that serves as an intermediary is subject to the List of Disclosures requirement regardless of its other "functions." Regarding the requests for guidance, SAMHSA may issue additional subregulatory guidance on this provision after this final rule is published.

G. Security for Records (§ 2.16)

SAMHSA is adopting this section as proposed except for some non-substantive, technical changes to the language in proposed § 2.16(a)(2)(i). SAMHSA is modernizing this section to address both paper and electronic records. First, SAMHSA revised the heading by deleting the word "written"

so that it now reads: Security for Records. Secondly, SAMHSA clarified that this section requires both part 2 programs and other lawful holders of patient identifying information to have in place formal policies and procedures for the security of both paper and electronic records. Finally, SAMHSA has replaced language in other sections of part 2 with a reference to the policies and procedures established under § 2.16, where applicable. As noted above, SAMHSA has made some technical changes to the language in proposed § 2.16(a)(2)(i). In particular, to more closely align with the HIPAA Security Rule, SAMHSA has revised § 2.16(a)(2)(i) to require that part 2 program security for electronic records policies must include "creating, receiving, maintaining, and transmitting such records." The proposed language was "copying, downloading, forwarding, transferring, and removing such records."

Public Comments

Some commenters supported the proposed provisions on security and stated that they provide appropriate protections. However, many commenters asserted that the security provisions of HIPAA should be followed and that those requirements should satisfy the part 2 provisions.

A commenter also supported the use of internal confidentiality agreements.

A commenter expressed concern that the rule does not address what a non-part 2 provider who receives part 2 data must do to ensure adequate safeguards are in place. Similarly, another commenter expressed concern about security obligations that would be placed on other lawful holders, such as courts, law firms, family members, or other private citizens who are often not the types of providers subject to the current (1987) part 2.

One commenter recommended an expiration date for electronic records. Another commenter recommended that the use of secure, certified HIT be added as a requirement for part 2 program providers, as well as any services provided that conduct audits and evaluations related to transition of patient information.

SAMHSA Response

SAMHSA appreciates the support of commenters on this issue. On the issue of HIPAA, covered entities must comply with all regulations that are applicable to them. Because some entities subject to this rule are not subject to HIPAA, SAMHSA may provide subregulatory guidance after the rulemaking on the extent to which compliance with

HIPAA security requirements, for those subject to them, will satisfy § 2.16. SAMHSA emphasizes that if an entity already has security practices and policies in place that meet the requirements of this rule, whether those practices were developed to meet the regulatory requirements or simply as a matter of good practice, the entity may not need to take additional action on this issue. In the NPRM, SAMHSA suggested resources for part 2 programs and other lawful holders for developing formal policies and procedures including materials from the HHS Office for Civil Rights (e.g., *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*), and the National Institute of Standards and Technology (NIST) (e.g., the most current version of the *Special Publication 800-88, Guidelines for Media Sanitization*).

On the issue of use of internal confidentiality agreements and the required use of secure, certified Health IT, § 2.16 provides requirements for formal policies and procedures to reasonably protect against unauthorized uses and disclosure of patient identifying information and to protect against reasonably anticipated threats or hazards to the security of patient identifying information. A part 2 program or other lawful holder of patient identifying information may impose any additional requirements that they feel will enhance protections.

With regard to security of the records lawfully obtained by non-part 2 programs, § 2.16 applies equally to these entities (referred to as lawful holders of patient identifying information). The required formal policies and procedures are intended to ensure protection of patient identifying information when electronic records are exchanged electronically using health IT, as well as when they are exchanged using paper records. In addition, the formal policies and procedures will have to address, among other things, the sanitization of hard copy and electronic media, which is addressed in the NPRM discussion of Disposition of Records by Discontinued Programs (§ 2.19). On the concern raised that § 2.16 places an unreasonable burden on courts, law firms, family members, or other private citizens who may obtain the information, a patient who has obtained a copy of his or her records or a family member or private citizen who has received such information from a patient would not be considered a lawful holder of patient identifying information in this context. Generally,

consents and permissible disclosures are initiated by a lawful holder who desires the information and, therefore, the lawful holder would already be familiar with part 2.

H. Disposition of Records by Discontinued Programs (§ 2.19)

SAMHSA is modifying this section from that proposed in the NPRM in response to public comments, as discussed below. In this section, SAMHSA addresses the disposition of both paper and electronic records by discontinued programs, including added requirements for sanitizing paper and electronic media, which is distinctly different from deleting electronic records and may involve clearing (using software or hardware products to overwrite media with non-sensitive data) or purging (degaussing or exposing the media to a strong magnetic field in order to disrupt the recorded magnetic domains) the information from the electronic media. If circumstances warrant the destruction of the electronic media prior to disposal, destruction methods may include disintegrating, pulverizing, melting, incinerating, or shredding the media. SAMHSA expects the process of sanitizing paper media (including printer and facsimile (FAX) ribbons, drums, etc.) or electronic media to be permanent and irreversible, so that there is no reasonable risk that the information may be recovered. For the purpose of this rule, SAMHSA makes a distinction between electronic devices (something that has computing capability, such as a laptop, tablet, etc.) and electronic media (something that can be read on an electronic device, such as a CD/DVD, flash drive, etc.).

Public Comments

A commenter expressed support for the proposal related to disposition of records by discontinued programs. Another commenter recommended that the rule allow for “selective sanitizing,” using methods that will not require overwriting the entire electronic media. Two commenters asked about patient records when a program is acquired by another program. A commenter suggested that the rule should address situations in which a patient cannot be located or is deceased and cannot give consent. The commenter provided multiple suggestions relating to disposition of records, including permit more flexible means of storage; permit scanning and electronic storage of records; do not require transfer to a portable device; offer an option to store records in a production encrypted network storage device. This commenter also asserted that sanitation of

electronic communications would not be feasible in organizations storing millions of electronic records; requiring storage of a portable electronic device in a sealed container does not add additional security if it is already encrypted; and deleting substance use information from records does not conceal the fact that someone has a substance use disorder but instead highlights the fact.

SAMHSA Response

SAMHSA acknowledges the support for the proposed provision. With regard to the issue of multiple sources of records, we have revised the language in the final rule to allow one year to complete the process of sanitizing paper or electronic media (*see* § 2.19(b)(2)(iii)). This change should allow for select patient records to be removed from both the specific site and any operational sources without disrupting other patient records. Regarding acquisition of one program by another, the § 2.19(a) regulatory text outlines the exceptions to removing patient identifying information from its records or destroying its records.

If the patient cannot be located or is deceased and cannot give consent, the part 2 program that has discontinued operations or is taken over or acquired by another program, must remove the patient’s identifying information from its records, including sanitizing any associated hard copy or patient records or patient identifying information residing on electronic media, to render the patient identifying information non-retrievable in a manner consistent with policies and procedures under § 2.16.

Regarding comments on more flexible means of electronic record storage, SAMHSA has revised § 2.19(b)(2) to allow for more flexibility. The revised language allows for electronic records to be transferred to a portable electronic device with implemented encryption to encrypt the data at rest so that there is a low probability of assigning meaning without the use of a confidential process or key and implemented access controls for the confidential process or key (*see* § 2.19(b)(2)(i)); or transferred, along with a backup copy, to separate electronic media, so that both the records and the backup have implemented encryption to encrypt the data at rest so that there is a low probability of assigning meaning without the use of a confidential process or key and implemented access controls for the confidential process or key (*see* § 2.19(b)(2)(ii)). For electronic storage of the records, if the records are scanned, they would have to be maintained consistent with § 2.19(b)(2) and the paper records would have to be

destroyed consistent with § 2.16. Regarding portable device storage, the final § 2.19 language specifies that the portable electronic device or the original and backup electronic media must be sealed in a container along with any equipment needed to read or access the information. The sealed container prevents the portable electronic device or the original and backup electronic media from being separated from the equipment needed to read or access the information.

I. Notice to Patients of Federal Confidentiality Requirements (§ 2.22)

SAMHSA is adopting this section as proposed. Consistent with the NPRM, SAMHSA considers the term “written” to include both paper and electronic documentation. Accordingly, the notice to patients may be either on paper or in an electronic format. SAMHSA also revised § 2.22(b)(2) to require the statement regarding the reporting of violations to include contact information for the appropriate authorities.

Public Comments

Several commenters expressed support for the proposed provisions, particularly the allowing of electronic notice, and they encouraged the use of plain language and notices in languages other than English. Several commenters recommended that SAMHSA should make a sample notice or language available to covered entities. One commenter asked how written notice can be provided for encounters that are not in person.

Other commenters suggested that the patient be given copies rather than written summaries of state and federal law; a paper report, if requested; the right to request and obtain restrictions; and a description of how patient information may be disclosed for scientific research.

SAMHSA Response

The final rule requires that the notice include contact information for the appropriate authorities for reporting violations. SAMHSA believes this change will make it easier for patients to identify to whom they should file a complaint of a potential violation of part 2. Therefore, SAMHSA declines to include a sample complaint form at this time but may consider whether to issue one outside of this rulemaking process. SAMHSA also declines to require copies rather than summaries of state and federal law because the notice to patients of federal confidentiality requirements is required to provide citations to the federal law and

regulations that protect the confidentiality of patient records and including information concerning state laws and regulations is optional. The notice must also be provided in writing but as was discussed in Terminology Changes (§ 2.11), the term “in writing” includes both paper and electronic documentation. Because the purpose of the notice is to communicate to the patient the federal law and regulations that protect the confidentiality of patient records, SAMHSA declines to require anything additional. However, if a part 2 program wishes to provide additional information, nothing in this provision prohibits them from doing so.

J. Consent Requirements (§ 2.31)

SAMHSA is finalizing the consent requirements in this section, with certain modifications as described in greater detail below. In summary, SAMHSA is adopting all proposed changes to § 2.31 except for two at this time. In the “From Whom” section of the consent requirements (§ 2.31(a)(2)), SAMHSA decided not to finalize its proposal to remove the general designation option, but did make minor updates to the terminology in the current (1987) regulatory text. As explained in greater detail below, the final “From Whom” provision of the consent requirements specifies that a written consent to a disclosure of part 2 information must include the specific name(s) or general designation(s) of the part 2 program(s), entity(ies), or individual(s) permitted to make the disclosure. SAMHSA also decided not to finalize the proposed requirement that a part 2 program or other lawful holder of patient identifying information obtain written confirmation from the patient that they understand the terms of the consent.

SAMHSA has revised the section heading from “Form of written consent” to “Consent requirements.” SAMHSA also made revisions to the two other sections of the consent form requirements: the “To Whom” section and the “Amount and Kind” section. SAMHSA also revised § 2.31 to require a part 2 program or other lawful holder of patient identifying information to include on the consent form that patients, when using a general designation in the “To Whom” section of the consent form, have the right to obtain, upon request, a List of Disclosures (*see* § 2.13). In addition, SAMHSA revised § 2.31 to permit electronic signatures to the extent that they are not prohibited by any applicable law.

1. General Comments on Consent Requirements

a. General

Public Comments

SAMHSA received many comments on the proposed rule’s updated consent requirements. Some commenters generally supported the new consent requirements. Other commenters listed various reasons for their support, including increased facilitation of informed patient decisions, increased patient choice with regard to protection of their health information, and increased sharing of health care records among providers. One commenter supported the use of paper and electronic forms of written consent.

Many commenters, however, expressed general opposition to the proposed consent requirements. Several commenters argued that the proposed rule created unnecessary burdens for providers, such as staff training, constant updates to consent forms, and expensive updates to provider EHRs. Several commenters argued the proposed consent rules would create obstacles to information sharing and integrated care. Specifically, a commenter argued that the “To Whom” and “From Whom” format restricts who within organizations can view a patient’s records, further hampering coordinated care. Another commenter argued that the proposed consent form requirements would make it difficult for many HIEs to exchange part 2 information, and that the new requirements do little to promote a patient’s informed consent. A couple of commenters argued that the proposed regulations would reduce access to substance use disorder treatment being added by general health care organizations, due to administrative burden and liability fears. General health care providers are less likely to add substance use disorder treatment, or partner or undertake projects with substance use disorder treatment providers. Another commenter stated this rule may result in providers not screening patients for substance use disorders and not documenting substance use disorder related information.

According to a few commenters, the current part 2 regulations exceed the statutory requirements that led to the regulations. One commenter suggested that 42 U.S.C 290dd–2 requires consent to share information and does not allow any shared information to be used for prosecution. The commenter goes on to state that nothing in Title 42, U.S.C. 290dd–2 requires an explicit description

of what information can be released, or requires time limits on consent. The commenter suggested that SAMHSA could reduce confusion and administrative burden by proposing revisions that are much more consistent with HIPAA than its current proposal.

SAMHSA Response

Regarding the comments on statutory authority, we do not agree that the regulations in 42 CFR part 2 exceed the authority provided for in 42 U.S.C. 290dd–2. The statute specifies that patient identifying information may be disclosed in accordance with prior written patient consent, “but only to such extent under such circumstances, and for such purposes as may be allowed under regulations prescribed” by the Secretary.

Regarding concerns about unnecessary burdens for providers, such as staff training, constant updates to consent forms, and expensive updates to provider EHRs, these burdens might be offset by the benefits of increased in flexibility in the consent requirements. With respect to obstacles to information sharing, one of SAMHSA’s goals for this rulemaking is to ensure that patients with substance use disorders have the ability to participate in and benefit from new integrated health care models without fear of putting themselves at risk of adverse consequences.

Public Comments

Some commenters stressed that consent forms should be easy to read, accessible to limited English proficiency patients, and should meet HIPAA’s plain language requirements. Commenters stated that language and literacy concerns could be barriers to actual understanding of the form’s contents. Similarly, suggesting that SAMHSA take into account the reading level standards in other health programs, including Medicare and Medicaid, one commenter asserted that the proposed regulations do not provide adequate options for an individual to easily and simply determine who can or cannot access their substance use disorder records.

SAMHSA Response

SAMHSA agrees with the commenters that the consent form should be written clearly so that the patient can easily understand the form. SAMHSA is considering issuing subregulatory guidance in the future to provide examples of forms that comply with the basic consent requirements in 2.31(a). In addition, SAMHSA encourages part 2 programs to be sensitive to the cultural and linguistic composition of their

patient population when considering whether the consent form should also be provided in a language(s) other than English (e.g., Spanish).

b. Consent Form Validity Period

Public Comments

Several commenters stated that a two-year time limit for the validity of consent is insufficient, with some commenters suggesting that consent forms be valid indefinitely or until death. For example, one commenter asked why SAMHSA would deny a person who has received substance use disorder treatment the right to decide that they want any and all information regarding their treatment shared with any and all of their health care providers indefinitely as needed for coordination of care. Another commenter stressed the language of § 2.31(a) was confusing and requested clarification on the permissible length of time a consent is valid.

SAMHSA Response

Under § 2.31, a part 2-compliant consent form must list the date, event, or condition upon which the consent will expire, if not revoked before. Thus, it is not sufficient under part 2 for a consent form to merely state that that disclosures will be permitted until the consent is revoked by the patient. It is, however, permissible for a consent form to specify the event or condition that will result in revocation, such as having its expiration date be “upon my death.” The rule does not set a two-year time limit for consents, as some commenters thought.

c. Technical Challenges to Proposed Consent Requirements

Public Comments

Commenters expressed concern about the technical challenges providers would face in complying with the proposed consent requirements. Generally, commenters expressed concern that few, if any, EHR systems and/or HIEs have the capability to segregate substance use disorder patient information in a way that could fully support the rule by reflecting the patient's consent choices, and many providers would have to expend significant amounts of funds to create or acquire a compliant system. Commenters argued that if providers do not have data segmentation capability, they may simply exclude substance use disorder patient data from their systems, thus adversely impacting system integration and patient care.

A couple of commenters asserted that EHR, HIE, and other electronic records

systems have no way of selecting different levels of consent for treating providers. Specifically, a commenter stated that SAMHSA should remove requirements for varied levels of consent within a given organization (e.g., between departments or individuals), instead limiting such variation to HIEs that share information between or across organizations. A commenter stated that it is not feasible to do individual exclusionary consents in an HIE, especially for an entity that has thousands of employees across multiple states.

A commenter stated that providers in an integrated care network may be precluded from performing important quality improvement checks because no set of clinically integrated network officials can be expected to have a direct treatment relationship with every patient in the large data pools necessary to drive these important public health efforts.

A commenter stated that the confidentiality of a substance use disorder patient's information should not be compromised if some electronic systems were poorly designed and without regard for part 2. Similarly, another commenter stated that technology should be regarded as a tool and should not diminish a patient's privacy rights.

SAMHSA Response

SAMHSA acknowledges the concerns regarding technical challenges to the consent requirements and data segmentation more broadly. As stated above, SAMHSA has played a significant role in encouraging the use of health IT by behavioral health (substance use disorders and mental health) providers and towards minimizing technical burdens through a variety of activities. SAMHSA actively participates in the development and stewarding of data standards to promote data segmentation and interoperability. Specifically, the Data Segmentation for Privacy (DS4P) initiative within ONC's Standards and Interoperability (S&I) Framework facilitated the development of standards to improve the interoperability of EHRs containing sensitive information that must be protected to a greater degree than other health information due to 42 CFR part 2 and similar state laws. The DS4P standards were used in several pilot projects, including the Department of Veterans Affairs (VA)/SAMHSA Pilot, which implemented all the DS4P use cases and passed all conformance tests; and SAMHSA's Opioid Treatment Program (OTP) Service Continuity Pilot that connected OTPs to an HIE to

facilitate continuity of care during disasters or other unexpected disruptions in service. Additionally, DS4P standards were adopted in ONC's 2015 Edition final rule (80 FR 62702, Oct. 16, 2015) as part of the 2015 Edition Health IT Certification Criteria (2015 Edition). See 45 CFR 170.315(b)(7) and (8). SAMHSA has also supported the development of the application branded Consent2Share, an open-source health IT solution based on DS4P, which assists in consent management and data segmentation and is currently being used by the Prince Georges County (Maryland) Health Department to manage patient consent directives while sharing substance use disorder information with an HIE. SAMHSA is currently updating Consent2Share, slated for release in late 2016, with the aim that its streamlined data stack and improved functionality will lower barriers to implementation in the field. SAMHSA is considering issuing subregulatory guidance in the future to address other technical solutions to complying with the regulation.

Regarding the comment that it is not feasible to do individual exclusionary consents in an HIE, the HIE does not have to give the patient the option to do individual level consent. SAMHSA has provided more flexibility in the consent provisions in an effort to ensure that patients with substance use disorders have the ability to participate in and benefit from new integrated health care models while, at the same time, maintaining core confidentiality protections.

d. Requests for Exemptions and Exceptions

Public Comments

Several commenters requested various exemptions or exceptions from the part 2 consent requirements, including a public health exception similar to that of the HIPAA Privacy Rule (see <http://www.hhs.gov/hipaa/for-professionals/special-topics/public-health/index.html>), an exemption for CCOs who have a treating relationship with a patient, an exemption for ACOs who have integrated delivery systems, an exception for state health data organizations that collect data under legislative authority and collection of substance use disorder data by state agencies, and in instances where part 2 data may be used to improve patient care coordination, ensure interoperability, and ensure patient safety. One commenter requested an exception for care coordination purposes for valid and vital clinical reasons.

Regarding § 2.20 (Relationship to state laws), a commenter said SAMHSA should include an exception under part 2, subpart D (Disclosures Without Patient Consent) allowing disclosures of substance use disorder treatment information based on state laws that authorize or compel such disclosures (e.g., for public health or medical assistance reasons). Another commenter, noting the role of multi-payer claims databases or MPCDs (also known as all payer claims databases (APCDs)), suggested that SAMHSA add a new section to include state health data organizations that collect data under a legislative authority, reasoning that these states have decades of experience in collecting and managing sensitive data with strict legal and policy controls.

A commenter said SAMHSA should permit oral consent with documentation and specific information to be shared.

SAMHSA Response

SAMHSA appreciates the perspectives expressed by those who seek additional exceptions or exemptions from part 2 consent requirements, as well as the suggestion that SAMHSA permit oral consents that are documented in writing.

The part 2 underlying statute, 42 U.S.C. 290dd-2, and this rule require a written patient consent to disclose part 2 information unless the disclosure is otherwise permitted under the part 2 statute or regulations. The statute, for instance, does not provide a general exception to the consent requirement for the purpose of sharing information with public health officials. In certain circumstances, disclosures of part 2 information may be authorized by court order to protect against an existing threat to life or of serious bodily injury (see § 2.63, Confidential communications) or to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained (see § 2.51, Medical emergencies). SAMHSA may in the future consider issuing subregulatory guidance to further describe medical emergencies under § 2.51 and how such emergencies may relate to public health emergencies declared at the federal, state, local, and/or tribal levels. SAMHSA does not, however, have the statutory authority to authorize routine disclosure of part 2 information for public health reporting, surveillance, investigation or intervention purposes.

With respect to § 2.20 (Relationship to state laws), in the proposed and final rules SAMHSA maintains current language regarding preemption. As

discussed above, SAMHSA cannot develop a new general exception for public health or medical assistance purposes in light of the statute. Likewise, SAMHSA cannot develop a specific new exception for APCDs (hereinafter referred to as MPCDs). The role of MPCDs is discussed in the section of this preamble concerning research (§ 2.52). SAMHSA disagrees with the recommendations to consider a specific exemption to the consent requirements for ACOs that have integrated delivery systems, except as described in § 2.53 for the purposes of audits and evaluations. Similarly, SAMHSA is not accepting the suggestion to provide a specific exemption from the part 2 consent requirements for CCOs that have a treating provider relationship with a patient (*i.e.*, that meet the definition of having a treating provider relationship with the patient whose information is being disclosed). SAMHSA believes that the final changes to the consent requirements will facilitate care coordination and information exchange. Improving the quality of substance use disorder care depends on effective collaboration of mental health, substance use disorder, general health care, and other service providers in coordinating patient care. However, the composition of a health care team varies widely among entities. Because SAMHSA wants to ensure that patient identifying information is only disclosed to those individuals and entities on the health care team with a need to know this sensitive information, we are limiting a general designation in the "To Whom" section of the consent requirements to those individuals or entities with a treating provider relationship. Patients may further designate their treating providers as "past," "current," and/or "future" treating providers. In addition, the consent form can include multiple authorizations in the "To Whom" section. A consent may allow a patient to designate, by name, one or more individuals with whom they do not have a treating provider relationship, that they authorize to receive or access their health care data.

While we are not establishing specific additional exemptions or exclusions from the consent requirements at this time in response to commenters' suggestions, in light of the longstanding role that contractors and subcontractors play in the health care system and their handling of part 2 data, we are issuing an SNPRM related to lawful holders' use of contractors and subcontractors.

e. Commenter Recommendations

Public Comments

Some commenters said SAMHSA should expand the list of persons who could view the patient's medical record without the patient's written consent to include clergy, social workers, psychologists and family members if in their professional opinion they were necessary for the patient's recovery and progress. Another commenter recommended expanding the list to include all types of professionals involved in the treatment of individuals receiving substance use treatment into the respective definitions, including those employed in social services that are members of the treatment team.

SAMHSA Response

The definition of "treating provider relationship" is sufficiently broad to cover the necessary components of a patient's care team. The statute, 42 U.S.C. 290dd-2, does not provide an exception to the consent requirement for the purpose of sharing information with family members. Part 2, therefore, requires a part 2-compliant consent to disclose patient identifying information unless disclosure is otherwise permitted under the statute or regulations.

Public Comments

Many commenters said SAMHSA should provide a sample consent form. Some commenters stated that any sample consent form should not be mandated to allow stakeholders flexibility.

SAMHSA Response

SAMHSA may, after publication of this rule, issue subregulatory guidance that includes a sample consent form that meets the specifications of the final rule. SAMHSA has never and has no intention of mandating the use of a specific consent form.

Public Comments

Several commenters generally supported the use of electronic signatures. Several commenters only supported electronic signatures when also authorized under state law. A couple of commenters requested guidance on what steps the provider would need to take to verify identity, provide the required prefatory information and to obtain a substance use disorder patient's electronic signature. A commenter requested guidance from SAMHSA on the areas modified by SAMHSA. A commenter said SAMHSA should identify the signatory and enforceability

consideration of electronic consent through reference to other laws.

SAMHSA Response

Because there is no single federal law on electronic signatures and there may be variation in state laws, SAMHSA recommends that stakeholders consult their attorneys to ensure they are in compliance with all applicable laws.

Public Comments

Some commenters made recommendations for patient privacy protection. One commenter noted that the use of secure, certified health IT, networks, and devices, especially for the transmission of patient records, does not appear to be included in the proposed provisions. Another commenter said meaningful consents could only be achieved by adding statements that inform the patient of the unprecedented risks of making highly sensitive substance use disorder information accessible throughout integrated health care systems or electronic health

information systems that cannot be made secure.

A commenter stated the proposed rule did not address revocation or refusal of consent. Similarly, another commenter recommended adding language that makes clear that revocation of consent prevents unauthorized access but does not remove the information from the electronic record.

SAMHSA Response

Section 2.16 addresses security for records and requires formal policies and procedures to reasonably protect against unauthorized use and disclosures of patient identifying information and to protect against reasonably anticipated threats or hazards to the security of patient identifying information. Whereas this provision does not specifically address the use of certified health IT networks, and devices, they may be used as long as the requirements of section 2.16 are met. Regarding revocation of consent, § 2.31(a)(6) requires: “A statement that the consent

is subject to revocation at any time except to the extent that the part 2 program or other lawful holder of patient identifying information that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer.” To the extent an individual refuses to consent to the disclosure of their patient identifying information, part 2 prohibits such disclosure unless otherwise permitted under the statute or regulations (*e.g.*, audit or evaluation, or scientific research).

2. To Whom

SAMHSA is adopting this aspect of the proposal. SAMHSA has moved the former § 2.31(a)(2), “To Whom” provision, to § 2.31(a)(4). The following table provides an overview of the options permitted when completing the designation in the “To Whom” section of the consent form.

TABLE 1—DESIGNATING INDIVIDUALS AND ORGANIZATIONS IN THE “TO WHOM” SECTION OF THE CONSENT FORM

42 CFR 2.31	Individual or entity to whom disclosure is to be made	Treating provider relationship with patient whose information is being disclosed	Primary designation	Required additional designation
(a)(4)(i)	Individual	Yes	Name of individual(s) (<i>e.g.</i> , Jane Doe, MD).	None.
(a)(4)(i)	Individual	No	Name of individual(s) (<i>e.g.</i> , John Doe)	None.
(a)(4)(ii)	Entity	Yes	Name of entity (<i>e.g.</i> , Lakeview County Hospital).	None.
(a)(4)(iii)(A)	Entity	No	Name of entity that is a third-party payer as specified under § 2.31(a)(4)(iii)(A) (<i>e.g.</i> , Medicare).	None.
(a)(4)(iii)(B)	Entity	No	Name of entity that is not covered by § 2.31(a)(4)(iii)(A) (<i>e.g.</i> , HIE, or research institution).	At least one of the following: 1. The name(s) of an individual participant(s) (<i>e.g.</i> , Jane Doe, MD, or John Doe). 2. The name(s) of an entity participant(s) with a treating provider relationship with the patient whose information is being disclosed (<i>e.g.</i> , Lakeview County Hospital). 3. A general designation of an individual or entity participant(s) or a class of participants limited to those participants who have a treating provider relationship with the patient whose information is being disclosed (<i>e.g.</i> , my current and future treating providers).

If a general designation is used, the entity must have a mechanism in place to determine whether a treating provider relationship exists with the patient whose information is being disclosed. Patients may further designate their treating providers as “past,” “current,” and/or “future” treating providers. In addition, a patient may designate, by name, one or more individuals on their health care team with whom they do not have a treating provider relationship.

a. General

Public Comments

Several commenters generally agreed with the proposed “To whom” section of the consent requirements, stating that it allows patients to disclose substance use disorder information to past, current, or future treating providers; would improve information and data sharing for health care, especially for entities that are continually adding new members; allow patients to remain in

control of their substance use disorder information and understand who had access to their data. One commenter supported the express permission to designate the name of the entity for third-party payers that require patient identifying information for purposes of reimbursement of services rendered to the patient.

Many commenters offered general support for the proposed rule’s general designation. Some commenters stated that the general designation creates a

balance between patient privacy and operational functions, facilitates internal communication within an integrated delivery system, streamlines the consent process, reduces administration burdens, creates new flexibility, may help facilitate increased behavioral health participation in some HIEs around the country, and would help improve the quality and continuity of care within integrated delivery models. A commenter supported the expansion of the use of a general designation when there is a treating provider relationship, but said it is unworkable to require an updated consent form every time new entities are added to the “umbrella” consent.

Some commenters generally disagreed with the proposed “To Whom” provision of the consent requirements. Several commenters argued that the proposal was burdensome, would create additional complexity, would reduce information sharing, and would not improve patient privacy protections or facilitate informed consent. Commenters stated it is unnecessary and impractical to require the consent form to name every HIE and other intermediaries that may assist in transmitting or providing access to the patient’s information. A couple of commenters stated the proposed rule would restrict the ability of patients to specifically name an entity or to authorize part 2 programs to send their information to entities that do not have a treatment relationship [treating provider relationship]. Another commenter said the regulatory preface mentions a number of very specific drivers of this purported need for broader sharing (such as HIEs), but the regulatory language itself contains no such limitation and offers HIE only as an illustrative example.

Many commenters specifically did not support the general designation in the “To Whom” section. Some commenters claimed that the proposal presumes each person entering a treatment process has the ability to understand the longer-term consequences, or that substance use disorder patients, who are under tremendous stress, would simply choose the general designation because it was easiest. A commenter said the general designation does not guarantee that a HIE or other organizations will send all patient data, which could be a critical source of information in the case of an emergency.

SAMHSA Response

A patient may consent to designate, for example, an HIE (an entity that does not have a treating provider relationship with the patient whose information is being disclosed) and “all my treating

providers” (a general designation of an individual or entity participant(s) or a class of individual or entity participants that must be limited to a participant(s) who has a treating provider relationship with the patient whose information is being disclosed). Using the same concept, an ACO, pursuant to a general designation, may disclose information described in the “Amount and Kind” section of a consent form (explained further in 3. Amount and Kind) to “all my entity treating providers.” If a general designation is used, the entity must have a mechanism in place to determine whether a treating provider relationship exists with the patient whose information is being disclosed (e.g., an attestation). In the HIE and ACO examples above, the entity that does not have a treating provider relationship with the patient whose information is being disclosed and serves as the intermediary may not further disclose the patient identifying information except to those providers who have a treating provider relationship with the patient whose information is being disclosed that can be verified by the intermediary. The prohibition on re-disclosure notice must be provided with the disclosure because it also applies to the treating provider(s) who receive the information from the entity that serves as an intermediary. In addition, a copy of the part 2-compliant consent form or the pertinent information on the consent form necessary for the treating provider(s) to comply with the signed consent should be provided with the disclosure.

The patient retains the ability to name only specific individuals or entities to whom their records will be disclosed. Patients have the option to use a general designation to designate entities with which they have a treating provider relationship, but are not required to do so. Although SAMHSA received comments suggesting that the proposed rule makes it more difficult to disclose necessary information to an organization that does not have a treating provider relationship with the patient whose information is being disclosed other than a 3rd party payer, the commenters did not provide examples of such entities. The final rule permits the “To Whom” section of the consent form to designate disclosure of information to an entity that does not have a treating provider relationship with the patient whose information is being disclosed, as long as the consent also includes one of three options specified in § 2.31(a)(4)(iii)(B), for example, include the name(s) of an individual participant(s).

If the patient designates all my current treating providers, and another of the patient’s treating providers becomes a participant in the entity that does not have a treating provider relationship with the patient and serves as the intermediary, a new consent form would not be required. For example, if a patient designates an HIE (an entity that does not have a treating provider relationship with the patient whose information is being disclosed and serves as an intermediary) and “my current treating providers,” and subsequently another of the patient’s treating providers becomes a participant in the HIE, a new consent form would not be required. In addition, more than one HIE or other intermediary may be listed on the consent form. With respect to burden, SAMHSA acknowledges that there may be burdens associated with the revised consent requirements. SAMHSA made these changes based on comments from stakeholders in the field and SAMHSA strongly believes that the changes to “To Whom” will increase flexibility for patients and providers.

b. Determination of Treating Provider Relationship

Public Comments

A commenter agreed with SAMHSA’s suggestion that entities must have an established mechanism for determining whether a treating provider relationship exists. However, several commenters stated that determining who has a treating provider relationship would be difficult. Commenters expressed concern that entities do not currently have mechanisms in place to determine whether a treating provider relationship exists with the patient whose information is being disclosed. Another commenter asked how an HIE would be able to determine which participants have a past/present/future treating provider relationship with the patient. A commenter stated that creating this mechanism would require additional resources and would discourage entities from sharing necessary data. Another commenter recommended a provision that exempts the provider from liability when relying in good faith on an attestation or representation from an outside treating provider.

Several commenters expressed concern that once a consent reflecting a general designation of recipients with a treating provider relationship has been executed and relied upon by the part 2 program, there is no method by which the program can ensure that the recipients are properly authenticated by the HIE or research institution. Commenters suggested the proposed

rule should specify that the HIE, ACOs, CCOs or research institution, as well as the recipient that has a treating provider relationship with the patient, be responsible for ensuring that the recipient is actually a treating provider and that the disclosure is appropriate under part 2.

A commenter requested clarification on whether care managers would be included as having a “treating provider relationship.” Another commenter requested clarification as to whether care coordinating entities that have a treating provider relationship may assign additional designees under the general designation (*e.g.*, treatment providers with different levels of care or recovery services).

Commenters recommended the language in the “To Whom” clause state “my treating providers” or “my service providers.” A commenter recommended “my substance use disorder providers” or “my treating providers except Dr. John Doe.” Another commenter recommended “my treating providers and transferring HIEs”

SAMHSA Response

Although SAMHSA understands the concerns about further clarifying when an entity is considered a treating provider, it respectfully declines to provide more specificity in the final rule than was included in the NPRM. The arrangements between treating providers and other entities evolve too rapidly to be comprehensively addressed in regulations. Although, SAMHSA has not revised the proposed text, SAMHSA may provide additional subregulatory guidance in the future if further clarification is needed. In addition, only individuals and entities that meet the definition of having a treating provider relationship with a patient are considered treating providers. The determination is fact-specific. Consistent with the NPRM, SAMHSA continues to encourage innovative solutions to implement this provision. For example, an HIE could have a policy in place requiring their participant providers to attest to have a treating provider relationship with a patient, or provide a patient portal where patients designate their treating providers.

c. Requests for Clarification

Public Comments

Some commenters requested clarification regarding the patient’s role in consent, including the patient’s ability to alter their consent, how patients can authorize disclosures to non-health entities other than third-

party payers, and what the impact would be if a patient failed to designate past, present, and future disclosures. One commenter stated that, if a patient designates an entity without a treating provider relationship and “my treating providers” without further specifying “past, present, or future,” it should be assumed that the intent is to designate “current” treating providers.

SAMHSA Response

Patients may designate on the consent form a specific individual(s) with whom they either have or do not have a treating provider relationship and/or a specific entity(-ies) with whom they have a treating provider relationship. Consents for disclosures to entities that do not have a treating provider relationship (other than third-party payers) require at least one of the following: (1) The name(s) of an individual participant(s); (2) the name(s) of an entity participant(s) that has a treating provider relationship with the patient whose information is being disclosed; or (3) a general designation of an individual or entity participant(s) or a class of participants that must be limited to a participant(s) who has a treating provider relationship with the patient whose information is being disclosed.

If a patient uses a general designation and lists “my treating providers” without further specifying “past, current, or future,” it should be presumed that the intent is to designate “current” treating providers. Finally, a patient can revoke a consent at any time, except to the extent that the part 2 program or other lawful holder of patient identifying information that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer.

Public Comments

Other commenters requested clarification regarding entity roles, including whether a CCO can request a single consent for multiple purposes (*e.g.*, care coordination, treatment, and payment); whether providers need to maintain the variety of forms to meet the requirements of § 2.31(a)(4); what limitations (if any) would be placed on HIE entities or research institutions using substance use disorder information received via the new consent process, specifically whether the disclosure would not be limited to treatment purposes; and whether an HIE-to-HIE disclosure is permissible and, if so, for what purposes. A few

commenters asked whether it would be permissible to list multiple HIEs on a consent form. Similarly, another commenter recommended SAMHSA adopt a broad definition of an HIE to allow a “network of networks,” such as the statewide health information network to be considered an HIE. A commenter requested clarification as to whether 42 CFR part 2 information can flow through other HIEs not designated on the consent form to transfer the information to the recipient.

A few commenters requested clarification on how the proposed changes would impact multi-party consent forms that allow disclosure “among and between” all the parties listed on the form. Similarly, a commenter requested clarification regarding the “To Whom” and “From Whom” definitions and how they would apply between two providers to whom a patient has independently given consent to receive information, urging that the definitions be general and consistent so that they allow for bi-directional flow of information.

A commenter said SAMHSA should clarify that the provision of general consent to disclosure of substance use disorder treatment also applies to disclosure of information between those responsible for treatment in the community and those responsible for treatment in correctional settings.

SAMHSA Response

Under the changes to the consent requirements, an entity that does not have a treating provider relationship with the patient may further disclose, with a part 2-compliant consent, to a named individual who does not have a treating provider relationship with the patient.

Section 2.31(a)(4) of the consent requirements may be completed with one or more recipients. Section 2.31(a)(5) of the consent requirements requires that the consent form include the purpose of the disclosure. Part 2 allows the use of a single consent form authorizing the disclosure of part 2 patient information to different recipients for different purposes. However, part 2 also requires a consent form to specify the amount and kind of information that can be disclosed, including an explicit description of the substance use disorder information that may be disclosed, to each of the recipients named in the consent. The amount of information to be disclosed “must be limited to that information which is necessary to carry out the purpose of the disclosure (*see* § 2.13(a)). This will vary depending on the different purposes for which different

recipients are being allowed to access or receive the information. Thus the consent form would have to be structured to make it clear what information may be given to each of the recipients, and for which purposes.

Disclosure of patient identifying information made with the patient's written consent must be accompanied by a written notice regarding the prohibition on re-disclosure (*see* § 2.32). This notice informs them that 42 CFR part 2 prohibits the recipients of the patient identifying information from re-disclosing it to any individual or organization not specified in the consent form unless otherwise permitted under the part 2 statute or regulations.

The rule includes an additional patient safeguard, in which patients who have included a general designation in the "To Whom" section of their consent form (*see* § 2.31) must be provided, upon request, a list of entities to which their information has been disclosed pursuant to the general designation.

With respect to multi-party consent, SAMHSA is not finalizing the "From Whom" provision (2.31(a)(2)) as proposed for the reasons discussed in 4. "From Whom." Therefore, consents may authorize disclosures "among and between" the parties designated in the "To Whom" and "From Whom" sections of the consent form.

Public Comments

Some commenters requested clarification regarding aspects of the "To Whom" provision, such as what would happen if a person does not want to give a general designation; how the process of designating past, present, and future treating providers would work in practice; whether a Performing Provider System (PPS) could be assigned in the "To Whom" section of the consent form; and whether a health care organization would be an appropriate entity to be named for disclosure.

With regard to third-party payers, a commenter asked whether a general designation for third-party payers could be used for other purposes, such as care coordination, population health, or other services that may fall under the definition of health care operations within the meaning of HIPAA. Some commenters recommended that third-party payers should not have to be listed in the "To Whom" section of the consent form.

SAMHSA Response

With regard to third-party payers, the regulations require written consent for disclosure of patient identifying

information to third-party payers. The statute does not provide an exception to this consent requirement. However, with respect to patients who have both a substance use disorder and a mental illness, § 2.15 of the regulations states that, in the case of a patient, other than a minor or one who has been adjudicated incompetent, that for any period suffers from a medical condition that prevents knowing or effective action on their own behalf, the part 2 program director may exercise the right of the patient to consent to a disclosure under subpart C of this part for the sole purpose of obtaining payment for services from a third-party payer. In addition, in the case of minor patients, § 2.14 of the regulations states the regulations do not prohibit a part 2 program from refusing to provide treatment until the minor patient consents to the disclosure necessary to obtain reimbursement, but refusal to provide treatment may be prohibited under a state or local law requiring the program to furnish the service irrespective of ability to pay.

If an individual does not want to use a general designation, they have several other options, which are enumerated in § 2.31(a)(4) of this final rule.

If a patient does not designate "current, past, and/or future" treating provider(s), the presumption is that the patient means "current treating provider(s)." SAMHSA may, after publication of this final rule, also provide further clarification on this process of designating past, present, and future treating providers in subregulatory guidance.

Whether a PPS or a health care organization may be listed in the "To Whom" section of the consent form depends upon whether they have a treating provider relationship with the patient whose information is being disclosed. If an entity does have a treating provider relationship with the patient, the entity name may be listed on the consent (*see* § 2.31(a)(4)(ii)). However, if the entity does not have a treating provider relationship with the patient whose information is being disclosed, and is not a third-party payer, the entity name may be listed on the consent form as long as one or more of the following is also listed: (1) The name(s) of an individual participant(s); (2) the name(s) of an entity participant(s) that has a treating provider relationship with the patient whose information is being disclosed; or (3) a general designation of an individual or entity participant(s) or a class of participants that must be limited to those participants who have a treating provider relationship with the

patient whose information is being disclosed.

SAMHSA plans to address issues concerning third-party payer use and disclosure of part 2 information in greater detail in an SNPRM.

d. Commenter Recommendations

Public Comments

Commenters recommended more flexibility in the "To Whom" section. Commenters recommended that SAMHSA expand the general designation to include all of the various participants in the modern health care system and their respective activities: Providers, care managers, health plans and ACOs, MCO services, CCOs, and similar integrated health care networks. One commenter said the general designation should include those who do not have a treating provider relationship with the patient but who/which require access to the patient's information solely in relation to fulfilling a specific function for the benefit of the individual or entity that has the treating provider relationship with specific patients. Another commenter requested that SAMHSA allow patients to generally consent to disclose information to any company assisting in processing their insurance claims. Another commenter suggested that patients be able to name as many treating providers as they wish under the general designation. One commenter said patients should be permitted to provide a generalized consent for all of their previous providers to disclose information. One commenter said generic consent (*i.e.*, disclosure through an HIE) is all that should be required because SAMHSA has previously provided guidance that HIEs may have access to part 2 information under a QSO agreement without patient consent. A commenter said the rule should allow for the general designation of certain types of non-treating providers, rather than require a listing of the name of each entity.

In contrast, other commenters suggested increased limitations on the "To Whom" designation. A commenter proposed excluding health information networks and health information organizations (HIOs) from being specifically identified on patient consent form because they are not true recipients of patient health information and simply facilitate electronic exchange of information. One commenter recommended that SAMHSA preserve the patient's right of consent to disclosures only to specifically identified practitioners

involved in their mental health treatment.

Regarding third-party payers, several commenters recommended allowing third-party payers to act as intermediaries for purposes of sharing substance use disorder information, allowing them to share information with all of the patient's treating providers. Another commenter requested general designation for third-party payers. To accommodate the operational realities of Medicaid, a commenter stressed that the rule should explicitly provide that consent to disclose covered data to Medicaid constitutes consent to release such data to Medicaid or to the payer's contracted entity (e.g. the MCO) to apply to both entities as a third-party payer. Similarly, another commenter recommended that the rule consider a designation to the name of the state agency, the MCO, or simply Medicaid as consent that applies to the state and its contracted delivery system, reasoning that not all Medicaid beneficiaries understand their health care system.

SAMHSA Response

SAMHSA acknowledges the commenters' concerns related to the recommendations above. SAMHSA has concluded that the proposed changes to the consent requirements would facilitate care coordination and information exchange. Improving the quality of substance use disorder care depends on effective collaboration of mental health, substance use disorder, general health care, and other service providers in coordinating patient care. However, the composition of a health care team varies widely among entities. Because SAMHSA wants to ensure that patient identifying information is only disclosed to those individuals and entities on the health care team with a need to know this sensitive information, we are limiting a general designation to those individuals or entities with a treating provider relationship. Patients may further designate their treating providers as "past," "current," and/or "future" treating providers. In addition, a patient may designate, by name, one or more individuals on their health care team with whom they do not have a treating provider relationship. SAMHSA clarifies that a QSO can be used to share part 2 information with the HIE when the HIE is a service provider to the part 2 program, but the QSO cannot be used to share information with the members of an HIE without patient consent.

As for third-party payers and others, SAMHSA must balance the need for and benefits of care coordination with the need for consent and the requirements of the part 2 governing statute.

SAMHSA declines to adopt commenter recommendations to allow third-party payers to serve as intermediaries that could share information with all the patient's treating providers because we conclude that the "To Whom" consent requirements are sufficiently broad to cover the necessary components of a patient's care team. For purposes of payment-related activities, to the extent that federal or state law authorizes or requires that the Medicaid or Medicare agency or program share data or enter into a contractual arrangement or other formal agreements to do so, consent to disclose patient identifying information to the agencies or programs (as a third-party payer) under section 2.31(a)(4)(iii)(A) is considered to extend to the contractors and subcontractors of the agencies or programs.

Commenters have provided SAMHSA with informative feedback on how lawful holders, including third-party payers and others within the healthcare industry, use health data or hire others to use health data on their behalf to provide operational services such as independent auditing, legal services, claims processing, plan pricing and other functions that are key to the day-to-day operation of entities subject to this rule. Those comments indicate that there may be varying interpretations of the part 2 rule's restrictions on lawful holders and their contractors' and subcontractors' use and disclosure of part 2-covered data for purposes of carrying out payment, health care operations, and other health care related activities. In consideration of this feedback and given the critical role third-party payers, other lawful holders, and their contractors and subcontractors play in the provision of health care services, SAMHSA is issuing an SNPRM to seek further comments and information on this matter before establishing any appropriate restrictions.

Public Comments

Instead of listing organizations in the "To Whom" section, a commenter recommended that a consent form should specify the reasons for disclosure (e.g. care coordination, management of benefits).

SAMHSA Response

In addition to the "To Whom" section, the consent form is required to include how much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed. In addition, the consent form must include the purpose of the disclosure. All the required elements

must be included on the consent form. SAMHSA declines to make the suggested change to allow the "Purpose" of the consent to dictate the recipients of the patient identifying information. The intent of SAMHSA's approach to the "To Whom" section of the consent form is to provide the patient options for the degree to which they will be able to identify, at the point of consent, who they are authorizing to receive their information.

Public Comments

A commenter stated that SAMHSA should explicitly recognize and include health plan care services, such as managed care, care coordination, case management and other integrated care activities as part of the required elements for written consent for entities that do not have a treating provider relationship with the patient under proposed § 2.31(a)(4)(iv).

A commenter stated any privacy concerns could be fixed by requiring (1) a general designation of a class of participants with a treating provider relationship; and (2) that the disclosing organization provide patients, upon request, a list entities to which their information has been disclosed.

A commenter proposed that § 2.31(a)(4) be revised to allow a general designation to be used whenever there is a "treating provider relationship" or a "care management relationship." The commenter stated the "care management relationship" should be defined to include the concepts of assistance in obtaining appropriate care, care coordination, and assistance in the implementation of a plan of medical care.

A couple of commenters suggested SAMHSA revise proposed § 2.31(a)(4)(iv)(C) to read: ". . . to a participant(s) who has a treating provider relationship with the patient at the time the disclosure is made." (Note, the relevant text is now found at § 2.31(a)(4)(iii)(B)(3) due to renumbering of the final regulation.) The commenters stated this would make it clear that participants who develop a treatment relationship with the patient after the date the consent can gain access.

Commenters recommended that the general authorization mirror the authorization under HIPAA to ease the transition and reduce compliance issues.

A commenter recommended SAMHSA work with other federal entities that are exploring parity enforcement to ensure that the proposed rule changes would not create barriers for states working on enforcement of the parity law.

If a patient notes their information may be shared with current and future health care providers, one commenter said the specific name of the ACO or other provider should not be required.

SAMHSA Response

SAMHSA declines to explicitly recognize and include health plan care services, such as managed care, care coordination, case management and other integrated care activities as part of the required elements for written consent for entities that do not have a treating provider relationship with the patient under proposed § 2.31(a)(4)(iv), or broaden the “treating provider relationship” to also include a “care management relationship.” The definition of “Treating provider relationship” is sufficiently broad to cover the necessary components of a patient’s care team.

A commenter stated any privacy concerns could be fixed by requiring (1) a general designation of a class of participants with a treating provider relationship; and (2) that the disclosing organization provide patients, upon request, a list of entities to which their information has been disclosed. Another commenter wanted to delete the requirement of naming the entity without a treating provider relationship with the patient whose information is being disclosed. SAMHSA is retaining the consent requirements discussed in this section of the preamble because we believe it balances increased flexibility with necessary privacy protections.

SAMHSA declines to mirror the authorization under HIPAA to ease the transition and reduce compliance issues, as a commenter suggested, because, due to its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA.

SAMHSA may, after publication of this final rule, provide further subregulatory guidance on specific concerns, such as states working on enforcement of the parity law.

Public Comments

Several commenters recommended splitting proposed § 2.31(a)(4)(iv) into two sections. The first would contain special provisions governing disclosures made through HIEs and would retain the references to “individual participants” and “entity participants.” The second would cover all entities that do not fall into any of the other categories in proposed paragraph (a)(4)(iv); in these cases, the specific entity to which disclosure is made would have to be specified.

SAMHSA Response

SAMHSA proposed § 2.31(a)(4)(iv) to apply to an entity (1) that does not have a treating provider relationship with the patient whose information is being disclosed, and (2) is not a third-party payer. Therefore, SAMHSA declines to make the recommended changes. We note, however, that due to re-numbering the proposed § 2.31(a)(4)(iv) provision is found in the final regulation at § 2.31(a)(4)(iii)(B).

Public Comments

A commenter recommended that the use of multi-party consents be permissible even when the “To Whom” section contains a general designation, and that the party(ies) named in the “To Whom” section be permitted to re-disclose patient information if the patient has consented to such re-disclosures in order to allow patients’ treating providers to communicate with each other (pursuant to patient consent) within networks like HIE and integrated care organizations. Another commenter stated that the general designation is a step in the right direction but the proposed rule would add a burdensome accounting, which is not required for disclosures pursuant to a valid authorization under HIPAA.

SAMHSA Response

On the issue of multi-party consent, a multi-party consent can be achieved by allowing for bi-directional communication using the general designation in both the “To Whom” and “From Whom” sections of the consent. It can also be created by naming multiple individuals with or without a treating provider relationship with the patient whose information is being disclosed or entities with a treating provider relationship with the patient whose information is being disclosed in the “To Whom” and “From Whom” sections of the consent. The key is to make sure the consent form authorizes each party to disclose to the other ones the information specified and for the purpose specified, in the consent. The “To Whom” and “From Whom” sections of the consent provisions of the final rule will permit multi-party consents.

With respect to the comment regarding the additional burden of the List of Disclosures associated with the use of a general designation on the consent form, SAMHSA addressed this issue in Section F.3, in the preamble discussion of Confidentiality Restrictions and Safeguards (§ 2.3). That discussion emphasizes the fact that there is no timeframe in which part 2

programs and lawful holders need to comply with the List of Disclosures systems requirements; the final rule only requires that if they choose to disclose information pursuant to a general designation on the “To Whom” part of the consent form, they must also be capable of providing a List of Disclosures upon request per § 2.13(d).

e. Proposed Alternative Approach for “To Whom” Section

SAMHSA is not finalizing the alternative approach to the “To Whom” consent provision. In the NPRM, SAMHSA proposed an alternative approach for the “To Whom” aspect of a consent form that attempted to reflect the same policy goal as the proposed regulation text while attempting to simplify the language that would appear on the consent form. This alternative approach would not change the existing language in the “To Whom” section of the consent form. Under this alternative approach, SAMHSA proposed to add a definition of “organization” to § 2.11. Organization would mean, for purposes of § 2.31, (a) an organization that is a treating provider of the patient whose information is being disclosed; or (b) an organization that is a third-party payer that requires patient identifying information for the purpose of reimbursement for services rendered to the patient by a part 2 program; or (c) an organization that is not a treating provider of the patient whose information is being disclosed but that serves as an intermediary in implementing the patient’s consent by providing patient identifying information to its members or participants that have a treating provider relationship, as defined in § 2.11, or as otherwise specified by the patient.

Public Comments

No commenters expressed support for the proposed rule’s alternative approach to required elements as stated. One commenter said the alternative approach would impose fewer burdens on patients and part 2 entities but did not agree with the restriction on dissemination to only treating entities. Another commenter supported the proposed alternative if it results in only the name of the HIE and not its participants being listed on the consent form.

Several commenters expressed general opposition to the proposed alternative approach. One commenter stated that redefining “organization” to make it more expansive would lead to erosion of trust and would have a chilling effect on the communications

necessary for effective treatment. Another commenter stated that a more expansive definition of “organization” may defeat a patient’s intent because a patient would have less notice that their information could be disclosed to an entity not specifically named on the consent form.

SAMHSA Response

Based on the comments, SAMHSA has not adopted the alternate approach. Although a few commenters supported the adoption of the broad definition of “organization,” none provided sufficient information to determine how that definition could be implemented to protect the patient’s information from disclosure to parties without a need to know. It is also unclear how the List of Disclosures requirement would be applied under a broader definition of “organization.” SAMHSA, therefore, has not adopted a definition of “organization.” SAMHSA disagrees with the recommendation that disclosure to a wider range of entities should be allowed without the patient’s specific consent.

3. Amount and Kind

SAMHSA is adopting this aspect of the proposal. SAMHSA has moved the former § 2.31(a)(5), “Amount and Kind” provision, to § 2.31(a)(3) and revised the provision to require the consent form to explicitly describe the substance use disorder-related information to be disclosed. The designation of the “Amount and Kind” of information to be disclosed must have sufficient specificity to allow the disclosing program or other entity to comply with the request.

a. General

Public Comments

Many commenters provided feedback on the proposed rule’s “Amount and Kind” requirements on a patient’s consent form. A few commenters generally supported the provision. However, several commenters generally disagreed with the proposed provision because it would either decrease or fail to improve the sharing of patient information; would hamper integrated care; would result in consent forms routinely becoming outdated; patients should not decide what information is disclosed; and the current (1987) rule language is adequate for protection of patient privacy.

Some commenters said the rule should continue to allow a general description of the type of information being disclosed. Other commenters asked SAMHSA to clarify why the revision of the regulatory language was

necessary and why specific information is preferable to simply stating that the consent form covers all the records maintained by the part 2 program.

SAMHSA Response

The designation of the “Amount and Kind” of information to be disclosed must explicitly describe the substance use disorder-related information to be disclosed and have sufficient specificity to allow the disclosing program or other entity to comply with the request. However, the entity creating the consent form may provide options by including free text space, or choices based on a generally accepted architecture (e.g. the Consolidated-Clinical Document Architecture (C-CDA)), or document (e.g. the Summary of Care Record as defined by CMS for the EHR Incentive Programs). It is permissible to include “all my substance use disorder information” as long as more granular options are also included.

Nothing in the rule would prevent the development and use of broad categories of the substance use disorder-related information on the Amount and Kind section of the consent form. The types of information that might be requested include diagnostic information, medications and dosages, lab tests, allergies, substance use history summaries, trauma history summary, elements of a medical record such as clinical notes and discharge summary, employment information, living situation and social supports, and claims/encounter data. If options are provided, it is also permissible to provide check boxes next to each option.

b. Impact of the Amount and Kind Requirement on Providers and Patients

Public Comments

Commenters expressed concern that the proposed “Amount and Kind” provision would be unduly burdensome for providers, thus obstructing communications. Several commenters stated that the proposed rule would require both patients and providers to have an in-depth understanding of the precise terms used for substance use disorder information. Some commenters thought this would put undue burden on patients. Other commenters argued that the “Amount and Kind” requirement would place an additional burden on patients to anticipate future care and/or continually update their consent forms. Similarly, commenters stated that patients do not know what information is necessary to support their treatment, which could lead to important information being omitted.

Commenters argued that the “Amount and Kind” provision would require requesting health providers to know the format, titling, and nomenclature used for substance use disorder information in the part 2 program.

A commenter argued that many patients would want all of their substance use disorder information disclosed if it would improve the quality and coordination of their care. Many commenters recommended that patients should be able to sign a consent to sharing their entire record (i.e., a global consent), with some arguing that the form should include a statement that covers “all my records,” “all my substance abuse records,” “entire record” and/or “full record.” Other commenters said patients should be able to choose via a check box “substance abuse treatment information” or authorize the entire medical record and list what cannot be disclosed. Several commenters stated that an exhaustive list of check boxes on the consent form would be confusing for many patients.

Some commenters said patients should be able to designate an option for overall record release with an option for further specification of dates and materials to be released from the substance use disorder record. However, another commenter said selections should be “all or nothing” to enable providers to exchange information with HIE, ACO, CCO or a similar entity according to the patient’s consent directive with other providers.

SAMHSA Response

The patient will be aware that they have substance use disorder information and can make a determination whether they want that information disclosed. The 1987 final rule part 2 regulations require the patient to list “how much and what kind of information is to be disclosed” (§ 2.31(a)(5)). SAMHSA has revised the provision to require that the consent form explicitly describe the substance use disorder information to be disclosed to ensure patients understand they are disclosing the specified substance use disorder information. The amount of specificity patients wish to include in the “Amount and Kind” section of the consent form is left to them, as long as it has sufficient specificity to allow the disclosing program or other entity to comply with the request. As such, this section does not prohibit a patient from listing “all my substance use disorder information” or “none of my substance use disorder information.” However, the Amount and Kind section of a consent form must accommodate more specific options. As stated previously, nothing in the rule

would prohibit the inclusion on a consent form of broad categories of the substance use disorder-related information that would generally appear in patient records to assist patients in identifying the information they wish to disclose. In developing broad categories of information to be included on the consent form, part 2 programs and other lawful holders of patient identifying information would need to take into consideration reading level standards and the concepts of plain language. The rule does not require further consent when new information is added to the substance use disorder record if the new information is covered by the “Amount and Kind” section on the consent form. If the “Amount and Kind” section does include specificity that the patient doesn’t understand, the party obtaining the consent should explain it to the patient. SAMHSA may, after publication of this final rule, issue in subregulatory guidance information for educating staff and patients. We are reliant on the provider to be clear to patient, which has always been the case.

c. Required Substance Use Disorder Information on Consent Forms

Public Comments

Some commenters said the level of detail required in the “Amount and Kind” section of the consent form was unrealistic, unnecessary, and confusing. A commenter argued that the level of detail required by the rule was at odds with the general designations necessary for information exchange. A commenter stated that EHR infrastructure may not be able to categorize and segregate information as described in proposed § 2.31(a)(3).

Some commenters urged SAMHSA to simplify or otherwise revise this section of the consent form. A commenter recommended that the list could be simplified by including standardized fields on the consent form that align with information commonly found on a Continuity of Care Document (CCD). Commenters recommended narrowing the list to several broad categories (e.g. employment information, living situation, social supports). A commenter stated that if more specific categories were needed, the patient could write in their own terms. Some commenters said the elements and extent of the consent should be the same under part 2 as it is in HIPAA. Other commenters said SAMHSA should use the required elements of a Summary of Care Record as defined by CMS for the EHR Incentive Program as a basis for the “kind” and “type” of information able to be disclosed. Another commenter

said SAMHSA should defer to the expertise of health plans to determine what is necessary for a treating provider to know about substance use disorder.

SAMHSA Response

The types of information that might be requested include diagnostic information, medications and dosages, lab tests, allergies, substance use history summaries, trauma history summary, employment information, living situation and social supports, and claims/encounter data. However, the entity creating the consent form may provide options to include free text space, or choices based on a generally accepted architecture or document such as the C-CDA, or Summary of Care Record, as defined by CMS for the EHR Incentive Program. It is permissible to include “all my substance use disorder information” as long as more granular options are also included. If options are provided, it is also permissible to provide check boxes next to each option. The designation of the “Amount and Kind” of information to be disclosed must have sufficient specificity to allow the disclosing program or other entity to comply with the request.

d. Requests for Clarification

Public Comments

A couple of commenters asked SAMHSA to clarify whether the “Amount and Kind” section is to inform the patient or the providers. A commenter requested clarification on whether multiple patient consents would be necessary when the contents of a record changes over time. Some commenters requested that SAMHSA provide more specific examples of adequate descriptions of the type of information being disclosed. Another commenter recommended SAMHSA create a sample consent form.

SAMHSA Response

The “amount and kind” section informs both the patient and the providers. It allows patients the opportunity to specify whether all of their substance use disorder treatment information or only some may be disclosed and sets the limits on what a part 2 program or other lawful holders may disclose. The amount and kind section will generally cover classes of information so that changes to the record should not trigger the need for re-consents for the same classes of information. SAMHSA may provide examples or a sample consent form in subregulatory guidance following the publication of the final rule.

4. From Whom

SAMHSA is not finalizing the substantive changes that were proposed for the “From Whom” provision in § 2.31(a)(2). In the NPRM, SAMHSA proposed to move the 1987 § 2.31(a)(1) “From Whom” language of the consent requirements provision to § 2.31(a)(2). In addition, because SAMHSA was also proposing, in certain instances, to permit a general designation in the “To Whom” section of the consent form, SAMHSA proposed to require the “From Whom” section of the consent form to specifically name the part 2 program(s) or other lawful holder(s) of the patient identifying information permitted to make the disclosure.

Public Comments

SAMHSA received comments on the “From Whom” section of the consent form from a group of commenters representing a broad spectrum of stakeholder organizations. The overwhelming majority of these commenters were opposed to the proposed change and many suggested withdrawing the proposal in § 2.31(a)(2) and retaining the 1987 “From Whom” language (§ 2.31(a)(1)).

Commenters expressed concern that the proposed § 2.31(a)(2) could decrease the sharing of health information; would add complexity with little or no benefit to patient privacy; would unnecessarily limit the use of a consent; and may accidentally cause the patient to omit a provider whom they want or need to see their data; would negatively impact certain HIE models. A significant majority of the comments regarding the “From Whom” section of the consent form voiced strong opposition to the proposal. A few commenters said the proposed change would unnecessarily limit the positive step SAMHSA took in permitting, in certain circumstance, a general designation in the “To Whom” section of the consent form. One commenter suggested revising the requirements on the basis that the proposed changes do not modernize the regulation.

SAMHSA Response

SAMHSA was persuaded by the overwhelming opposition to the proposed “From Whom” language and, with the exception of minor technical revisions, will retain in this final rule the language in the current (1987) regulation. SAMHSA made this decision for several reasons. First, the existing “From Whom” requirements have been in effect for nearly 30 years and were based on the Department’s prior determination that, even with a general

designation option, the provision did not jeopardize patient privacy. The fact that SAMHSA is not aware of any reports of the current (1987) "From Whom" requirement resulting in unintended consequences further supports this position.

Second, in the NPRM, SAMHSA supported the elimination of the general designation option in the "From Whom" section of the consent form based on concerns that "[t]he patient may be unaware of possible permutations of combining the two broad designations (*i.e.*, in the "To Whom" and "From Whom" sections) to which they are consenting, especially if these designations include future unnamed treating providers." Based on the comments received, we believe this concern may have been overstated. Commenters generally did not agree that the "unintended consequences" the NPRM postulated were likely to occur. Commenters also asserted that SAMHSA's proposal shifted the burden from the receiver to the sender of health information and would be burdensome both to providers and patients. In addition, the proposed change could undermine new models to streamline consent.

While the option of using a general designation in either the "To Whom" or the "From Whom" sections (or both) provides the patient greater flexibility, and may result in two broad designations, it is still ultimately the patient's decision whether to use these options or to specifically name both the disclosing and receiving parties on the consent form. We agree with the remarks of one commenter that the proposed change to the "From Whom" section potentially undermines, rather than supports, patient choice, which was not SAMHSA's intent. Another commenter suggested that SAMHSA's proposed revisions may restrict multi-party consents and disclosures, such as consents that authorize disclosures "between and among" the parties. These types of consents are an important option for part 2 programs and patients, which SAMHSA believes would be eliminated if it were to finalize the proposal articulated in the NPRM. Another characterized the proposed change as adding greater complexity to the consent process for patients with little or no benefit to patient privacy.

Third, leaving the 1987 "From Whom" section essentially unchanged may reduce the burden on providers and IT vendors to accommodate this final regulation. HIE consortiums/associations and state governments were particularly concerned about the impact of the proposed revisions on consent-to-

access HIE models (sometimes referred to as a community-wide consent-to-access model). As several commenters said, the only way for the participant to comply with the NPRM "From Whom" requirement would be for the participant to list the name of every part 2 program in the relevant state in the "From Whom" section of the consent form in order to inform the patient that there is a possibility that one of these programs might be the source of the information being accessed. Not only would this require the listing of hundreds of providers on the face of a consent form—effectively transforming the document into a provider directory—but it would also require the listing of part 2 programs that are not participating in the HIE, which would be misleading and likely draw objections from these programs.

Moreover, the identities of part 2 programs that may be sources of information are constantly changing as new programs are licensed or join the HIE. This would mean that every time a participant sought to access a patient's information in an HIE, it would have to provide the patient with a consent form listing all of these new providers, and the participant would constantly need to print new forms with updated lists of part 2 programs in the state. This would even apply in the vast majority of cases where no part 2 information would be exchanged, since a participant in a consent-to-access model often does not know whether the sought-after information contains part 2 information and, therefore, needs to assume that it does. Requiring participants to print lengthy consent forms with an updated list of part 2 programs every time a new part 2 program is licensed in the relevant state (and developing a system to inform every participant about such updates) is simply not feasible. The community consent-to-access model was implemented specifically in order to meet the spirit and letter of the 1987 part 2 regulations. In addition, federal and state governments have invested hundreds of millions of dollars to build statewide health information networks in reliance on the 1987 part 2 regulations, which allow consent forms to have a general designation of "From Whom" the records are being disclosed. Theoretically, it is possible for part 2 programs to switch to a consent-to-disclose model while all other participants continue to operate under a consent-to-access model.

Fourth, the flexibility provided in the "To Whom" and "From Whom" sections of the consent form are balanced by the specificity in the "Amount and Kind" and "Purpose"

sections of the consent form. SAMHSA has revised the "Amount and Kind" element on the consent form to require the consent form to explicitly describe the substance use disorder-related information to be disclosed so that patients will be aware of the substance use disorder information they are authorizing to disclose when they sign the consent form. In addition, under the current (1987) regulation, consent forms are required to include the purpose of the disclosure. Any disclosure made under these regulations must be limited to that information which is necessary to carry out the purpose of the disclosure.

5. New Requirements

SAMHSA is modifying this aspect of the proposal. SAMHSA proposed to add two new requirements related to the patient's signing of the consent form. First, SAMHSA proposed a provision that would have required the part 2 program or other lawful holder of patient identifying information to include a statement on the consent form that the patient understands the terms of their consent. For the reasons explained below, SAMHSA is not incorporating this requirement into § 2.31 in this final rule. Second, SAMHSA revised § 2.31 to require the part 2 program or other lawful holder of patient identifying information to include a statement on the consent form that the patient understands their right, pursuant to § 2.13(d), to request and be provided a list of entities to which their information has been disclosed when the patient includes a general designation on the consent form. SAMHSA is including this requirement in the final rule (*see* § 2.31(a)(4)(iii)(B)(3)(i)).

Public Comments

A few commenters supported the additional statement clarifying that the patient understands the terms of consent and their rights. One commenter suggested expanding the statement to include language about the potential consequences of utilizing a general designation in the "To Whom" and "From Whom" fields, which would address concerns about the use of two general designations, while preserving the flexibility allowed in the "From Whom" section of the current (1987) regulation.

However, other commenters opposed updating the consent requirements because doing so would require providers to update consent forms or would require a separate substance use disorder consent form. Several commenters questioned the purpose of

the additional signed statement. A commenter criticized the proposed language and argued that it was an attempt to avoid liability.

Several commenters argued that patients would not have the capacity to understand what they are signing. Furthermore, another commenter stated that a signed statement saying that the patient has read the terms of the consent does not mean the patient actually read and understood the consent. A commenter recommended a provision to allow the treating physician to sign a consent for substance use disorder records for patients who may lack the cognitive ability to sign a waiver.

SAMHSA Response

SAMHSA agrees with the commenters that the requirement that the part 2 program or other lawful holder of patient identifying information must include a statement on the consent form that the patient understands the terms of their consent is unnecessary. As commenters stated, a signature on a confirmation statement does not assure that the patient has, in fact, read or understood it. It is also the case, as commenters stated, that some patients may not have the capacity, at the time they are admitted, to provide an informed consent. Therefore, SAMHSA has eliminated this requirement.

K. Prohibition on Re-Disclosure (§ 2.32)

SAMHSA is adopting this section as proposed except for a clarifying revision to § 2.32(a). As discussed in the NPRM preamble, the prohibition on re-disclosure provision only applies to information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder and allows other health-related information shared by the part 2 program to be re-disclosed, if permissible under the applicable law. SAMHSA also clarified in the NPRM preamble that, if data provenance (the historical record of the data and its origins) reveals information that would identify, directly or indirectly, an individual as having or having had a substance use disorder, the information is prohibited from being re-disclosed. In addition, SAMHSA revised § 2.32 to clarify that the federal rules restrict any use of the information to criminally investigate or prosecute any patient with a substance use disorder, except as provided in §§ 2.12(c)(5) and 2.65.

1. General

Public Comments

Several commenters generally supported the prohibition on re-

disclosure, with some stating that the prohibition ensured the confidentiality of the patient's information and would facilitate broader sharing of information among providers and programs in support of integrated care, thus increasing quality of care. A commenter supported the delineation between substance use disorder data and other health-related data, particularly the flexibility to share portions of a patient's record that do not fall under part 2 requirements. Another commenter supported application of the prohibition on re-disclosure to individuals or entities that receive confidential identifying information from lawful holders.

However, many commenters generally disagreed with the prohibition on re-disclosure. Commenters argued that the prohibition created unnecessary barriers and challenges for health care providers and would jeopardize patient treatment and care coordination (e.g., due to over-restriction of medical records). One commenter argued that the prohibition would prevent the inclusion of substance use disorder treatment information within HIE, ACOs, CCOs, and research institutions. Another commenter stated the prohibition would prevent substance use disorder treatment clinics from being incorporated into integrated care networks. A commenter said the prohibition on re-disclosure would prohibit providers or payers from correcting or supplementing knowledge of another provider based on fear of violating the law. Lastly, a commenter said the proposed rules prohibition on re-disclosure was not different from the current (1987) regulation and therefore no clarification was necessary.

SAMHSA Response

SAMHSA is adopting § 2.32 as proposed except for a minor clarification in § 2.32(a). As discussed elsewhere in this final rule, SAMHSA is attempting to balance the facilitation of information exchange within new health care models that promote integrated care with the continued need for confidentiality protections that encourage patients to seek treatment without fear of compromising their privacy. SAMHSA acknowledges the legitimate concerns of commenters regarding how care coordination relates to patient safety. However, SAMHSA must consider the intent of the governing statute (42 U.S.C. 290dd-2), which is to protect the confidentiality of substance use disorder patient records. SAMHSA believes that the prohibition on the re-disclosure of information that would identify, directly or indirectly, an

individual as having been diagnosed, treated, or referred for treatment for a substance use disorder comports with its statutory mandate. SAMHSA notes that the revisions to § 2.32 clarify that the prohibition on re-disclosure only applies to information that would identify an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, but does not apply to health information unrelated to the substance use disorder, such as treatment for an unrelated health condition. These revisions should minimize decisions by part 2 programs to protect an entire patient record.

Public Comments

Several commenters argued that the original statute for the substance use disorder regulations did not prohibit re-disclosure. Another commenter argued that HIPAA did not exist when the original regulations regarding substance use disorder data were promulgated and that the re-disclosure prohibition was not needed in today's legal environment. Another commenter stated that the re-disclosure prohibition is at odds with the goals of The Mental Health Parity and Addiction Equity Act and the Affordable Care Act.

SAMHSA Response

While the statute may not be explicit with regard to certain provisions in 42 CFR part 2, the statute directs the Secretary to prescribe regulations to carry out the purpose of the statute, which may include definitions and may provide for such safeguards and procedures that in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Because 42 CFR part 2 and its governing statute are separate and distinct from HIPAA and due to its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA. However, SAMHSA aligned policy with HIPAA where possible.

SAMHSA strives to facilitate information exchange within new health care models while addressing the legitimate privacy concerns of patients seeking treatment for a substance use disorder. These concerns include: The potential for loss of employment, loss of housing, loss of child custody, discrimination by medical professionals and insurers, arrest, prosecution, and incarceration.

2. Impact of Re-Disclosure Prohibition on Patient Privacy and Patient Choice Public Comments

Several commenters expressed concerns that the prohibition on re-disclosure did not improve patient privacy protections. A commenter stated that the proposed changes allowed more disclosures without patient notice, undermining the goal of protecting a patient's privacy. A commenter argued that any information given by a substance use disorder treatment program, including a refusal to provide information, could identify an individual as having a substance use disorder (whether or not the patient actually does) or having received treatment for a substance use disorder. Another commenter argued against expanding the scope of part 2 to non-substance use disorder conditions which may unfairly suggest the presence of a substance use disorder.

Several commenters expressed concern that the prohibition on re-disclosure interfered with a patient's choice on whether to disclose their medical record. Commenters argued that the prohibition on re-disclosure imposed an unnecessary burden on substance use disorder patients who wish to have the same level of quality coordinated care as other patients. Several commenters expressed concern that the prohibition on re-disclosure required patients to anticipate future care. Several commenters argued that a patient should be allowed to consent to or otherwise control the re-disclosure of their information.

SAMHSA Response

Patients may permit re-disclosures of their information via written consent. Part 2-compliant consent forms can authorize an exchange of information between multiple parties named in the consent form. The key is to make sure the consent form authorizes each party to disclose to the other ones the information specified and for the purpose specified, in the consent. In addition, the revised consent requirements allow patients, under certain circumstances, to authorize disclosure of their information via a general designation (e.g., to "all my current and future treating providers") rather than to specifically name each recipient.

As SAMHSA has stated in this regulation, the "To Whom" section of the consent form can authorize a disclosure of patient identifying information to an entity that does not have a treating provider relationship with the patient whose information is

being disclosed and acts as an intermediary for its participants, such as an HIO, and a general designation of individual and entities with a treating provider relationship with the patient whose information is being disclosed that are participants. The required statement prohibiting re-disclosure should accompany the information disclosed through consent along with a copy of the part 2-compliant consent form (or the pertinent information on the consent form necessary for the intermediary to comply with the signed consent), so that each subsequent recipient of that information is notified of the prohibition on re-disclosure.

3. Disclosure of Information that May Indicate a Substance Use Disorder Public Comments

Several commenters argued that determining which conditions and medications would "identify a patient as having or having had a substance abuse disorder" would be a burden on providers. Commenters said most staff within an HIE do not have the qualifications (e.g., clinical knowledge regarding medical conditions and medications) to distinguish which information could indicate an individual's substance use disorder and would thus need to be trained accordingly. Commenters stressed that the difficulty in determining what patient information would indicate a patient had a substance use disorder would discourage providers and health plans from exchanging information, further inhibiting coordinated care and enforcing differential treatment of individuals with substance use disorders.

Several commenters expressed concern that the language of the proposed rule was too broad. A commenter said the provision was problematic because many medications are frequently related to substance use disorder or other physical or mental conditions, so there is a risk of indicating a patient had a substance use disorder whether or not the patient actually did have a substance use disorder. Similarly, commenters argued that preventing disclosure of information that suggests a substance use disorder is too broad and would overly restrict the information available to health care providers, thus endangering patient safety. A commenter recommended that SAMHSA interpret "identifies a patient as having or having had a substance use disorder" to mean only information that actually identifies a patient as having a substance use disorder, rather than

including information that merely suggests that a person might have an substance use disorder. A commenter recommended that the provision be interpreted as written in the rule language, not as expansively considered in the NPRM preamble.

One commenter argued that a prescription for a certain drug is not enough to identify a person as having a substance use disorder, let alone indicate the person is receiving care from a substance use disorder program. The commenter stated that this ambiguity is sufficient to be able to say that the information does not "identify" the person as having a substance use disorder or, moreover, that they are being treated in a program.

A commenter stated that, when the data sharing of the records are redacted to remove all evidence of substance use disorder they become worthless in terms of ensuring improved client care. Further, this commenter said that there is no way to ensure such redaction would be done effectively and that there is a high risk of inadvertent disclosure, which cannot be made private again.

SAMHSA Response

Comments received by SAMHSA suggest that the discussion in the NPRM of re-disclosure regarding medications and examples provided were not clear. Both the proposed rule and this final rule prohibit re-disclosure of part 2 information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, such as indicated through standard medical codes, descriptive language, or both, unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed or is otherwise permitted by the part 2 statute or regulations. Such information could, in some circumstances, include part 2 information concerning a patient's prescription for a medication typically used for medication-assisted treatment or a disease or condition frequently associated with substance use disorders. While certain medical information in and of itself may not identify a patient as having a substance use disorder and approved medications may be used for various purposes, the context of this preamble and § 2.32 concerns the re-disclosure of information that is directly related to the patient's undergoing treatment for substance use disorders. Therefore, it is considerably more likely that the re-disclosure of such information would result in identifying the patient as receiving treatment for a substance use disorder. By contrast, a

patient who is not receiving such treatment (and, therefore, whose health information is not covered by this rule) would not face such risks even if their medication or condition is frequently associated with substance use disorders. It is also important to note that in some cases, patients may expressly consent to further re-disclosure and that such re-disclosure may in some cases be allowed under other provisions of this rule. SAMHSA understands that this is an important topic and may provide additional subregulatory guidance on this issue after the publication of this final rule.

4. Technical Challenges in Preventing Unauthorized Re-Disclosure Public Comments

Commenters expressed concern that, due to how information is exchanged electronically, it may be technically difficult for the medical industry to prevent re-disclosure. Commenters argued that providers do not have the technical ability to segregate substance use disorder content and redact that information from being sent to new providers who use or review the record. More specifically, a commenter argued that EHR currently have the ability to contribute patient data to an HIE or a Regional Health Information Organization (RHIO) at the patient level, not at the services rendered level. A commenter stated that this capability was five to ten years away. A commenter argued that if the outputs of the DS4P's pilots were refined and required under the federal health IT certification program, there would have been solution for the re-disclosure of substance use disorder information.

Several commenters expressed concern about the lack of technical standards. A commenter recommended that SAMHSA adopt clear technical methods and standards for recipients of disclosures, by which part 2 providers and programs would be able to identify which records are not part 2 sensitive and can be incorporated directly into recipient's EHR. Similarly, a commenter stated there needed to be standards for all EHR Vendors and HIEs to address the re-disclosure prohibition.

Some commenters expressed concern about the burden of upgrading their record system to comply with the prohibition on re-disclosure. Commenters stated that the re-disclosure prohibition would require upgrades and modifications to EHR and HIEs. A commenter stated that SAMHSA should provide funding to upgrade HIE systems or HIEs would be

likely to refuse to accept substance use disorder data.

Many commenters said the prohibition on re-disclosure and the technical limitations many providers faced in preventing re-disclosure would have adverse impacts on sharing of information and patient care. A commenter stated that, due to the technical limitations, some providers would continue to prohibit re-disclosure of the patient's entire medical record. Other commenters argued that the technical limitations would result in substance use disorder information being kept out of the electronic health care environment, leaving gaps that could contribute to poor patient outcomes. A commenter stated that part 2 programs would be unable to participate in integrated care delivery models because their system was not equipped to segregate substance use disorder data.

A commenter stated that SAMHSA should encourage the expansion of meaningful use to allow behavioral health care providers to adopt data segmentation technology. A commenter stated that, in light of the EHR requirements under meaningful use, SAMHSA should consider ways to reduce the burden on entities using EHR with respect to disclosure statements under § 2.32. Another commenter argued that SAMHSA should simply issue consent recommendations and incorporate more complex structures, such as data segmentation, in a broader mandate or on other requirements in order to allow sufficient time for implementation.

SAMHSA Response

SAMHSA actively supports the continued development of data standards to support the integration of substance use disorder treatment in emerging health care models. The Data Segmentation for Privacy (DS4P) initiative within ONC's Standards and Interoperability (S&I) Framework facilitated the development of standards to improve the interoperability of EHRs containing sensitive information that must be protected to a greater degree than other health information due to 42 CFR part 2 and similar state laws. The DS4P standard allows a provider to tag a C-DA document with privacy metadata that expresses the data classification and possible re-disclosure restrictions placed on the data by applicable law. This aids in the electronic exchange of sensitive health information. In October 2015, ONC adopted the DS4P standard as part of the 2015 Edition health IT certification criteria. The DS4P certification criteria

require health IT to demonstrate the ability to send and receive summary care records that are document-level tagged. SAMHSA will continue to work with ONC to further refine the DS4P standard so that it can be applied to segment data at the data element level in the manner described in ONC's "Connecting Health and Care for the Nation: A Shared Nationwide Interoperability Roadmap—Version 1.0 Final (Roadmap)," ² and to accelerate the adopting of the DS4P send and receive standards.

Regarding re-disclosure, the primary advantage of continuing the prohibition on re-disclosure by recipients of a disclosure with patient consent is that it assures a greater measure of confidentiality for patient identifying information. SAMHSA strives to facilitate information exchange within new health care models while addressing the legitimate privacy concerns of patients seeking treatment for a substance use disorder. These concerns include: The potential for loss of employment, loss of housing, loss of child custody, discrimination by medical professionals and insurers, arrest, prosecution, and incarceration.

The prohibition on re-disclosure predates this rulemaking and providers were already required to comply with the existing provision. SAMHSA proposed only minor changes to the provision for clarity, which should not necessitate system upgrades. Therefore, SAMHSA declines to respond to comments regarding the burdens of system upgrades to comply with the prohibition on re-disclosure.

Finally, SAMHSA works closely with its federal colleagues to improve the integration of substance use disorder treatment providers and their data. Although the part 2 authorizing statute does not give SAMHSA authority to mandate data segmentation, as noted above, DS4P was included in the ONC 2015 Edition Health IT Certification Criteria (2015 Edition). SAMHSA has also supported the development of the application branded Consent2Share, an open-source health IT solution based on DS4P which assists in consent management and data segmentation and will continue to work to improve the granularity of how the DS4P standard operates.

² <https://www.healthit.gov/sites/default/files/hie-interoperability/nationwide-interoperability-roadmap-final-version-1.0.pdf>.

5. Requests for Clarification of the Re-Disclosure Prohibition

Public Comments

Commenters requested clarification on various aspects of the re-disclosure prohibition. Some commenters asked for clarification on what records were subject to the re-disclosure prohibition (e.g., the actual record, or the part 2-compliant record that is now incorporated into the physician's notes at the receiving institution). The commenters requested examples of how data may, or may not, be disclosed after lawful receipt of part 2 data.

A commenter suggested that SAMHSA confirm that only records that originated at a part 2 program are subject to the prohibition on re-disclosure.

SAMHSA Response

Once patient identifying information has been initially disclosed (with or without patient consent), no re-disclosure is permitted without the patient's express consent to re-disclose or unless otherwise permitted by the part 2 statute or regulations. Only disclosure of patient identifying information made with the patient's written consent must be accompanied by a written notice regarding the part 2 prohibition on re-disclosure. Although there is no requirement to provide such written notice to individuals and entities who receive information through other means under the part 2 program, all lawful holders must comply with the part 2 program requirements, including, but not limited to the limitations on re-disclosure.

Regarding requested confirmation that only records originated at a part 2 program are subject to the prohibition on re-disclosure, SAMHSA clarifies that individuals and entities that are not covered by part 2 that possess substance use disorder data that did not originate in a part 2-covered provider are not subject to the part 2 program requirements. However, if those individuals and entities received that information that is subject to part 2 via patient consent (with or without the notice of prohibition on re-disclosure) or through any other means under the part 2 program (i.e., through means that made them a lawful holder), they would be required to comply with part 2.

Public Comments

Several commenters asked for clarification with regard to disclosing prescription medications. A few commenters asked whether prescription medications could be disclosed without consent if the prescriber states that the

prescription is not for substance use disorder treatment. Another commenter asked what the requirements were for medications that are used "off label" to treat substance use disorder and medications that treat withdrawal. A commenter asked for clarification on whether providers in part 2 programs, who do not reveal their part 2 program affiliation, would be prohibited from disclosing information about substance use disorder prescriptions that are also prescribed for non-substance use disorder purposes, unless the patient has consented to the disclosure.

SAMHSA Response

SAMHSA agrees that part 2 would permit the disclosure of information without patient consent relative to a medication that is used for both substance use disorder and non-substance use disorder purposes, even when it is being prescribed for the purpose of substance use disorder treatment. In disclosing the information, both the provider and the data provenance must not identify the provider as being affiliated with a part 2 program or prescribing the substance use disorder medication for substance use disorder treatment.

Public Comments

Regarding the prohibition on re-disclosure, a commenter requested that SAMHSA provide clarification on what impact a court order has on sharing information otherwise deemed confidential under the part 2 regulations.

SAMHSA Response

SAMHSA has previously stated in FAQ guidance concerning re-disclosures that when information is disclosed pursuant to an authorizing court order, part 2 requires that steps be taken to protect patient confidentiality. In a civil case, part 2 requires that the court order authorizing a disclosure include measures necessary to limit disclosure for the patient's protection, which could include sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered [42 CFR 2.64(e)(3)]. In a criminal case, such order must limit disclosure to those law enforcement and prosecutorial officials who are responsible for or are conducting the investigation or prosecution, and must limit their use of the record to cases involving extremely serious crimes or suspected crimes [42 CFR § 2.65(e)(2)].

Public Comments

A commenter asked how a mixed-use mental health and substance use

treatment facility should handle re-disclosure and how SBIRT would be addressed under this section.

SAMHSA Response

Only the substance use disorder information is covered by part 2. The mental health information is not. The prohibition on re-disclosure only applies to information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, such as indicated through standard medical codes, descriptive language, or both, and allows other health-related information shared by the part 2 program to be re-disclosed, if permissible under other applicable laws.

6. Recommendations To Improve the Prohibition on Re-Disclosure

Public Comments

Several commenters recommended exclusions to the prohibition on re-disclosure of substance use disorder patient data. A commenter said patients should be able to consent to the disclosure of substance use disorder information to a covered entity and such information would be protected by HIPAA, but would be free from the re-disclosure prohibition. Some commenters said SAMHSA should permit re-disclosure of substance use disorder treatment information for the purpose of treatment and/or care coordination. Another commenter suggested an exemption for providers within a given PDMP, CCO, ACO or HIE, for the purposes of treatment, payment, or health care operations. A commenter said SAMHSA should allow re-disclosures without patient consent for public health purposes to prevent disease or control injury or disability. Lastly, a commenter said SAMHSA should add a category under subpart D "Disclosures without Patient Consent" to include state health data organizations that collect data under a legislative authority.

SAMHSA Response

Due to its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA. In light of the statute, SAMHSA declines to create the specific suggested exclusions from the use and disclosure restrictions. SAMHSA will specifically address disclosures to subcontractors and contractors for health care purposes in the SNRPM.

Public Comments

Commenters requested that SAMHSA provide guidance in several areas, including the type of permissible information that can be disclosed; applicability to co-occurring disorders; and applicability to multi-use organizations. A commenter said SAMHSA should publish the medical codes (e.g., ICD-10s) that are affected by this provision.

SAMHSA Response

As for the type of permissible information that can be disclosed, the proposed clarifications to § 2.32 clarify that the prohibition on re-disclosure only applies to information that would identify, directly or indirectly, an individual as having been diagnosed, treated, or referred for treatment for a substance use disorder, such as indicated through standard medical codes, descriptive language, or both, and allows other health-related information shared by the part 2 program to be re-disclosed, if permissible under other applicable laws.

Regarding the re-disclosure of information related to co-occurring disorders, only the substance use disorder information is covered by part 2. The mental health information in a patient record is not. However, part 2 programs must ensure adequate confidentiality protections for mental health patient data that are applicable based on any relevant federal or state law.

Public Comments

Commenters proposed many other recommendations to improve the re-disclosure provision. One commenter said the rule should specify the consequences part 2 providers will face if they violate the proposed rule's prohibition on re-disclosure. A commenter said non-part 2 programs that prescribe substance use disorder medication should not be forbidden from disclosing such prescriptions, nor required to state the purpose of the medication. A commenter said the rule should continue to prohibit information being shared with law enforcement for criminal prosecution. A commenter said SAMHSA should include an updated sample Notice of Prohibition of Re-disclosure in the final rule. One commenter said patients should have the ability to remove their substance use disorder history from their medical record after ten years. A commenter said SAMHSA should rescind the proposed prohibition on re-disclosure relative to general designations and advocate for

the medical community to do more within their industry to recognize and provide appropriate, comprehensive care for those living with substance use disorders.

SAMHSA Response

Regarding the consequences for violation of the re-disclosure prohibition, each disclosure made with the patient's written consent must be accompanied by the notice of prohibition on re-disclosure. Under 42 U.S.C. 290dd-2 (f), any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined in accordance with Title 18.

Regarding the comment on non-part 2 prescribers, prescribers that are not covered by part 2 are not prohibited from disclosing such prescriptions nor required to specify the purpose of such prescriptions.

On prohibition of information being shared with law enforcement for criminal prosecution, this prohibition remains in effect. Specifically, SAMHSA has clarified § 2.32(a) to state "[t]he federal rules restrict any use of the information to criminally investigate or prosecute any patient with a substance use disorder, except as provided at §§ 2.12(c)(5) and 2.65."

Public Comments

A commenter stated that individuals or entities who are not part 2 programs may not be familiar with the specific consent requirements of part 2, so the next-to-last sentence of § 2.32 should include a citation to § 2.31.

SAMHSA Response

SAMHSA appreciates the suggestion and has revised § 2.32 to add a reference to the § 2.31 to the penultimate sentence in paragraph (a).

L. Disclosures to Prevent Multiple Enrollments (§ 2.34)

SAMHSA is adopting this section as proposed. SAMHSA has modernized § 2.34 by updating terminology and revising corresponding definitions. SAMHSA also consolidated definitions by moving definitions from this section to the part 2 definitions provision (§ 2.11), as discussed in Section III.D.

Public Comments

A few commenters supported disclosures to prevent multiple enrollments. Some urged the proposed regulations to go further and specifically allow registries in the form of HIEs or PDMPs to share controlled substance prescriptions in the same manner that it would allow withdrawal management or

maintenance treatment programs. The aim would be to prevent multiple prescribing of prescription drugs that can be abused. Other commenters argued that the registry should be available to check enrollment beyond 200 miles. Asserting that the requirement to list every site that may be contacted in the consent document is an unusual burden, one of these commenters suggested that the concern can be better addressed by indicating "any licensed treatment center within the state when a patient presents for treatment." One commenter requested clarification as to what type of "central registry" is being considered for disclosure of patient records. Another suggested language that allows for multiple payments to providers in situations where clients are enrolled in multiple programs and where programs may be obtaining multiple payments for multiple services.

SAMHSA Response:

Central registries, defined as "an organization that obtains from two or more member programs patient identifying information about individuals applying for withdrawal management or maintenance treatment for the purpose of avoiding an individual's concurrent enrollment in more than one treatment program," serve a different purpose than HIEs or PDMPs. According to the Centers for Disease Control and Prevention, PDMPs are state-run electronic databases used to track the prescribing and dispensing of controlled prescription drugs to patients. They are designed, in part, to monitor this information for suspected abuse or diversion (i.e., channeling drugs into illegal use), and can give a prescriber or pharmacist critical information regarding a patient's controlled substance prescription history. Although PDMPs may serve many valuable purposes, SAMHSA decided not to address issues pertaining to e-prescribing and PDMPs in the final rule because, as stated in the NPRM, they were not ripe for rulemaking at the time due to the state of technology and because the majority of part 2 programs are not prescribing controlled substances electronically.

Under § 2.34(a)(3)(ii), the consent may authorize a disclosure to any withdrawal management or maintenance treatment program established within 200 miles of the program after the consent is given without naming any such program. Regarding comments on the 200-mile limit, SAMHSA declines to make any changes to the 200-mile limit because it is unlikely that a patient would be

enrolled in multiple programs greater than 200 miles from each other. The regulations do not confine the 200-mile limit to within a state.

As for the request to allow a consent for disclosure to “any licensed treatment center within the state where a patient presents for treatment,” SAMHSA has concluded that the proposed specificity is needed. Section 2.34 requires that the consent must list the name and address of each central registry and each known withdrawal management or maintenance treatment program to which a disclosure will be made. This specificity was retained because the purpose of the section is to prevent multiple enrollments that would result in a patient receiving substance use disorder treatment medication from more than one provider, thereby increasing the likelihood for an adverse event or diversion.

Regarding the request to allow for multiple payments to providers in situations where clients are enrolled in multiple programs and where programs may be obtaining multiple payments for multiple services, SAMHSA has determined that this request is outside of the scope of the proposed part 2 changes in the NPRM.

M. Medical Emergencies (§ 2.51)

SAMHSA is adopting this section as proposed. SAMHSA has revised the medical emergency exception to give providers more discretion to determine when a “bona fide medical emergency” (42 U.S.C. 290dd–2(b)(2)(A)) exists. The revised language states that patient identifying information may be disclosed to medical personnel to the extent necessary to meet a bona fide medical emergency in which the patient’s prior informed consent cannot be obtained. SAMHSA continues to require the part 2 program to immediately document, in writing, specific information related to the medical emergency.

1. General

Public Comments

Many commenters expressed support for the proposed change in language of the medical emergency exception to provide medical personnel with increased discretion to determine a “bona fide medical emergency.” Some commenters expressly supported aligning the regulatory language with the statutory language for medical emergencies. A commenter supported the special rule that would allow the disclosure of patient identifying information to medical personnel at the

FDA who provide reason to believe that the health of any individual may be threatened by a product under the FDA’s jurisdiction and that the information used solely for notifying the patient or their physicians of the potential dangers.

However, several commenters warned that part 2 programs should not be expected to assume the unrealistic burden of liability for a HIE’s capability to comply with all part 2 requirements. Another commenter argued the current medical emergency exception is clear under current (1987) law and providers are already making the determination as to what constitutes an emergency.

SAMHSA Response

SAMHSA appreciates the support of commenters on this issue. With regard to the comment about the burden of liability, SAMHSA asserts that the treating provider must make the determination as to whether a bona fide medical emergency exists. However, concern alone about potential drug interaction may not be sufficient to meet the standard of a medical emergency. Thus, based on the circumstances of the presenting situation, SAMHSA recommends that health care providers obtain consent from the patient where feasible.

2. Definition of “Bona Fide Medical Emergency”

Public Comments

Commenters provided various suggestions for expanding the definition to include disclosure of records for mental health involuntary commitment evaluations and other psychiatric emergencies; to detoxification centers; when there is “risk of serious harm” to self or others by reason of a substance use disorder; in order to save a life or prevent further injury of a person who is not able to make a rational decision due to mental impairment; and to prevent suicide. Several commenters asserted the revisions should include an exception for disclosure without consent in order to prevent medical emergencies from occurring in the first place. Other commenters suggested not limiting this section to only medical emergencies, but allowing disclosures for treatment, payment, and operation purposes. A few commenters supported adding a duty to warn exception where a substance use disorder patient discloses intent, plan, or means to inflict harm onto another individual or the public.

SAMHSA Response

On the request to expand the definition, while the statute authorizes

an exception for a bona fide medical emergency, broadening this provision to include non-emergency situations would be inconsistent with the statutory scheme. With respect to warnings, part 2 does not impose a duty to warn—or a duty to disclose any information. It only governs when disclosures may be made, not when they must be made. SAMHSA has previously provided FAQ guidance on when a part 2 program may make a disclosure without divulging patient identifying information. SAMHSA will monitor this issue and may consider whether additional subregulatory guidance in the future may be helpful.

Regarding involuntary commitment, patient identifying information may be disclosed to medical personnel to the extent necessary to meet a bona fide medical emergency in which the patient’s prior informed consent cannot be obtained. This may include situations in which the patient is not regarded as being legally competent under the laws of their jurisdiction. Such circumstances may apply when a patient is subject to an involuntary commitment (*i.e.*, formally committed for behavioral health treatment by a court, board, commission, or other lawful authority). Consistent with § 2.51, during the period of time a patient is not regarded as being legally competent, any previously established, unrevoked, or unmodified general designation remains valid for their current treating providers until such time as the individual’s competency is restored. The treating provider(s) would, in such circumstances, be expected to follow provisions of this rule pursuant to medical emergencies, including all documentation requirements. Importantly, at any time when a patient is legally competent, they may modify their general designation consistent with the provisions of this final rule.

Public Comments

Other commenters suggested restrictions on the definition of “bona fide medical emergency” or other limitations to the medical emergency exception. Several recommended that the final rule explicitly state that the medical emergency exception continues to be limited to circumstances in which an individual needs immediate medical care and the patient’s consent cannot be obtained. The medical emergency exception does not apply to situations where the patient could but will not consent, since the exception should not be used to avoid obtaining consent. A commenter urged that a “bona fide medical emergency” be limited to circumstances in which an individual

needs immediate medical care because of an immediate (not future) threat to a person's health.

A commenter asserted that it be specified that a "medical emergency" is determined by the treating provider.

A commenter asserted that the information disclosed in a "bona fide medical emergency" should be more clearly limited and the rule should require the provider to affirmatively share the required documentation of the disclosure with the patient.

A commenter stated that part 2 information disclosed in a medical emergency should not be re-disclosed for criminal investigation or prosecution.

A few commenters advocated for emergency care providers to be permitted to access only limited part 2 information available through a HIE.

SAMHSA Response

On situations in which the patient could but will not consent, SAMHSA has not revised the regulatory language, but agrees that "patient consent could not be obtained" refers to the fact that the patient was incapable of providing consent, not that the patient refused consent.

With regard to the request that a "medical emergency" be determined by the treating provider, SAMHSA clarifies that any health care provider who is treating the patient for a medical emergency can make that determination.

On limiting the information disclosed, § 2.13(a) of the rule indicates that the amount of information to be disclosed "must be limited to that information which is necessary to carry out the purpose of the disclosure."

With regard to the comment on re-disclosure, SAMHSA will address re-disclosure of part 2 information obtained during a medical emergency in subregulatory guidance rather than in the rule, as it has in the past.

Public Comments

Several commenters asserted that automated or pre-determinations for medical emergencies should be allowed. A commenter suggested that pre-defining the criteria for medical emergency would enable HIEs to automate the decisions about whether a patient visit is a medical emergency. The commenter said such criteria could be defined by each individual hospital or could be based on national standards. Another commenter argued that Level of Care Utilization System (LOCUS) scores and the ASAM levels could be used as clinical standards for determining "bona fide emergency" situations where

behavioral health information should be more broadly shared.

SAMHSA Response

Automated electronic health information systems can be programmed to flag specific patient information for medical personnel to use in determining whether a bona fide medical emergency exists and may be programmed to provide alerts to authorized providers. However, as SAMHSA has explained in previous FAQ guidance, one may not automate the determination of a medical emergency.

Public Comments

Many commenters requested examples of emergency situations in order to minimize confusion among providers and organizations as to the circumstances under which medical emergencies would be valid. Many of these commenters provided their own instances requesting clarification if disclosure would be necessary.

SAMHSA Response

SAMHSA plans to provide the requested examples in subregulatory guidance after the publication of this final rule.

3. Documentation of Medical Emergency Public Comments

Many commenters argued for removal of the requirement that a part 2 program immediately document a disclosure pursuant to a medical emergency. A commenter stated that SAMHSA should simplify the existing onerous documentation requirements that impede vital sharing of information. Another commenter suggested part 2 programs should rely on other functionalities that retain disclosure and specific information related to the medical emergency, such as audit reports.

A commenter suggested the language be modified to allow the part 2 program to document the disclosure "promptly" rather than "immediately."

Other commenters suggested eliminating the requirement to provide "the name of the medical personnel to whom disclosure was made."

Another commenter asserted that the rule should allow an HIE to maintain documentation of disclosures for the part 2 program and provide ongoing access to such information.

A commenter suggested that a "list of the information disclosed" be added to the list of information that must be entered into the patient record at the time of the emergency disclosure.

SAMHSA Response

SAMHSA is not convinced of the benefit of replacing "immediately" with "promptly," particularly since neither term is defined in the final rule. With regard to the suggestion to eliminate the requirement to provide "the name of the medical personnel to whom disclosure was made," the current (1987) part 2 regulations (as well as the regulatory language in the NPRM) require part 2 programs to document the name of the medical personnel to whom disclosure was made and their affiliation with any health care facility because it is important for that information to be available to the part 2 program and the patient.

4. Other Comments on Medical Emergencies

Public Comments

Some commenters suggested that SAMHSA expand who is authorized to access emergency records. Some commenters requested the definition of "medical personnel" include any professional who provides health-related services, including behavioral health services, rather than being limited to medical doctors, nurses, and emergency medical technicians. Other commenters suggested the language be changed so that "non-medical personnel" who are currently working with clients in an emergency situation have access to the patient emergency record. A commenter argued that substance use disorder patients commonly face medical emergencies and therefore it is prudent for an emergency department be named or identified under the "general disclosure" provision.

SAMHSA Response

Part 2 allows patient identifying information to be disclosed to medical personnel in a medical emergency. Part 2 does not define the term "medical personnel" but merely provides that information can be given to medical personnel who have a need for information about a patient in a bona fide medical emergency. It is up to the health care provider or facility treating the emergency to determine the existence of a medical emergency and which personnel are needed to address the medical emergency. The name of the medical personnel to whom the disclosure was made, their affiliation with any health care facility, the name of the individual making the disclosure, the date and time of the disclosure, and the nature of the medical emergency must be documented in the patient's records by the part 2 program disclosing

the information. SAMHSA does not have the authority to permit information to be disclosed to “non-medical personnel” pursuant to a medical emergency because the authorizing statute for the regulations codified at 42 CFR part 2 limits disclosures to “medical personnel.”

With regard to identifying emergency departments under the “general disclosure” provision, the medical emergency exception requires that a provider determine that a bona fide medical emergency exists and that a patient’s visit to an emergency room does not automatically constitute such an emergency. SAMHSA reiterates that there is a difference between refusal to consent and being incapable of consenting to disclosure.

Public Comments

Commenters requested clarification on which entity, the receiving emergency department or HIE, would be obligated to maintain part 2-compliance with information received through a declared patient emergency. A commenter argued the rule should state that a hospital emergency room or other health care provider that obtains program information under the medical emergency exception would not be subject to part 2 rules with respect to such program information.

SAMHSA Response

Part 2 requires that when a disclosure is made in connection with a medical emergency, the part 2 program must document in the patient’s record the name and affiliation of the recipient of the information, the name of the individual making the disclosure, the date and time of the disclosure, and the nature of the emergency. Thus, data systems must be designed to ensure that the part 2 program is notified when a “break the glass” disclosure occurs and part 2 records are released pursuant to a medical emergency. The notification must include all the information that the part 2 program is required to document in the patient’s records. The information about emergency disclosures should also be kept in the HIE’s electronic system. Regarding the requests for clarification on part 2 applicability to information disclosed pursuant to a medical emergency, SAMHSA understands the importance of these questions. However, because these issues are not related to specific proposals made in the NPRM, SAMHSA plans to address them in subregulatory guidance after the publication of the final rule.

Public Comments

A commenter warned that emergency disclosures for requesting of part 2 records can occur by means other than solely through an HIE.

SAMHSA Response

The EHR is the vehicle for the disclosure of the part 2 record but not the decision-maker. The name of the person who makes the determination to disclose and discloses the information electronically through an EHR system should be recorded. SAMHSA clarifies that the example used of an HIE was not meant to be exhaustive to include all potential sources of disclosures.

N. Research (§ 2.52)

SAMHSA is modifying this section from the regulatory text proposed, as described in detail below. SAMHSA is implementing several changes to the research provision. First, we have revised the section heading by deleting the word “activities.” In addition, SAMHSA has revised the research exception to permit data protected by 42 CFR part 2 to be disclosed by any individual or entity that is in lawful possession of part 2 data (lawful holder of part 2 data) under certain conditions.

SAMHSA also addressed data linkages because the process of linking two or more streams of data opens up new research opportunities and potential risks. In the NPRM, SAMHSA proposed to permit researchers to request to link data sets that include patient identifying information if (1) the data linkage uses data from a federal data repository, and (2) the project, including a data protection plan, is reviewed and approved by an Institutional Review Board (IRB) registered with the Office for Human Research Protections (OHRP) in accordance with 45 CFR part 46. SAMHSA requested comments in the NPRM on whether to expand the data linkages provision beyond federal data repositories. After considering the public comments received on this topic, as discussed in greater detail below, SAMHSA has revised the data linkages provision to permit researchers to link to federal and non-federal data repositories provided certain conditions are met.

The revised § 2.52 permits a researcher to include part 2 data in reports only in aggregate form. SAMHSA clarified in this final rule that, with respect to these types of reports, the patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized

means to identify a patient, directly or indirectly as having or having had a substance use disorder. SAMHSA requires any individual or entity conducting scientific research using patient identifying information to meet additional requirements to ensure compliance with confidentiality provisions under part 2. Note that de-identified information can be shared for the purposes of research; this was the status quo under the previous part 2 regulations, and this final rule does not change that.

Finally, § 2.52 addresses, in addition to the maintenance of part 2 data, the retention and disposal of such information used in research. SAMHSA expanded the provisions in § 2.16 (Security for records) and references the policies and procedures established under § 2.16 in revised § 2.52. The NPRM language in (a)(1) only referenced “the HIPAA privacy rule at 45 CFR 164.512(i)” while the final rule regulatory language in (a)(1) now says: “consistent with the HIPAA Privacy Rule at 45 CFR 164.508 or 164.512(i), as applicable”.

1. General

Public Comments

Many commenters expressed support for revising the research exception to permit data protected by part 2 to be disclosed to qualified personnel for the purpose of conducting scientific research by a part 2 program or any other individual or entity that is in lawful possession of part 2 data (lawful holder of part 2 data). Many commenters expressed general support for expanding the circumstances in which research may be conducted with part 2 data. Many commenters supported disclosure of data from other lawful holders of substance use disorder records with researchers. Commenters supported the prevention of data scrubbing of records and other data suppression related to substance use disorders. Some commenters specified support to stop “suppression” of Medicare and Medicaid data from any records associated with substance use disorder.

SAMHSA Response

SAMHSA’s revisions to the research provision address these concerns regarding access to substance use disorder information from CMS claims/ encounter data disclosed for research purposes. First, the research provision permits part 2 programs and other lawful holders of patient identifying information (not just part 2 program directors) to disclose data protected by

42 CFR part 2 to qualified personnel for the purpose of conducting scientific research if the researcher provides documentation of meeting certain requirements related to other existing protections for human research. Second, SAMHSA also addressed data linkages to enable researchers holding part 2 data to link to data sets from federal and non-federal data repositories provided certain conditions are met as spelled out in section 2.52.

Public Comments

Another commenter supported the use of data use agreements for all research transfers of part 2 information and requested the proposed regulation provide examples of these agreements. A commenter stated that the agency should allow research of additional administrative data sets such as those held by HIEs, ACOs, state Medicaid agencies, commercial insurance companies, and Medicare Advantage plans with appropriate IRB reviews.

SAMHSA Response

Although not required by § 2.52, the regulation would permit any lawful holder of patient identifying information to require a researcher sign a data use agreement spelling out these requirements.

SAMHSA is adopting its proposal regarding the research exception to permit data protected by 42 CFR part 2 to be disclosed to qualified personnel for the purpose of conducting scientific research by a part 2 program or any other individual or entity that is in lawful possession of part 2 data if the researcher provides documentation of meeting certain requirements related to other existing protections for human research. If an entity meets the requirements of an “other lawful holder of patient identifying information,” as described in the preamble of this final rule, the entity would be authorized to disclose part 2 data for research purposes in accordance with § 2.52.

Public Comments

Another commenter asked a series of questions related to the release of data by lawful holders that are not part 2 programs (*e.g.*, HIEs). The commenter asked how these HIEs, third-party payers, etc., will be able to determine that a researcher will maintain the confidential patient identifying information in accordance with the security requirements set out in § 2.52(a)(2); how will the “lawful holders” be able to assess whether the potential benefits of the research outweighs any risks to confidentiality as required by § 2.52(a)(3); and what

individual at these various “lawful holders” will be the equivalent of a part 2 program director and have the authority to make these decisions. The commenter stated that it is almost certain that these “lawful holders” will not sufficiently know the confidentiality regulations so as to ensure the researchers are aware of, and will comply with the prohibition against re-disclosure specified in § 2.52(b).

SAMHSA Response

SAMHSA examined the existing regulations that protect human subjects in research and concluded that, if those requirements were fulfilled, 42 CFR part 2 would ensure confidentiality protections consistent with the statute, while providing the expanded authority for disclosing patient identifying information. Requirements that ensure compliance with HIPAA and the Common Rule (*e.g.*, IRB and/or privacy board review) with respect to research provide these assurances, including that the researcher has a plan to protect and destroy identifiers and to not re-disclose the information in an unauthorized manner. The individual who would make the determination to disclose part 2 data on behalf of a part 2 program or other lawful holder would be the individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer or their designee. In addition, there is nothing in the regulation that requires this individual to disclose the data, even if the researcher provides documentation of compliance with the requirements under § 2.52.

Public Comments

A commenter stated that the proposed rule adopted an overly narrow approach to disclosures for scientific research, by limiting part 2 disclosures only to entities or individuals subject to the HIPAA Privacy Rule or the HHS Common Rule. The commenter stated that because the commenter is not a HIPAA covered entity or business associate under HIPAA, and is not currently subject to the Common Rule, the commenter does not appear to meet the conditions required for disclosure for scientific research. The commenter stated that limiting disclosures for research purposes only to entities or individuals subject to the HIPAA Privacy Rule and/or Common Rule is inconsistent with the language and intent of the governing statute, which broadly authorizes disclosures to qualified personnel for the purposes of conducting scientific research.” (42 U.S.C. 290dd–2(b)(2)(B)). The

commenter urged SAMHSA to interpret research broadly to include state analytic activities to identify patterns and variations in the cost, quality and delivery of health care, similar to the approach adopted by CMS for the release of CMS claims/encounter data to state agencies.

SAMHSA Response

The revised research exception will now permit data protected by 42 CFR part 2 to be disclosed for research purposes by part 2 programs and other lawful holders of patient identifying information not just by part 2 program directors as the 1987 final rule regulations require. Because SAMHSA is expanding the authority for disclosing patient identifying information beyond part 2 program directors, it was necessary to establish a mechanism to ensure that confidentiality protections consistent with the statute were fulfilled in all cases. SAMHSA determined that the existing regulations that protect human subjects in research would accomplish this, and, therefore, decided to limit the permitted disclosures for research purposes under part 2 to instances in which the researchers would meet the requirements governing their receipt of protected health information from a covered entity under the HIPAA privacy rule and/or the requirements governing research on human subjects under the HHS Common Rule. Under this expanded authority, the HIPAA standards would be applied as a test regardless of whether the data source for the disclosure was a HIPAA covered entity.

Under 42 CFR part 2, the research provision provides clear policies on conducting research and protecting the confidentiality of patient identifying information, including their obligations to comply with requirements under 42 CFR 2.16, Security for Records.

Public Comments

A commenter stated that SAMHSA, in coordination with state regulators, should work together to issue guidance related to the application of the federal part 2 requirements to substance use disorder information that may be requested by states for public health and other purposes.

SAMHSA Response

The statute authorizing part 2 contains specific limited exceptions to the consent requirement, and making a change to exempt states from this requirement, under certain conditions, would be inconsistent with the statutory scheme.

Public Comments

One commenter stated that the expansion of the disclosure of patient identifying information should be limited to CMS and/or state governmental agencies that have authority over substance use disorder treatment services. The commenter stated that an unintended consequence of implementing the potential of wide-spread disclosure of previously protected information is that the protections the confidentiality regulations afforded patients will be eviscerated as essentially all the recipients of protected information, for the last 40 years will no longer be bound by the prohibition of re-disclosure, subjecting the patient's information to re-disclosure, without the patient's consent, to any individual or entity representing that they are conducting scientific research. The commenter argued that SAMHSA should limit the number of entities who can release patient identifying information to those who actually have the resources to verify that such disclosure to a researcher is for a valid research purpose; can ensure proper research protections are in place; and affirm the patient will not be more vulnerable as a result of the disclosure. The vast majority of lawful holders cannot adequately perform this analysis and therefore cannot protect the patient's interest as required under the part 2 regulations.

SAMHSA Response

SAMHSA declines to narrow the scope of the research provision as suggested. In developing the proposed rule, SAMHSA examined the existing regulations that protect human subjects in research and concluded that, if those requirements were fulfilled, 42 CFR part 2 would ensure confidentiality protections consistent with the statute, while providing the expanded authority for disclosing patient identifying information. Specifically, IRBs determine that, when appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data before approving the research (45 CFR 46.111(a)(7)). SAMHSA is interested in affording patients protected by 42 CFR part 2 the same opportunity to benefit from advanced research protocols while continuing to safeguard their privacy, and narrowing the scope of lawful holders that may disclose part 2 data for research purposes, as suggested by the commenter would limit the ability of patients to benefit from these research efforts.

Public Comments

Other commenters expressed concern about the expanded research exception. A commenter stated that the proposed provision would create a wide opportunity for data sharing with increased risk of adverse impact. Similarly, a commenter warned that the research exception revision poses unnecessary risk of data breach of patient's confidentiality.

SAMHSA received a large number of comments, particularly from researchers, expressing support for the revised research provision. These commenters expressed concern that, without this revised provision, researchers' access to substance use disorder-related data in Medicare and Medicaid claims/encounter databases would be limited to instances in which consent could be obtained. A number of commenters cited a study by K. Rough et al. published in the March 15, 2016, issue of the *Journal of the American Medical Association* that found the exclusion of part 2 data from Medicare and Medicaid claims/encounter data in research contexts coincided with decreases in the rates of diagnoses for certain conditions commonly co-occurring with substance use disorder. Commenters reiterated a point made in the article that underestimating diagnoses has the potential to bias health services research studies and epidemiological analyses. Some commenters also stated that implementing appropriate data safeguards can protect patient privacy while still allowing researchers access to critical data.

SAMHSA Response

SAMHSA agrees with the commenters' assertions regarding how the exclusion of this substance use disorder data hampers vital public health research, particularly in light of the growing national opioid epidemic and is finalizing the research data access proposal in the final rule.

With respect to concerns about privacy and the expansion of the research exception, SAMHSA clarifies that the research exception is intended to permit data protected by 42 CFR part 2 to be disclosed to qualified personnel for the purpose of conducting scientific research by a part 2 program or any other individual or entity that is in lawful possession of part 2 data (lawful holder of part 2 data).

The research provision (§ 2.52(b)) already includes a requirement that the researcher receiving the part 2 data is fully bound by 42 CFR part 2. Although not required by § 2.52, the regulation

would permit any lawful holder of patient identifying information to require a researcher to sign a data use agreement spelling out these requirements. Lawful holders of patient identifying information may disclose part 2 data without patient consent for research purposes only under the specified circumstances under the research provision.

Public Comments

A commenter requested clarification as to whether "lawful holders" may disclose part 2 data to third parties to conduct research or whether the "lawful holder" has to conduct the research itself.

Citing the HIPAA tracking criteria for disclosures outside the entity pursuant to a waiver of authorization, another commenter asked SAMHSA to clarify what tracking requirements would apply to disclosure of part 2 data for purposes of research. This commenter also asked SAMHSA to clarify whether disclosure for purposes of research means sharing the data with anyone for research purposes or only applies when part 2 data is shared with an outside entity.

SAMHSA Response

The research provision permits part 2 programs and other lawful holders of patient identifying information to disclose data protected by 42 CFR part 2 to qualified personnel for the purpose of conducting scientific research if the researcher provides documentation of meeting certain requirements related to other existing protections for human research. "Qualified personnel" is a statutory term and SAMHSA has clarified that this term includes those individuals who meet the requirements specified in the research provision to receive part 2 data for the purpose of conducting scientific research.

The proposed rule did not include a tracking requirement for information disclosed under the research exception and so we are declining to include such a requirement in the final rule.

Public Comments

Another commenter reasoned that municipalities should be able to receive and match patient identifying information and then use the de-identified data for planning and analysis purposes (e.g., determining how many criminal justice-involved defendants have a previous history of substance use disorder treatment).

SAMHSA Response

SAMHSA declines to make the recommended expansion to the research

provision. SAMHSA is revising the research exception to permit data protected by 42 CFR part 2 to be disclosed to qualified personnel for the purpose of conducting scientific research by a part 2 program or any other individual or entity that is in lawful possession of part 2 data (lawful holder of part 2 data). "Qualified personnel" is a statutory term and SAMHSA has clarified that this term includes those individuals who meet the requirements specified in the research provision to receive part 2 data for the purpose of conducting scientific research. This term would not preclude researchers from conducting such research efforts on behalf of a municipality. However, part 2 prohibits researchers from re-disclosing patient identifying information except back to the individual or entity from whom that patient identifying information was obtained or as permitted under § 2.52(c) of this section, and permits researchers to include part 2 data in reports only in aggregate form in which patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized means to identify a patient, directly or indirectly, as having or having had a substance use disorder.

Public Comments

A commenter expressed support for the strengthened proposed research provision whereby patient identifying information may be released only after the program director has determined the research recipient has obtained appropriate IRB and/or privacy board approval and consent. Another commenter asserted that information that is de-identified and presented in aggregate should be permitted to be more readily used in research. The commenter stated that this was another area where SAMHSA can promote greater alignment with HIPAA, which provides allowances for covered information that is de-identified and presented in the aggregate.

SAMHSA Response

Part 2 only applies to information that would identify a patient as having or having had a substance use disorder. The revised research provision allows researchers to include part 2 data in reports only in aggregate form in which patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized means to identify a patient, directly or indirectly, as having or having had a substance use disorder. The revised § 2.52 also

requires researchers to maintain and destroy patient identifying information in accordance with the security policies and procedures established under § 2.16. SAMHSA aligned policy with HIPAA where possible. However, 42 CFR part 2 and its governing statute are separate and distinct from HIPAA, and the part 2 regulations use different terminology than used in HIPAA.

Public Comments

A commenter requested clarification on whether data disclosed to qualified personnel under § 2.52 would include "identifiable information." For example, this commenter asked why a name would be relevant if the data and information would be used for research. Another commenter stated that certain patient identifying information such as social security numbers should not be included, as it serves no purpose to researchers. The commenter stated that this can easily be mitigated by data segmentation and consent management, but until then the rule should be maintained in that the part 2 program director is the only individual authorized to release of information.

SAMHSA Response

The part 2 data that may be disclosed for research purposes include patient identifying information, as that term is defined in § 2.11. One reason researchers would need identifiable information is to link part 2 data to other data sets, or for conducting data linkages. SAMHSA also proposed to address data linkages, which requires identifiable information, because the process of linking two or more streams of data opens up new research opportunities and potential risks. For example, the practice of requesting data linkages from other data sources to study the longitudinal effects of treatment is becoming widespread. SAMHSA is interested in affording patients protected by 42 CFR part 2 the same opportunity to benefit from these advanced research protocols while continuing to safeguard their privacy. Likewise, SAMHSA revised the research provision to enable part 2 data to be disclosed for research purposes by part 2 programs and other lawful holders of patient identifying information so that patients may benefit from the additional scientific research that will be conducted and that will facilitate continual quality improvement of part 2 programs and the important services they offer. This additional research would not be able to be conducted if SAMHSA were to continue to maintain the existing part 2 research provision, as suggested.

2. Suggestions for Improvement of the Research Provisions

Public Comments

Some commenters made suggestions to improve privacy protections as it relates to research. A commenter suggested that the research provision require a certificate of confidentiality as a prerequisite to researcher access to part 2 information.

SAMHSA Response

The research provision (§ 2.52(b)) already includes a requirement that the researcher receiving the part 2 data is fully bound by 42 CFR part 2. Although not required by § 2.52, the regulation would permit any lawful holder of patient identifying information to require a researcher sign a data use agreement spelling out these requirements.

According to NIH, certificates of confidentiality do not take the place of good data security or clear policies and procedures for data protection, which are essential to the protection of research participants' privacy. Under 42 CFR part 2, the research provision provides clear policies on conducting research and protecting the confidentiality of patient identifying information, including their obligations to comply with requirements under 42 CFR 2.16, Security for Records.

Public Comments

A commenter concluded that the number of entities who could release patient identifying information should be limited to those who have the resources to verify the research is valid and the patient will not become more vulnerable as result of disclosure. A commenter suggested that strict policies be in place at all levels of research organizations to assure that prohibited re-disclosure of patient information does not occur. A commenter asserted that aligning part 2's requirements for a valid written consent with those applicable under the HIPAA Privacy Rule would avoid confusion. One commenter suggested that the filing of conflict of interest statements by the primary investigators and co-investigators be required. A commenter suggested a change in language to clarify that researchers will resist any judicial demand for access to patient records, except as permitted by these regulations.

SAMHSA Response

SAMHSA examined the existing regulations that protect human subjects in research and concluded that, if those requirements were fulfilled, 42 CFR part

2 would ensure confidentiality protections consistent with the statute, while providing the expanded authority for disclosing patient identifying information. Requirements that ensure compliance with HIPAA and the Common Rule (e.g., IRB and/or privacy board review) with respect to research provide these assurances, including that the researcher has a plan to protect and destroy identifiers and to not re-disclose the information in an unauthorized manner. Disclosure of part 2 data also would be allowable for research that qualifies for exemption under the Common Rule due to the lower risk to subjects in the circumstances where exemptions apply, and this has been clarified in § 2.52(a)(2). The individual who would make the determination to disclose part 2 data on behalf of a part 2 program or other lawful holder would be the individual designated as director or managing director, or an individual otherwise vested with authority to act as chief executive officer or their designee. In addition, there is nothing in the regulation that requires this individual to disclose the data, even if the researcher provides documentation of compliance with the requirements under § 2.52.

SAMHSA declines to make the recommended change regarding conflicts of interest to the research section (§ 2.52). The revised research provision requires reviews, either by an IRB and/or privacy board, for the specific purpose of minimizing risk to patients and their privacy. The research provision also requires researchers requesting data linkages, as described in § 2.52(c), to have the request reviewed and approved by an IRB registered with the Department of Health and Human Services, Office for Human Research Protections in accordance with 45 CFR part 46 to ensure that patient privacy is considered and the need for identifiable data is justified. In addition, HHS has issued subregulatory guidance that, to the extent financial interests may affect the rights and welfare of human subjects in research, IRBs, institutions, and investigators need to consider what actions regarding financial interests may be necessary to protect those subjects.

SAMHSA proposed to require any individual or entity conducting scientific research using patient identifying information to meet additional requirements to ensure compliance with confidentiality provisions under part 2. Among these are a provision (§ 2.52(b)(1)) that “requires researchers to be fully bound by these regulations and, if necessary, to resist in judicial proceedings any efforts to obtain access to patient records

except as permitted by these regulations.”

Public Comments

Another commenter suggested that the rule allow an extended disclosure period specific to research that could be included in the initial disclosure approval.

SAMHSA Response

The part 2 regulations do not specify a disclosure period in the research provision.

Public Comments

A commenter said that it would bring clarity and aid entities seeking to comply with the proposed rule if it included a definition of “repository” and of “scientific research.” The commenter stated that the HHS Common Rule provisions, referenced repeatedly in the proposed rule, apply only to activities which meet the definition of research involving human subjects. It is not clear whether SAMHSA intends to adopt Common Rule definitions or create a separate scheme.

SAMHSA Response

SAMHSA did not propose a regulatory definition for these terms in the NPRM and respectfully declines to define the terms in the final rule as suggested. “Scientific research” is a statutory term that is not defined. Researchers requesting part 2 data for the purposes of conducting scientific research and whose research is subject to the Common Rule would need to comply with requirements for the Common Rule as well as those of part 2. SAMHSA refers to the term “repository” in the context of the data linkages provision, and intended the term to broadly refer to data that is stored and managed. SAMHSA may address undefined terms that require further elaboration in subregulatory guidance or in subsequent rulemaking.

Public Comments

One commenter supported provisions that allow states to work with outside entities, which are HIPAA and Common Rule compliant, to conduct research that will improve care and drive quality outcomes for Medicaid beneficiaries with a substance use disorder.

SAMHSA Response

SAMHSA supports the efforts of part 2 stakeholders to work together collaboratively and in compliance with the law. Part 2 prohibits researchers from re-disclosing patient identifying information except back to the

individual or entity from whom that patient identifying information was obtained or as permitted under the data linkages provision. Researchers may include part 2 data in reports only in aggregate form in which patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized means to identify a patient, directly or indirectly, as having or having had a substance use disorder.

3. HIPAA and HHS Common Rule Requirements

Public Comments

Many commenters expressed support for aligning requirements for disclosure of information for conducting research with existing requirements for research as regulated by the HHS Common Rule (45 CFR part 46). A commenter remarked that an alternate approach would be to create a single category of consent for research purposes.

SAMHSA Response

In this part 2 final rule, SAMHSA has implemented certain revisions that are predicated on the current version of the Common Rule (45 CFR part 46, Protection of Human Subjects, promulgated in 1991). Should conflicting policies be created in the future, SAMHSA will take appropriate action (e.g., issue an NPRM or technical correction). With respect to creating a single category of consent for research, the existing consent requirements permit patient consent for the disclosure of patient identifying information for the purpose of scientific research.

4. Data Linkages

SAMHSA revised § 2.52 from the proposed regulatory text by separating out the data linkages provisions into its own paragraph, § 2.52(c) for purposes of clarity and readability. In addition, the final § 2.52 addresses data linkages to enable researchers holding part 2 data to link to data sets from federal and non-federal data repositories as explained in greater detail below. SAMHSA proposed to permit researchers to request to link data sets that include patient identifying information under certain conditions. We proposed to limit the data repositories from which a researcher may request data for data linkages purposes to federal data repositories because federal agencies that maintain data repositories have policies and procedures in place to protect the security and confidentiality of the patient identifying information that must be submitted by a researcher in order to link the data sets. SAMHSA

sought input from the public regarding whether to expand the data linkages provision beyond federal data repositories; what confidentiality, privacy, and security safeguards are in place for those non-federal data repositories; and whether those safeguards are sufficient to protect the security and confidentiality of the patient identifying information.

Public Comments

Several commenters suggested that researchers be allowed to perform data linkages between data sets containing substance use disorder data. However, some warned that the proposed rule was unclear regarding data linkages. One commenter said SAMHSA should clarify that researchers have the option to submit data to a federal data repository, like CMS, for linking of federal data, but are not required to do so. Other commenters argued that proposed § 2.52 should explicitly allow researchers to perform their own data linkages between data sets containing substance use disorder records. A commenter asserted that non-profit entities who engage in research should be distinct from for-profit organizations and that for-profit organizations should not be allowed access to large linked data sets.

Many commenters expressed support for permitting linkage with non-federal repositories where adequate, flexible safeguards are in place to protect the security and confidentiality of part 2 data. A commenter asserted that only allowing researchers to combine 42 CFR part 2 records received without patient consent with records from a federal repository is not consistent with the goal of enhancing research conducted with data protected by part 2. In particular, commenters pointed out that many state, local, tribal, and corporate data repositories with hospital emergency department and discharge, trauma registry, and birth and death records would not be covered by the federal data linkages language in the proposed rule, thereby hampering important research and evaluation activities. Additionally, commenters supported the expansion of data linkages in order to better support the analysis required by evolving health care delivery and payment models, such as Accountable Care Organizations.

Commenters urged that appropriate privacy and security protections are in place, to include physical security and disposition of data if SAMHSA permits linkages to non-federal data repositories. One commenter remarked that protections imposed by federal repositories that are not imposed by

other repositories should be identified and considered as requirements, so as not to lose the insight offered through additional linkage opportunities.

Another suggested implementation of data use agreement language to non-federal repositories. A commenter reasoned IRBs or privacy officers could ensure other repositories are in compliance with part 2 requirements.

However, a few commenters did not support expansion of data linkage to non-federal repositories. Some commenters expressed concerns about the security of data in both federal and non-federal data repositories citing examples of healthcare data breaches. One commenter concluded data linkage to any data repositories be withdrawn from the proposed language citing the federal agencies as well as health care data repositories inability to adequately safeguard personal information. Another commenter suggested data repositories performing the data linkages, if outside of part 2 entity, not be given information subject to part 2.

SAMHSA Response

SAMHSA would like to clarify that the data linkages provision is not intended to prohibit a researcher from linking a data set in the researcher's possession that contains part 2 data with a data set from a third party source, so long as the part 2 data is not further disclosed in the data linkage process and the researcher adheres to any applicable confidentiality, privacy, and security requirements and safeguards. Regarding the comment on for-profit organizations, whether the researcher is a for-profit or not-for-profit organization, the researcher would be required to have IRB approval and/or privacy board review of their research, and, additionally, IRB approval of the research project that contains the data linkage component, to ensure risks to the patient and their privacy are minimized. In addition, part 2 prohibits researchers from re-disclosing patient identifying information except back to the individual or entity from whom that patient identifying information was obtained or as permitted under the data linkages provision. Researchers may include part 2 data in reports only in aggregate form in which patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized means to identify a patient, directly or indirectly, as having or having had a substance use disorder.

In response to public comments, SAMHSA has decided in the final rule to permit data linkages to both federal

and non-federal data repositories subject to the conditions explained below. SAMHSA believes that these changes will enhance research while still ensuring the protection of part 2 patient identifying information. SAMHSA agrees with commenters that many non-federal data repositories, as well as federal data repositories, contain data that is critical to research and, therefore, SAMHSA is expanding data linkages provisions.

In the data linkages provision of this final rule (§ 2.52(c)), SAMHSA revises its proposal to enable researchers holding part 2 data to link to data sets from any repository, including non-federal repositories, provided that the linkage has been reviewed and approved by an Institutional Review Board registered with the Department of Health and Human Services, Office for Human Research Protections in accordance with 45 CFR part 46 to ensure that patient privacy is considered and the need for identifiable data is justified. In addition to having the request reviewed and approved by an IRB, the researcher must ensure that patient identifying information obtained under the rule's research provisions is not provided to law enforcement agencies or officials. SAMHSA states in the final rule that the data repository is fully bound by the provisions of part 2 upon receipt of the patient identifying data and must, after providing the researcher with the linked data, destroy or delete the linked data from its records, including sanitizing any associated hard copy or electronic media, to render the patient identifying information non-retrievable in a manner consistent with the policies and procedures established under § 2.16 Security for records. In addition, the data repository must ensure that any data obtained pursuant to part 2's research provisions is not provided to law enforcement agencies or officials.

Public Comments

One commenter recommended that SAMHSA expand data linkages beyond research to the broader need for it to be inclusive of coordinated care. The commenter stated that this is another area where SAMHSA could look to existing HIPAA provisions and align the part 2 provisions accordingly.

SAMHSA Response

SAMHSA declines to make the revision suggested by the commenter. The transfer of part 2 information for the purposes of research, as allowed under § 2.52, is an exception to patient consent, and, therefore, the data linkages provision cannot be expanded

to other parts of the regulation. Because of its targeted population, part 2 provides more stringent federal protections than most other health privacy laws, including HIPAA. However, SAMHSA aligned policy with HIPAA where possible.

5. Multi-Payer Claims Database

Public Comments

Many commenters urged the final rule to explicitly include a statement on the authority granted to MPCDs (also referred to as APCDs) that maintain adequate safeguards to collect, link, and disseminate substance use disorder records without patient consent for research purposes. Several commenters argued that many states have established state-sponsored MPCD systems and urged the proposed rule to specifically ensure substance use disorder data are not systematically excluded from state MPCD systems, allowing part 2 data to be collected, linked, and disseminated without patient consent for research purposes. A commenter requested specific guidance as to whether MPCDs could be lawful holders of part 2 data with the same disclosure requirements as those for HIEs. A commenter stated that the rule should authorize state data repositories such as an MPCD to link part 2 data to other data for research purposes.

SAMHSA Response

For an MPCD or any entity to disclose part 2 data for research purposes under the rule's research exception to consent requirements (§ 2.52), the entity must be a "lawful holder of patient identifying information." Under the research provision, any lawful holder of part 2 data may disclose the data to qualified researchers that meet the requirements under the HHS Common Rule or HIPAA Privacy Rule. As SAMHSA discussed in the NPRM preamble, a "lawful holder" of patient identifying information is an individual or entity who has received such information in accordance with the part 2 requirements, and, therefore, is bound by 42 CFR part 2. Examples of potential "lawful holders" of patient identifying information include a patient's treating provider, a hospital emergency room, an insurance company, an individual or entity performing an audit or evaluation, or an individual or entity conducting scientific research. As permitted by the authorizing statute and under these regulations, any lawful holder of patient identifying information may disclose part 2 data without patient consent for research purposes under the

circumstances specified under the research provision.

Regarding the specific scenario raised by commenters, SAMHSA wishes to clarify that MPCDs and other data intermediaries are permitted to obtain part 2 data under the research exception provided in § 2.52, provided that the conditions of the research exception are met. Furthermore, an MPCD or data intermediary that obtains part 2 data in this fashion would be considered a "lawful holder" under these final regulations and would therefore be permitted to redisclose part 2 data for research purposes, subject to the other conditions imposed under § 2.52. The final rule edits the language under paragraph 2.52(a) to clarify that the regulations do not prohibit such a disclosure.

Except as provided in paragraph 2.52(c), a researcher may not redisclose patient identifying information for data linkages purposes. SAMHSA's data linkages provision permits researchers to request to link data sets that include patient identifying information if the data linkages component is reviewed and approved by an IRB registered with OHRP in accordance with 45 CFR part 46 and certain other conditions are met. The data linkages provision is not intended to prohibit a researcher from linking a data set in the researcher's possession that contains part 2 data with a data set from a third-party source, so long as the part 2 data is not further disclosed in the data linkage process and any applicable confidentiality, privacy, and other conditions as specified in this rule are adhered to.

O. Audit and Evaluation (§ 2.53)

SAMHSA is modifying the proposed language as discussed below. SAMHSA has revised the section heading by deleting the word "activities." SAMHSA modernized this section to include provisions governing both paper and electronic patient records. In addition, we revised the requirements for destroying patient identifying information by citing the expanded Security for Records section (§ 2.16). Furthermore, we updated the Medicare or Medicaid audit or evaluation paragraph title to include Children's Health Insurance Program (CHIP) and, in subsequent language, refer to Medicare, Medicaid, and CHIP.

The § 2.53 revisions permit the part 2 program, not just the part 2 program director, to determine who is qualified to conduct an audit or evaluation of the part 2 program. The revised language also permits an audit or evaluation necessary to meet the requirements of a

CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE), under certain conditions, by better aligning the criteria in this section with those set forth in the Affordable Care Act (regulating ACOs, in part, at 42 U.S.C. 1395jjj). We have specified that such ACO or similar CMS-regulated entities must have in place administrative and/or clinical systems. While the NPRM indicated both types of systems were required, it has been noted that some ACO or similar CMS-regulated entities will not have both clinical and administrative systems. We also have clarified in the final rule that the ACO or similar CMS-regulated organization (including a CMS-regulated QE) is subject to periodic evaluations by, or receives patient identifying information from, CMS or its agents. To ensure that patient identifying information is protected, the ACO or similar CMS-regulated organization (including a CMS-regulated QE) that is the subject of, or is conducting, the audit or evaluation must have a signed Participation Agreement with CMS or similar documentation that demonstrates that the organization and its auditors or evaluators must conduct the audit and evaluation activities in full compliance with all applicable provisions of 42 U.S.C. 290dd-2 and 42 CFR part 2.

Public Comments

Several commenters provided comments with regard to § 2.53, Audit and Evaluation. A few commenters discussed the application of this section to Medicare and Medicaid. A couple of commenters recommended clarifying that Medicaid agencies are permitted under the QSO exception to disclose part 2 information to third-party payers for audit or evaluation purposes. These commenters also suggested that Medicaid and other third-party payers may use (third-party) contractors and vendors to assist beneficiaries and perform such activities as program integrity activities. The commenters argued that the QSO exception described above should include communications between third-party payers such as Medicaid agencies and other holders of part 2 data and QSOs to help ensure "operational efficiency." Another commenter suggested that the revisions concerning the auditing process and Participation Agreements would be too burdensome, and would be inconsistently applied because Medicare and Medicaid do not have to comply with the auditing requirements, whereas providers do. Further, a couple of commenters stated that part 2 programs would be confused in

attempting to decipher which organizations have Participating Agreements with CMS in place, further exacerbating the existing compliance issues with part 2. A commenter requested that SAMHSA clarify whether Medicaid program ACOs and external quality review organizations (EQRO) are considered “CMS-regulated” for the purposes of permitted disclosures. The commenter suggested that Medicaid program entities should be considered CMS-regulated entities.

SAMHSA Response

A QSO is an individual or entity that provides a service to a part 2 program consistent with a QSOA (*see* §§ 2.11, Definitions; 2.12(c)(4), Applicability). A QSOA is a two-way agreement between a part 2 program and the individual or entity providing the desired service. Therefore, to be a QSO, the contracted entity must be providing the service to a part 2 program. The QSOA authorizes communication only between the part 2 program and QSO. Third-party payers, such as Medicaid, are not considered part 2 programs as defined in this rule, and are not eligible to have QSO through a QSOA. That said, comments to the proposed rule raised questions that indicate that there may be varying interpretations of the current (1987) part 2 rule’s restrictions regarding the use of contractors/subcontractors in contexts other than the QSO context, such as the sharing of part 2 information by third-party payers with contractors and subcontractors to carry out activities related to audit and evaluation and program integrity, and we intend to address such scenarios with greater clarity in an SNPRM. As stated under § 2.12(a)(1), Restrictions on disclosures, the restrictions on disclosures in these regulations apply to any information, whether recorded or not, which would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such information by another person. Patient identifying information that has been rendered non-identifiable in a manner that creates a very low risk of re-identification may be disclosed.

With regard to the concern that the proposed revisions to § 2.53 would be burdensome and create confusion when part 2 programs have to determine who has a Participation Agreement or similar documentation in place, CMS-regulated entities that, among other requirements, are subject to periodic evaluations by CMS or its agents, or are required by CMS to evaluate participants in the ACO or similar CMS-regulated

organization (including a CMS-regulated QE) relative to CMS-defined or approved quality and/or cost measures should be able to produce evidence that they have Participation Agreements or similar documentation in place with CMS if requested by a part 2 program.

As to whether Medicaid program ACOs and EQROs are considered “CMS-regulated,” this rule explicitly states that ACOs and similar organizations regulated by CMS may, subject to certain conditions, disclose or require participants in the organization to disclose part 2-covered information in order for the organization to meet CMS audit and evaluation requirements. Other entities may also be considered “CMS-regulated” depending on the particular circumstances, for example, as a result of their direct supervision by CMS, the establishment by CMS of regulations governing their conduct or qualification, or, in the case of Medicaid and CHIP-related entities, CMS’ approval of state plans or waivers and supervision of the state agencies. Medicaid program ACOs and EQROs do fit within the entities covered by the audit and evaluation provisions of the part 2 program. SAMHSA may further elaborate on this topic in subregulatory guidance issued following the publication of the final rule.

Public Comments

A few commenters provided input on SAMHSA’s proposal to permit audit or evaluation necessary to meet the requirements of a CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE), under certain conditions. A couple of commenters recommended that SAMHSA modify part 2 to permit CMS to provide all claims with substance use disorder treatment information through the Claim and Claim Line Feed (CCLF) file so patients can receive comprehensive, quality treatment and programs can operate more efficiently and effectively. The commenters suggested that because 42 U.S.C. 290dd-2(b)(2)(B) permits substance use disorder treatment program to disclose treatment records without the consent of the patient for the purpose of audits or evaluation; § 2.53 of the proposed rule also permits substance use disorder treatment programs to disclose treatment records to ACOs or other CMS-regulated organizations to allow the organizations to meet CMS’s audit and evaluation requirements for participation; therefore the provision could be expanded, or clarified, to also permit CMS to disclose substance use disorder treatment information to ACOs and bundled payment participants for

audit and evaluation activities. Another commenter expressed concern about the expansion of the part 2 audit and evaluation exception to include ACOs, because ACOs are continually “auditing” programs as a continual process of evaluating and monitoring and part 2’s language makes clear that an audit or evaluation is a time-limited activity that is not intended to permit ongoing access to program records. This commenter asserted that the part 2 audit and evaluation exception should not be allowed to result in a practice that circumvents the need to obtain a patient’s consent to access their information.

One commenter noted that CMS’s application of part 2 in its removal of substance use disorder treatment information from the monthly CCLF, in which CMS redacts any claim submitted by any provider where a substance use disorder is either the principal or secondary diagnosis, causes CMS to remove claims from the CCLF file that are not produced by federally assisted substance use disorder treatment programs. The commenter urged SAMHSA to work with CMS to develop a pathway to include substance use disorder treatment information in the CCLF data file.

SAMHSA Response

CMS may disclose patient identifying information to a CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) for Medicare audit and evaluation purposes pursuant to § 2.53(c), which provides that “[p]atient identifying information, as defined in § 2.11, may be disclosed under paragraph (c) of this section to any individual or entity for the purpose of conducting a Medicare, Medicaid, or CHIP audit or evaluation. . . .” Neither the statute nor the part 2 regulations define audit or evaluation. However, under this section of the audit and evaluation exception, the purpose of the disclosure must be to conduct a Medicare, Medicaid, or CHIP audit or evaluation. This may include audit or evaluation activities, such as reviews of financial performance or the quality of health care services delivered, undertaken by the CMS-regulated organization itself to review its own performance. The exception does not cover any activities conducted by ACOs that may not be reasonably construed as being related to such a purpose.

Public Comments

Commenters provided other recommendations related to this section. A commenter suggested that § 2.53(d) should be revised to permit disclosure

of patient information to entities that have administrative control over auditors. Another commenter suggested that SAMHSA consider allowing “lawful holders” the ability to share information for audit and evaluation services, with the agreement that the service provider must adhere to part 2.

Another commenter recommended that SAMHSA convene a group of state, local, and provider representatives to develop draft guidance.

SAMHSA Response

Regarding the suggestion that § 2.53(d) should be revised to permit disclosure of patient information to entities that have administrative control over auditors, except as provided in § 2.53(c), patient identifying information disclosed under this section may be disclosed only back to the program from which it was obtained and used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities, as authorized by a court order entered under § 2.66.

As recommended by a commenter, SAMHSA plans to develop and publish subregulatory guidance regarding the application of § 2.53 audit and evaluation disclosures after publication of this final rule.

P. Other Public Comments on the Proposed Rule

1. Requests To Extend the Public Comment Period

Public Comments

Several commenters requested extension to the public comment period. Commenters stated the complexity and importance of the rule warranted additional time for reflection and comment. A few commenters requested that the comment period be extended for one year to allow for a more open process. A couple of commenters suggested that in addition to extending the comment period for one year, public hearings also be held across the country.

SAMHSA Response

While SAMHSA recognizes that the issues addressed in the part 2 NPRM are complex and important, we concluded that the 60-day comment period was sufficient to provide the public a meaningful opportunity to comment, and this conclusion is supported by the hundreds of complex and thoughtful comments received. Additionally, the NPRM was available to the public for a preliminary review on the **Federal Register** Web site upon submission of the NPRM to the **Federal Register**, which was several days prior to publication, thereby providing

stakeholders additional time prior to the publication date. Finally, on June 11, 2014, SAMHSA held a public listening session and, invited through a **Federal Register** notice, general comments, as well as comments on six key provisions of 42 CFR part 2.

2. Rulemaking Process

Public Comments

One commenter expressed concern that SAMHSA did not summarize or address specific comments from stakeholders who participated in the public listening sessions.

Another commenter said that the part 2 changes should move forward but should be monitored and modified accordingly over the next two to three years.

SAMHSA Response

SAMHSA will undertake further rulemaking as necessary and intends to respond to issues raised with respect to the part 2 regulations, as they have in the past, through subregulatory guidance.

SAMHSA considered all comments received in the June 2014 public Listening Session on the part 2 regulations. As explained in the NPRM, feedback from the Listening Session was considered and helped to inform the development of the February 2016 NPRM (*see* 81 FR 6988, 6993). SAMHSA posted all comments received in response to the Listening Session **Federal Register** Notice on its Web site: <http://www.samhsa.gov/about-us/who-we-are/laws-regulations/public-comments-confidentiality-regulations>.

3. Implementation Timeline and Other Barriers to Implementation

Public Comments

To allay privacy concerns, a commenter said that SAMHSA should delay the proposed part 2 changes to further develop its Consent2Share application and encourage wider adoption. Similarly, a commenter recommended further testing and evaluation on IT solutions before issuing part 2 changes. This commenter further urged SAMHSA to address these issues in the final rule by specifically detailing a process for updating the Consent2Share tool so that its design specifications remain compatible with the rapidly advancing and very fluid EHR design landscape.

SAMHSA Response

SAMHSA declines to accept these recommendations to delay publication of a final rule pending technology developments or Congressional action.

Technology adoption is an ongoing process, and the majority of current EHR and HIE applications may not have the capability to support the DS4P initiative. In addition, paper records are still used today in some part 2 programs and shared through facsimile (FAX). In addition, SAMHSA's publication of a final rule would not prevent further Congressional action with respect to part 2.

Public Comments

One commenter expressed concern that applying electronic data segmentation in conjunction with patient privacy preferences can significantly increase the complexity of the workflow process and have unintended consequences on system performance and response times at the point of care. The commenter recommended that SAMHSA, in conjunction with other federal agencies, advisory bodies, such as the National Committee on Vital and Health Statistics (NCVHS), and public and private stakeholders should convene public discussions to evaluate the possibility of data segmentation standards in electronic systems, the benefits and potential unintended consequences that may result, along with the associated costs and anticipated consumer uses of such standards and processes.

In addition to the technical challenges, a commenter said that SAMHSA should recognize other barriers to implementation of part 2 changes, including complexity in navigating individual state regulations, challenges around mapping to clinical codes, and lack of a standardized service discovery mechanism to ensure capability of exchanging systems to evaluate the ability to receive and interpret a tagged document.

SAMHSA Response

SAMHSA recognizes the concerns expressed by the commenter; however, SAMHSA's jurisdiction is limited to those regulations over which it has authority. We note that the part 2 regulations permit, but do not require, data segmentation.

4. Educational Opportunities

Public Comments

Some commenters urged SAMHSA to provide trainings/webinars and technical assistance after the final rule is adopted so that substance use disorder providers, other health care providers, and patients will understand the changes to ensure compliance with the rule. Expressing concern that many people will not understand the idea of

an HIE or a registry, one commenter suggested creating paid space for a nurse visit to walk a consumer through the consent.

A few commenters encouraged SAMHSA to invest in provider and patient education efforts on the value of integrated care, the role of information sharing in enabling integrated care, how the consent process works, patient rights under 42 CFR part 2, and the implications of providing consent to share personal health information.

A commenter encouraged SAMHSA to continue its efforts to provide guidance as to how part 2's requirements can be incorporated into HIE systems, suggesting that many of the perceived part 2 issues can be resolved by proper education regarding the actual requirements and how information can be exchanged pursuant to part 2 with little, if any, additional effort if proper operational practices are utilized by health care providers and management organizations.

One commenter suggested that SAMHSA establish a consumer engagement committee or seek input from an existing national consumer advisory council to support part 2 programs in complying with certain areas of the rule, such as developing user-friendly consent forms and crafting educational materials for patients. One commenter suggested that SAMHSA contract with the Legal Action Center to create a webinar or FAQ to provide guidance to community health centers and other "multi-use" organizations as to the applicability of part 2.

Another commenter recommended that SAMHSA develop educational materials targeted at pharmacists because of the pharmacy profession's growing role in substance use disorder treatment.

SAMHSA Response

SAMHSA appreciates these comments on educational opportunities and plans to address specific commenter requests in subregulatory guidance after the publication of the final rule. SAMHSA will consider additional educational activities, such as trainings, webinars, and establishing engagement committees, should SAMHSA determine the need during implementation of the final rule.

5. Increased Enforcement

Public Comments

Some commenters urged SAMHSA to ensure that part 2 provides for meaningful enforcement and penalties, with a few reasoning that the rule would create new avenues for the exchanges of

patients' substance use disorder information, especially to other parts of the health care system that may have little to no experience treating substance use disorder or complying with part 2. One of these commenters asserted that fines imposed for part 2 violations are so minimal that they are not a deterrent to intentional or accidental violations. A commenter suggested that SAMHSA adopt the HIPAA penalties contained in the HITECH Act and specify that any disclosures of information in violation of this statute must be excluded from evidence and deemed inadmissible for use in any administrative, civil, or criminal proceeding.

Urging SAMHSA to review and correct the enforcement concerns of the underlying statute, one commenter argued that the current confidentiality obligations have questionable enforcement authority because there is no express provision in Title 18 pertaining to the confidentiality of drug and alcohol treatment records. Although the original part 2 underlying statute set forth specific fines, the commenter explained that a subsequent revision (by Pub. L. 102-321) eliminated the fines leaving only a reference to Title 18. Moreover, the commenter said that by the proposed transfer of the existing enforcement authority from FDA to SAMHSA, the proposed rule appears to remove enforcement authority that actually exists to a potential state of unenforceability. Similarly, another commenter stated that SAMHSA does not have legislative authority to impose penalties for disclosure. No mention of privacy law violation fines, penalties, or offenses exist in Title 18. Thus, the current confidentiality obligations have no enforcement authority. The commenter stated that entities receiving unauthorized information would likely not be subject to penalties unless a common law breach of privacy lawsuit is filed.

SAMHSA Response

The Department of Justice is responsible for enforcing violations of 42 CFR part 2 in accordance with Title 18 of the United States Code. Title 42 U.S.C. 290dd-2 provides that "[a]ny person who violates any provision of [the] section or any regulation issued pursuant to [the] section shall be fined in accordance with title 18." Reports of violation of the regulations may be directed to the United States Attorney's Office (USAO) for the judicial district in which the violation occurs or may be directed to SAMHSA for possible referral to the relevant USAO. A report of any violation of these regulations by an opioid treatment program may be

directed to the relevant USAO as well as the SAMHSA office for opioid treatment program oversight, pursuant to 42 CFR part 8.

6. Other Miscellaneous Comments on the Proposed Rule

Public Comments

A commenter suggested that SAMHSA revise the title of part 2 to "Confidentiality of Patient Records Relevant to Substance Use Disorders and Associated Behavioral Diagnoses," to ensure person-centered language is used.

SAMHSA Response

To be consistent with recognized classification manuals, current diagnostic lexicon, and commonly used descriptive terminology, SAMHSA proposed to refer to alcohol abuse and drug abuse collectively as "substance use disorder," and, for consistency, proposed to revise the title of 42 CFR part 2 from "Confidentiality of Alcohol and Drug Abuse Patient Records" to "Confidentiality of Substance Use Disorder Patient Records."

Public Comments

Some commenters made specific suggestions or requested clarification regarding parts of the part 2 regulations that were not the subject of the proposed changes in the NPRM. For example, commenters addressed §§ 2.14 (Minor patients), 2.20 (Relationship to state laws), and 2.21 (Relationship to federal statutes protecting research subjects against compulsory disclosure of their identity).

SAMHSA Response

SAMHSA acknowledges commenters' questions and suggestions relating to all aspects of the part 2 regulations. However, for purposes of this final rule, SAMHSA generally considered comments submitted on provisions for which changes were not proposed in the February 2016 NPRM to be outside of the scope of this rulemaking. SAMHSA will take such comments and recommendations under advisement and may issue subregulatory guidance in the future to address some of these issues brought up by commenters.

Public Comments

Another commenter also urged SAMHSA to work with CMS to ensure that when proper criteria are met, such as through a QSOA and/or a signed consent form, patient substance use claim information is available to ACOs through their CCLF files. Asserting that it is a major blind spot in the ability of an ACO to manage total care if it does

not have data on substance use disorder data, a commenter encouraged SAMHSA to work with CMS on ways to effectively manage substance use disorder care within the administration of the ACO program. One commenter suggested that SAMHSA work with federal agencies, states, localities, and providers to identify the cost/burden of the rule on entities and professionals. The commenter also recommended that SAMHSA work with the CMS and the Office of the National Coordinator for Health Information Technology (ONC) to align the rule with guidance permitting the HITECH enhanced funding for administrative costs to other providers.

SAMHSA Response

SAMHSA will continue to work with CMS and its other federal partners to ensure the effective and timely implementation of the part 2 final rule.

Public Comments

Because a state provides health care, including federally funded substance use disorder treatment programs, to inmates in the state jail system, a commenter stated that the part 2 regulations impact the methods by which care is coordinated for inmates and urged SAMHSA to consider part 2's impact on incarcerated populations.

SAMHSA Response

SAMHSA considered how the regulations would impact part 2 programs and lawful holders of patient identifying information, as well as other stakeholders. All part 2 programs and other lawful holders of patient identifying information must comply with part 2. If a jail or prison meets the definition of a part 2 program, it would be required to comply with part 2.

Public Comments

One commenter stated that there should be an option for the patient to have the ability to remove their substance use disorder history from their medical record after a ten-year minimum time period.

SAMHSA Response

Although SAMHSA is not prescribing any specific retention period, the expectation is the both paper and electronic records would comply with applicable federal, state, and local retention laws.

Public Comments

A commenter requested that SAMHSA provide a description of 42 CFR part 2-covered entities similar to the designation under HIPAA.

SAMHSA Response

SAMHSA may address applicability in subregulatory guidance or in subsequent rulemaking.

VI. Rulemaking Analyses

A. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), agencies are required to provide a 60-day notice in the FR and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. We provided for this comment period as part of the NPRM. The part 2 information collections are approved under OMB Control No. 0930-0092, and SAMHSA will shortly submit the changes associated with this rule to OMB for review.

This rule includes changes to information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements, as defined under the PRA (5 CFR part 1320). Some of the provisions involve changes from the information collections set out in the previous regulations. Information collection requirements are: (1) Section 2.13(d)—Disclosure: Requires entities named by patients using general designation under § 2.31(a)(4)(iv)(C) to provide a list of entities to which the patient's information has been disclosed to participants pursuant to the general designation, (2) Section 2.22—Disclosure: Requires each program notify each patient that federal law and regulations protect the confidentiality of substance use disorder patient records and provide a written summary of the effect of this law and these regulations, (3) Section 2.51—Recordkeeping: This provision requires the program to document a disclosure of a patient record to authorized medical personnel in a bona fide medical emergency as defined in § 2.51. The regulation is silent on retention period for keeping these records as this will vary according to state laws. It is expected that these records will be kept as part of the patients' health records. The major change from current (1987) regulations is the list of disclosures requirement at Section 2.13(d). SAMHSA proposed that entities named on a consent form that

disclose patient identifying information to their participants under the general designation must provide patients, upon request, a list of entities to which their information has been disclosed pursuant to a general designation (*i.e.*, list of disclosures). Impact of this provision is noted below. SAMHSA notes that entities are not required to use the general designation permitted under § 2.31(a)(4)(iii)(B)(3)(i).

Under the PRA, the time, effort, and financial resources necessary to meet the information collection requirements referenced in this section are to be considered in rulemaking. The NPRM solicited comments on PRA issues. Commenters did not raise concerns regarding the burden for information collection requirements for the recordkeeping and notification provisions above. Though commenters expressed concern about some aspects of the list of disclosures requirements, these comments did not suggest that the burden of information collection would increase for 42 CFR part 2-compliant entities. Indeed, one commenter noted that current practice for many facilities to maintain both paper and electronic records may be both burdensome and inefficient. By promoting use of EHRs, changes in this rule may help to improve efficiency for providers. Some commenters also hypothesized that complying with the list of disclosures requirement would require such steps as developing a tracking system; or manual review or audit of all records; and mailing of letters through U.S. mail. Entities should already be collecting and retaining information needed to comply with the list of disclosures requirement. The final rule does not impose requirements to manually review all records, mail letters using the U.S. Postal Service or develop a tracking system specifically to comply with the list of disclosures provisions. For instance, we note below that entities could comply with the List of Disclosures requirement by either collecting this information electronically by using audit logs to obtain the required information or by keeping a paper record. Similarly, we point out that list of disclosures may be transmitted through such methods as mail or email or through other means preferred by the patient. We discuss the list of disclosures requirements further in the impact analysis section below.

Annual burden estimates for these requirements are summarized in the table below:

TABLE 2—ANNUAL BURDEN ESTIMATES

	Annual number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Hourly wage cost	Total cost
Disclosures							
42 CFR 2.13 (d)	¹ 19,548	1	19,548	² 4.15	81,124	³ \$36.9175	\$2,995,000
42 CFR 2.22	⁴ 12,034	155	⁵ 1,861,693	.20	372,338.6	⁶ 40.26	14,990,000
Recordkeeping							
42 CFR 2.51	12,034	2	24,068	.167	4,019	⁷ 34.16	137,000
Total	⁸ 31,582		1,905,309		457,482		18,123,000

¹ The number of entities required to generate a list of disclosures based on the number of estimated patient requests. Patient requests are based the total number of annual treatment admissions from SAMHSA's 2010–2012 Treatment Episode Data Set (TEDS) (see footnote 5). The estimated patient requests equal the average of the total number of requests for a 0.1 percent request rate and a 2 percent request rate. SAMHSA notes that this estimate reflects the number of patient requests rather than the number of impacted entities as some entities may receive more than one request.

² The estimated time for developing a list of disclosures is 4 hours for entities collecting the information electronically using an audit log and 3 hours for entities that produce such a list from paper records. Because 90 percent of entities are estimated to collect the information electronically using an audit log and 10 percent are estimated to use paper records, the average weighted time to develop a list of disclosures is 3.9 hours [(0.9 × 4 hours) + (0.1 × 3 hours)]. Including the estimated 15 minutes to prepare each list of disclosures for mailing or transmitting, the total estimated time for providing a patient a list of disclosures is 4.15 hours (3.9 hours + 0.25 hours).

³ The weighted hourly rate for health information technicians, medical technicians and administrative staff who will be preparing the list of disclosures. The hourly rate is weighted to reflect the fact that health information and medical technicians, who will be generating the list of disclosures, have a higher wage rate than administrative staff and will contribute more hours to generating the list of disclosures. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics* [accessed June 3, 2015], Standard Occupations Classification codes (29–2071, 31–9092) [www.bls.gov/oes/]. The hourly wage rate was multiplied by 2 to account for benefits and overhead costs.

⁴ The number of publicly funded alcohol and drug facilities based on SAMHSA's 2013 National Survey of Substance Abuse Treatment Services (N–SSATS). The estimated annual number of respondents, 12,034, is based on N–SSATS data and reflects facilities receiving federal funding. However, under N–SSATS an organization may complete survey responses for multiple facilities.

⁵ The average number of annual treatment admissions from SAMHSA's 2010–2012 TEDS.

⁶ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics* [accessed July 16, 2015], Standard Occupations Classification code (21–1011) [www.bls.gov/oes/]. The hourly wage rate was multiplied by 2 to account for benefits and overhead costs.

⁷ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics* [accessed July 16, 2015], Standard Occupations Classification code (43–0000) [www.bls.gov/oes/]. The hourly wage rate was multiplied by 2 to account for benefits and overhead costs.

⁸ The combined total of the number of publicly funded alcohol and drug facilities and the number of entities required to generate a list of disclosures.

As described in greater detail in Section VI.B, Regulatory Impact Analysis, the respondents for the collection of information under § 2.22 and 2.51 are publicly (federal, state, or local) funded, assisted, or regulated substance use disorder treatment programs. The estimate of the number of such programs (respondents) is based on the results of the 2013 N–SSATS, and the average number of annual total responses is based on 2010–2012 information on patient admissions reported to the Treatment Episode Data Set (TEDS), approved under OMB Control No. 0930–0106 and OMB Control No. 0930–0335.

The respondents for the collection of information under § 2.13(d) are entities named on the consent form that disclose information to their participants pursuant to the general designation. These entities primarily would be organizations that facilitate the exchange of health information (e.g., HIEs) or coordinate care (e.g., ACOs, CCOs, and CPCMHs), but other organizations, such as research institutions, also may disclose patient identifying information to their participants (e.g., clinical researchers) pursuant to the general designation on the consent form. Because there are no definitive data sources for this potential range of organizations, we are not associating requests for a list of disclosures with any particular type of

organization. Consequently, the number of organizations that must respond to list of disclosures requests is based on the total number of requests each year.

B. Regulatory Impact Analysis

1. Public Comments on Notice of Proposed Rulemaking Regulatory Impact Analysis

a. Support for Cost Estimates Public Comments

SAMHSA received roughly 376 comments on the proposed rule. However, relatively few comments focused on the Regulatory Impact Analysis. We respond to these comments below and have made changes in our analysis, when appropriate, to reflect these comments.

A few commenters suggested that the estimated costs outlined by SAMHSA in the proposed rule are in line with actual costs. For instance, one commenter suggested that the estimated total cost of \$239 million over 10 years would not be unduly burdensome and would improve patient care and safety. A commenter stated that costs would be minimal for integrating the requirement properly to sanitize and dispose of records into training and instruction. Another commenter stated that the costs related to modifying release forms and training staff would be absorbed by organizations and would not impact business processes. Explaining that in

order to reflect the revision in title of 42 CFR part 2, a modification of the printed and on-line versions of applicable CFR Titles would be necessary, a commenter concluded that because of regular updates to CFRs, the incorporation of amendments made as part of this rule should not result in a significant economic impact.

SAMHSA Response

SAMHSA acknowledges and appreciates the comments received that expressed support for the cost estimates in the NPRM. Though SAMSHA does not attempt in this rule to quantify benefits, it is important to note that updates to 42 CFR part 2 may result in long-term cost savings as well due to improved care coordination and integration and more efficient use of data for research and performance improvement purposes.

b. Assertions That SAMHSA Underestimated Costs

Public Comments

Some commenters generally asserted that the compliance and implementation costs were underestimated. One commenter suggested that cost effectiveness of complying with the proposed regulation will impact members and patients because of the additional costs associated with implementation (e.g., outreach and education, changes to

consent forms), which undermines care coordination and effective delivery of services. Another commenter suggested that the projected costs of complying with part 2 should include costs for other institutions that are affected with re-disclosure of the provision; costs to individual practitioners or health organizations with few clinicians that fall under part 2; vendor-related costs; costs for software development and upgrades should be added to the costs of electronic record purchase and maintenance; cost to HIE; and costs to hire administrative staff.

A few commenters suggested that the estimated \$8,000 cost per facility to implement consent management was too low, failing to reflect fully development, testing and process costs. One commenter suggested that the estimated \$8,000 cost per facility to implement consent management likely does not consider vendor-related costs such as development, testing, training, adoption and process modifications that may need to occur, only the cost of the infrastructure investment. Commenters urged SAMHSA and federal partners to consider funding HIT adoption by behavioral health providers. Another commenter stated that the proposed rule underestimated the cost of scaling efforts to integrate DS4P and Consent2Share, including upgrades and iterations across EHR products. Commenters also suggested SAMHSA modify its DS4P efforts to reflect updated 42 CFR part 2 requirements. Lastly, a commenter suggested that the estimate of \$8,000 to comply with the proposal underestimates the costs for existing pharmacy management systems to add new functionality and applications and does not include other software or security requirements, training, or other implementation costs associated with the proposed rule. Another commenter generally suggested that the estimated cost burden of transitioning to a new consent form will be greater than proposed in the proposed rule.

Several commenters mentioned other specific areas in which SAMHSA underestimated costs. One commenter suggested that the costs estimated related to EHR customizations are underestimated because there is no current standard interoperability within EHRs that address part 2 information. Another commenter also shared their own experience in which they estimated a cost of \$30,000 to comply with 42 CFR part 2 when including 2 substance use specialists as part of an integrated treatment model using an electronic health record. This commenter asserted based on their own experience that if

small entities attempt to develop integrated substance use disorder treatment programs they may face similar costs, including information technology time and efforts to modify EHRs to include restrictions on sharing of 42 CFR part 2 information in an integrated setting prohibitive. Another commenter stated that time, resources and training would be required to implement proposed changes to §§ 2.12, 2.31, and 2.32, and that personnel and financial constraints are common within the health care industry. The commenter estimated that the ability to adapt currently used electronic health records to segregate certain patient information will also take considerable effort and time. A commenter stated that the proposed cost analysis associated with staff training is inaccurate because it assumes that only substance use disorder counselors would need training when, in actuality, other fields would also need to be trained because they could potentially become lawful holders of the patient information (e.g., social work, psychology, medicine, managed care, HIE, research organizations). The commenter added that additional work will be needed to redact patient records to be in compliance with the data sharing elements related to information that could identify a patient as a substantive abuse disorder patient. A commenter stated that the cost to organizations to comply with the requirement for U.S. mail transmissions will be significant.

SAMHSA Response

Though commenters suggested anecdotally that SAMHSA underestimated the burden of 42 CFR part 2-compliance, SAMHSA notes the availability of data segmentation tools such as Consent2Share, an open source tool for consent management that is compliant with 42 CFR part 2. As noted above (in Section V.J.1.c), SAMHSA will be shortly releasing an updated version of Consent2Share with improved functionality and ability to meet the list of disclosures requirements. Provided that a facility already is using electronic health records and can partner with a health information exchange using Consent2Share or similar software, SAMHSA believes based on current efforts to pilot an updated version of Consent2Share that a cost of between \$6,000 and \$10,000 is reasonable. At the individual clinic level, initial set-up, training and testing are expected to constitute the main expenses. D4SP, Consent2Share, and similar tools make it feasible for entities to comply with updated 42 CFR part 2 requirements at reasonable cost.

While we acknowledge comments that entities other than those directly subject to this rule may be impacted by its provisions, including vendors of EHR products, such impacts are outside the scope of the regulation. We do not mandate vendors to perform additional activities. Nonetheless, SAMHSA will monitor such impacts and, to the extent feasible, work with stakeholders and federal partners to develop fact sheets and other materials to assist in outreach to patients and others about changes made in this rule. Likewise, while SAMHSA is unable to directly fund updates to EHRs, SAMHSA continues to work closely with ONC and others to ensure inclusion of behavioral health providers in ongoing information technology programs (See <http://www.samhsa.gov/health-information-technology/samhsas-efforts>; <https://www.healthit.gov/policy-researchers-implementers/behavioral-health>).

We acknowledge that the cost of updating consent forms may be greater than we had proposed and have made changes to our cost estimates in this final rule to reflect the need to update forms to meet new requirements. We note that most of these costs may only need to be incurred once and in the past some organizations have made sample template forms and materials available (See e.g., <http://lac.org/resources/substance-use-resources/confidentiality-resources/sample-forms-confidentiality/>). SAMHSA may, at a future time, develop sample templates and forms to ease compliance costs.

c. Other Comments on Costs

Public Comments

Some commenters said existing functionalities within EHR systems and consent management tools do not easily separate or redact substance use disorder information from general medical information when such systems are shared across an integrated health system. Similarly, commenters expressed concern that the proposed rule could have the opposite effect of its intended purpose by causing HIEs to exclude part 2 information from information exchanges entirely since most HIEs and EHRs today do not support data segmentation. Asserting that the proposed part 2 changes would require HIEs to create an architecture for data management that provides for the segmentation of substance use disorder and general behavioral health data from physical health care data, including a way to have consent operate differently in each of the environments, one commenter asserted that this is a costly challenging administrative burden that

does nothing to promote the sharing of information between all necessary providers for the integration of coordination of care.

A commenter suggested that the financial burden of the proposed rule would vary depending on the size or complexity of the covered entity.

Another commenter asserted that the rule should not be adopted because it would result in increased health care costs. The commenter stated that SAMHSA is not able to estimate additional costs that are likely to occur when adding sensitive substantive abuse disorder treatment information of patients to electronic health information systems without patient consent (*e.g.*, additional security, costs related to breaches, class action lawsuits for breached information, and loss of business due to breaches). The commenter concluded that, because these costs do not provide additional substance use disorder or health care services, and instead remove dollars from health care services, the proposed rule is in conflict with SAMHSA's proposed goal of reducing unnecessary health care costs.

SAMHSA Response

SAMHSA agrees that costs may vary based on an institution's size, complexity and patient population served. However, we anticipate that over time compliance costs will drop significantly as institutions implement initial compliance efforts. SAMHSA notes that EHRs already are widely used in many health care settings with no evidence of class action lawsuits, loss of business or other speculative impacts (see *e.g.*, <http://dashboard.healthit.gov/quickstats/quickstats.php>). Though SAMHSA is concerned about health care costs, the use of EHRs is likely both to improve care and reduce costs over time. Changes made in this rule will help to support EHR adoption and integration of care. Though in general EHR adoption among behavioral health providers lags behind that of other health care providers, forthcoming N-SSATS data reflect that more than 25 percent of surveyed substance use disorder treatment facilities used EHRs only and more than half use EHRs and paper-based records. Such growing adoption by substance use disorder treatment facilities reflects that EHR use is consistent with good quality of care and 42 CFR part 2 compliance.

2. Statement of Need

This final rule reflects changes in the health care system and behavioral health, such as the increasing use of electronic health records and drive

toward greater integration of physical and behavioral health care. Despite efforts to enhance integration and coordination of care, however, it remains important to ensure persons seeking treatment for substance use disorders can remain confident as to the safeguarding of their medical information. This rule updates 42 CFR part 2 to balance these important needs.

3. Overall Impact

SAMHSA examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), Section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in any one year). This rule does not reach the economic threshold and thus is not considered to be an economically significant rule. However, because this rule raises novel policy issues arising out of legal

mandates, the rule is considered “a significant regulatory action,” this regulatory impact analysis has been prepared, and the rule has been reviewed by OMB.

When estimating the total costs associated with changes to the 42 CFR part 2 regulations, we assumed five sets of costs: updates to health IT systems costs, costs for staff training and updates to training curriculum, costs to update patient consent forms, costs associated with providing patients a list of entities to which their information has been disclosed pursuant to a general designation on the consent form (*i.e.*, the List of Disclosures requirement), and implementation costs associated with the List of Disclosures requirements. We assumed that costs associated with modifications to existing health IT systems, staff training costs associated with updating staff training materials, and costs to update consent forms would be one-time costs the first year the final rule is in effect and would not carry forward into future years. Staff training costs other than those associated with updating training materials were assumed to be ongoing annual costs to part 2 programs, also beginning in the first year that the final rule is in effect. The List of Disclosures costs were assumed to be ongoing annual costs to entities named on a consent form that disclose patient identifying information to their participants under the general designation. In the NPRM, SAMHSA proposed to require non-treating providers to implement the List of Disclosures requirement at any time, but they cannot use the general designation without being able to provide a List of Disclosures. Therefore, we assumed that starting in year 1 ten percent of entities would decide to implement each year, resulting in 100 percent of entities implementing by year 10. We note that it is possible that some entities will never implement this requirement and choose to forego use of the general designation.

We estimated, therefore, that in the first year that the final rule is in effect, the total costs associated with updates to 42 CFR part 2 will be about \$70,691,000. In year two, we estimate that costs will be roughly \$17,680,000 and increase annually as a larger share of entities implement List of Disclosures requirements and respond to disclosure requests. Over the 10-year period of 2016–2025, the total undiscounted cost of the part 2 changes will be about \$241 million in 2016 dollars. When future costs are discounted at 3 percent or 7 percent per year, the total costs become approximately \$217,586,000 or

\$193,098,000, respectively. These costs are presented in the tables below.

TABLE 3—TOTAL COST OF 42 CFR PART 2 REVISIONS

[Note: Numbers may not add due to rounding]

[Note that all costs presented in this analysis are rounded to avoid communicating inaccurate levels of precision]

Year	Staff training costs	Consent form updates	List of disclosures	Health IT costs	Total costs
[2016 dollars]					
	(A)	(B)	(C)	(D)	(E)
2016	\$15,521,000	\$2,104,000	\$4,930,000	\$48,136,000	\$70,691,000
2017	12,438,000	0	5,242,000	0	17,680,000
2018	12,438,000	0	5,554,000	0	17,992,000
2019	12,438,000	0	5,866,000	0	18,304,000
2020	12,438,000	0	6,178,000	0	18,616,000
2021	12,438,000	0	6,490,000	0	18,928,000
2022	12,438,000	0	6,802,000	0	19,240,000
2023	12,438,000	0	7,114,000	0	19,552,000
2024	12,438,000	0	7,426,000	0	19,864,000
2025	12,438,000	0	7,738,000	0	20,176,000
Total	127,463,000	2,104,000	63,338,000	48,136,000	241,040,000

TABLE 4—TOTAL COST OF 42 CFR PART 2 REVISIONS—ANNUAL DISCOUNTING

[Note: Numbers may not add due to rounding]

Year	Total costs	Total with 3% annual discounting	Total with 7% annual discounting
[2016 dollars]			
	(E)	(F)	(G)
2016	\$70,691,000	\$70,691,000	\$70,691,000
2017	17,680,000	17,165,000	16,523,000
2018	17,992,000	16,959,000	15,715,000
2019	18,304,000	16,751,000	14,941,000
2020	18,616,000	16,540,000	14,202,000
2021	18,928,000	16,327,000	13,495,000
2022	19,240,000	16,113,000	12,820,000
2023	19,552,000	15,897,000	12,176,000
2024	19,864,000	15,681,000	11,561,000
2025	20,176,000	15,463,000	10,974,200
Total	241,040,000	217,586,000	193,098,000
Annualized .....	.....	25,507,717.01	27,492,811.02

Note: Numbers may not add due to rounding.

The costs associated with the proposed revisions stem from staff training and updates to training curriculum, updates to patient consent forms, compliance with the List of Disclosures requirement (including implementation costs), and updates to health IT infrastructure for information exchange. Based on data from the 2013 N-SSATS, we estimated that 12,034 hospitals, outpatient treatment centers, and residential treatment facilities are covered by part 2. N-SSATS is an annual survey of U.S. substance use disorder treatment facilities. Data is collected on facility location, characteristics, and service utilization. Not all treatment providers included in N-SSATS are believed to be under the jurisdiction of the part 2 regulations.

The 12,034 number is a subset of the 14,148 substance use disorder treatment facilities that responded to the 2013 N-SSATS, and includes all federally operated facilities, facilities that reported receiving public funding other than Medicare and Medicaid, facilities that reported accepting Medicare, Medicaid, TRICARE, and/or Access to Recovery (ATR) voucher payments, or were SAMHSA-certified Opioid Treatment Programs. If a facility did not have at least one of these conditions, it was interpreted not to have received any federal funding and, therefore, not included in the estimate. The estimated annual number of respondents, 12,034, is based on N-SSATS data and reflects facilities receiving federal funding. However, under N-SSATS an

organization may complete survey responses for multiple facilities it oversees. Thus, an organization with three facilities may complete three separate surveys.

If an independently practicing clinician does not meet the requirements of paragraph (1) of the definition of Program they may be subject to 42 CFR part 2 if they constitute an identified unit within a general medical facility which holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment or if their primary function in the facility or practice is the provision of such services and they are identified as providing such services. Due to data limitations, it was not possible to estimate the costs

for independently practicing providers covered by part 2 that did not participate in the 2013 N-SSATS. For example, data from American Board of Addiction Medicine (ABAM) provides the number of physicians since 2000 who have active ABAM certification. However, there is no source for the number of physicians who have not participated in the ABAM certification process. In addition, it is not possible to determine which ABAM-certified physicians practice in a general medical setting rather than in a specialty treatment facility that was already counted in the N-SSATS data.

Several provisions in the NPRM referenced “other lawful holders of patient identifying information” in combination with part 2 programs. These other lawful holders must comply with part 2 requirements with respect to information they maintain that is covered by part 2 regulations. However, because this group could encompass a wide range of organizations, depending on whether they received part 2 data via patient consent or as a result of one of the limited exceptions to the consent requirement specified in the regulations, we are unable to include estimates regarding the number and type of these organizations and only included part 2 programs in this analysis.

In addition to the part 2 programs described above, SAMHSA proposed that entities named on a consent form that disclose patient identifying information to their participants under the general designation must provide patients, upon request, a list of entities to which their information has been disclosed pursuant to a general designation (*i.e.*, list of disclosures). These entities primarily would include organizations that facilitate the exchange of health information (*e.g.*, HIEs), and may also include organizations responsible for care coordination (*e.g.*, ACOs, CCOs, and CPCMHs). The most recent estimates of these types of entities are 67 functional, publicly funded HIEs and 161 functional, privately funded HIEs in 2013.¹ As of January 2015, there were an estimated 744 ACOs covering approximately 23.5 million individuals.² Finally, the National Committee for Quality Assurance (NCQA) recently noted that there are now more than 10,000 NCQA-recognized CPCMHs.³ While these types of organizations were the primary focus of this provision on the consent form, other types of entities, such as research institutions, may also disclose patient identifying information to their participants (*e.g.*, clinical researchers) pursuant to the general designation on

the consent form. Because there are no definitive data sources for this potential range of organizations, we are not associating requests for lists of disclosures with any particular type of organization. We, instead, estimate the number of organizations that must respond to list of disclosures requests based on the total number of requests each year.

a. Direct Costs of Implementing the Proposed Regulations

There is no known baseline estimate of the current costs associated with 42 CFR part 2-compliance. However, as reflected by commenters who requested alignment between HIPAA and 42 CFR part 2, HIPAA authorization and notification requirements have similarities to requirements of 42 CFR part 2 (see <http://www.hhs.gov/hipaa/for-professionals/privacy/index.html>). Instead, therefore, in the absence of data and studies specifically focused on compliance with 42 CFR part 2, SAMHSA has estimated these costs based on a range of published costs associated with HIPAA implementation and compliance.^{4,5}

i. Staff Training

Because SAMHSA lacks specific data regarding the cost of staff training to comply with 42 CFR part 2, SAMHSA has examined analogous HIPAA implementation costs. A Standard HIPAA training that meets or exceeds the federal training requirements is, on average, one hour long.⁶ Therefore, we also estimated one hour of training per staff to achieve proficiency in the 42 CFR part 2 regulations. To estimate the labor costs associated with staff training, we averaged the average hourly costs for counseling staff in specialty treatment centers (\$20.33⁷), hospital treatment centers (\$21.80⁸), and solo practice offices (\$24.67¹⁹). The resulting average wage rate was \$22.27 per hour. In order to account for benefits and overhead costs associated with staff time, we multiplied the average hourly wage rate by two. These estimates were only for training costs associated with counseling staff, who we assume will have primary responsibility for executing the functions associated with the part 2 revisions.

It is important as well to note that many current staff already have familiarity with current (1987) 42 CFR part 2 requirements. With regard to training materials, most part 2 programs are assumed to already have training curricula in place that covers current (1987) 42 CFR part 2 regulations, and, therefore, these facilities would only need to update existing training

materials rather than develop new materials. Part 2 entities may determine the content of this training. The American Hospital Association estimated that the costs for the development of Privacy and Confidentiality training, which would include the development of training materials and instructor labor costs, was \$16 per employee training hour in 2000.¹⁰ Because we assumed that part 2 programs would be updating existing rather than developing entirely new training materials, we estimated the cost of training development to be one-half of the cost of developing new materials, or \$8 per employee. Adjusted for inflation,¹¹ training development costs in 2016 would be \$11.04 per employee.

Using SAMHSA's 2010–2012 TEDS average annual number of treatment admissions ($n=1,861,693$) as an estimate of the annual number of patients at part 2 programs and calculated staffing numbers based on a range of counseling staff-to-client ratios (*i.e.*, 1 to 10¹² and 1 to 5¹³). Based on these assumptions, staff training costs associated with part 2 patient consent procedures were projected to range from \$10.3 million to \$20.7 million in 2016. We averaged the two estimated costs for staff training to determine the final overall estimate of \$15,521,000. We assumed the costs associated with updating training materials will be a one-time cost. Therefore, in subsequent years, we assumed the costs associated with staff training would be a function of the average hourly wage rate (multiplied by two to account for benefits and overhead costs) and the estimated number of staff (developed based on the same two staff-to-client ratios described above multiplied by estimated patient counts). Staff training costs associated with part 2 revisions were projected to range from \$8.3 million to \$16.6 million after 2016. We averaged the two estimated costs for staff training to determine the final overall estimate of \$12,438,000.

ii. Updates to Consent Forms

Updates to the 42 CFR part 2 regulations will need to be reflected in patient consent forms. As there is no literature to date on costs to update forms for 42 CFR part 2, we examined results from a 2008 study from the Mayo Clinic Health Care Systems¹⁴ that reported actuarial costs for HIPAA implementation activities. These costs were about \$1 per patient visit. Adjusted for inflation, costs associated with updating the patient consent forms in 2016 would be \$1.13 per patient visit. We used the average number of substance abuse treatment admissions

from SAMHSA's 2010–2012 TEDS as our estimate of the number of clients treated on an annual basis by part 2 facilities. The total cost burden associated with updating the consent forms to reflect to the updated 42 CFR part 2 regulations would be approximately \$2,104,000 (1,861,693 * \$1.13).^[14]

iii. List of Disclosures Costs

The proposed part 2 regulations allow patients who have consented to disclose their identifying information using a general designation to request a list of entities to which their information has been disclosed pursuant to the general designation. Under this final rule, entities named on a consent form that disclose patient identifying information to their participants under the general designation will be required to provide a list of disclosures after receiving a patient request. Under the List of Disclosures requirements, a patient could make a request, for example, to an organization that facilitates the exchange of health information (e.g., an HIE) or an organization responsible for coordinating care (e.g., an ACO) for a list of disclosures that would include the name of the entity to whom each disclosure was made, the date of the disclosure, and a brief description of the patient identifying information disclosed, and include this information for all entities to whom the patient identifying information has been disclosed pursuant to the general designation in the past two years.

For purposes of the analysis, we assumed that entities disclosing patient identifying information to their participants pursuant to a patient's general designation on a consent form are already collecting the information necessary to comply with the List of Disclosures requirement, in some form, either electronically or using paper records. We also assumed that these entities could comply with the List of Disclosures requirement by either collecting this information electronically by using audit logs to obtain the required information or by keeping a paper record. However, to address possible concerns about technical feasibility and other implementation issues, SAMHSA finalizes its proposal that the List of Disclosures requirement may be implemented at any time, but non-treating providers cannot use the general designation without being able to provide a List of Disclosures to allow entities collecting this information time to review their operations and business processes and to decide whether technological solutions are needed to

enable them to more efficiently comply with the requirement.

In order to make preliminary estimates of the implementation costs, we first estimated the number of potentially impacted entities based on the anticipated number of patient requests for a disclosure report in a calendar year. We used the average number of substance use disorder treatment admissions from SAMHSA's 2010–2012 TEDS (n = 1,861,693) as the number of patients treated annually by part 2 programs. We then used the average of a 0.1 and 2 percent patient request rate as our estimate of the number of impacted entities (n = 19,548).

From there, we assumed 10 percent of the impacted entities would use paper records to comply with the disclosure reporting requirements (n = 1,995) and would have minimal implementation costs. Among the remaining entities, many may be able to comply with the disclosure reporting requirements without developing or implementing new technologies. For entities that do choose to either update their existing capabilities or develop and implement new technologies to facilitate compliance, we assumed two sets of costs: (1) Planning and policy development costs and (2) system update costs. SAMHSA notes that the Office of the National Coordinator for Health Information Technology and other organizations are encouraging adoption of electronic health records to allow providers to access patient records remotely, improve communication with patients and other providers and reduce errors (<https://www.healthit.gov/providers-professionals/benefits-electronic-health-records-ehrs>). For these reasons, we believe that the trend toward adoption of electronic health records will continue.

Absent any data on the number of facilities that would require new technology or the type of technology to be implemented, we assumed that twenty-five percent (n = 4,398) of the remaining entities would choose to upgrade their existing health IT systems. The actual system upgrade costs will vary considerably based on the type of upgrades that are required. Some entities may only require minor system updates to streamline the reporting requirements, while others may choose to implement an entirely new system. Given these data limitations, we assumed an average, per-entity cost, of \$2,500 for planning development costs and an average, per-entity cost, of \$8,000 for system upgrades for a total cost of \$10,500. We assume that ten

percent of entities will implement each year, resulting in 100 percent of the 4,398 entities having implemented the system planning and upgrades by year 10. The implementation costs for List of Disclosures reporting compliance in year 1, and each year thereafter, are estimated to be approximately \$4,618,000 $([4,398 * 0.10] * [8,000 + 2,500])$. We acknowledge that without better data on the number of facilities that may require new technology and the number of facilities that would use the general designation and therefore be required to comply with the list of disclosures requirement, this approach may overestimate or underestimate the costs.

As entities begin to comply with the disclosure reporting requirements, we assumed that the majority of the costs associated with the List of Disclosures requirement would primarily come from staff time needed to prepare a list of disclosures upon a patient's request. We also assumed that the information would need to be converted to a format that is accessible to patients.

For those entities with a health IT system, we expected that disclosure information would be available in the system's audit log. We also assumed that, unless the audit log has some sort of electronic filtering system, it would contain information above and beyond the requirements for complying with a request for a list of disclosures. We had also assumed that the staff accessing and filtering an audit log to compile the information for lists of disclosures would be health information technicians. The average hourly rate for health information technicians is \$19.44 an hour.^[15] In order to account for benefits and overhead costs associated with staff time, we multiplied the hourly wage rate by two. Absent any existing information on the amount of time associated with producing a list of disclosures from an audit log, we assumed it would take a health information technician half a day (or 4 hours) on average, to produce the list from an audit log.

For entities using paper records to track disclosures, we expected that a staff member would need to gather and aggregate the requested list of disclosures from paper records. We assumed medical record technicians would be the staff with the primary responsibility for compiling the information for a list of disclosures. The average hourly rate for medical record technicians is \$19.44 an hour an hour.^[16] In order to account for benefits and overhead costs associated with staff time, we multiplied the hourly wage rate by two. Absent any existing

information on the amount of time associated with producing a list of disclosures from paper records, we assumed it would take a medical record technician 3 hours, on average, to produce the list from paper records. ^[17]

The number of requests for a list of disclosures will determine the overall burden associated with the List of Disclosures reporting requirements. However, because this is a new requirement, there were no data on which to base an estimated number of requests per year. We expected that the rate of requests will be relatively low. We therefore calculated the total costs for two rates, 0.1 percent and 2 percent of patients per year.

We used the average number of substance use disorder treatment admissions from SAMHSA's 2010–2012 TEDS as the number of patients treated annually by part 2 programs. Assuming that 10 percent of patients making requests (n = 186.17 to n = 3,723.39) would request a list of disclosures from entities that track disclosures through paper records and 90 percent of patients making requests (n = 1,675.52 to n = 33,510.47) would make such a request of entities that track disclosures through health IT audit logs, the estimated costs to develop lists of disclosures range from roughly \$21,700 to \$434,300 for entities using paper records, and \$261,000 to \$5,212,000 for entities using audit logs. (These ranges reflect the costs based on the two estimated patient

rates of request referenced above (*i.e.*, 0.1 percent and 2 percent of patients per year)).

Once a list of disclosures has been produced, it can be returned to the patient either by email or mail. Since the method of sending the list of disclosures depends on patient preference, we assumed that 50 percent of the lists of disclosures would be sent by email and 50 percent by first-class mail. We assumed that mailing and supply costs related to list of disclosures notifications were \$0.10 supply cost per notification and \$0.49 postage cost per mailing. We also estimated that it would take an administrative staff member 15 minutes to prepare each list of disclosures for mailing and/or transmitting, and that staff preparing the letters earn \$15.34 ^[18] per hour. In order to account for benefits and overhead costs associated with staff time, we multiplied the hourly wage rate by two. The estimated costs for list of disclosures notifications range from approximately \$7,700 to \$154,000 for notifications sent by first-class mail, and \$7,140 to \$143,000 for notifications sent by email.

To produce the final overall cost estimate, we took the average of the minimum and maximum estimated costs to develop lists of disclosures by entities collecting the information electronically by using an audit log, and the average of the minimum and maximum estimated costs to develop

lists of disclosures by entities using paper records. We then added the averages together to produce our estimate of the total cost to entities to develop lists of disclosures. Next we took the average of the minimum and maximum estimated costs for list of disclosures notifications sent via email and the minimum and maximum estimated costs for such notifications sent via first-class mail. We then added these two averages together to produce our estimate of the total cost to entities for list of disclosures notifications. Finally, the development and notification costs for these lists of disclosures were added together for the final estimate of costs associated with complying with List of Disclosures reporting requirements. The total cost for List of Disclosures reporting compliance across all entities was roughly \$3,120,000 in 2016 dollars. Complying with List of Disclosures requirements is assumed to be an ongoing, annual activity for entities that have completed the system upgrade and comply with the disclosure requirements. Since we assume 10 percent of entities begin to comply with the requirements each year, year 1 reporting compliance costs is roughly \$312,000 ($3,120,000 \times 0.10$) and \$624,000 ($3,120,000 \times 0.20$) in year 2, and continues to increase each year until year 10 all entities are complying and have annual compliance costs of \$3,120,000

TABLE 5—TOTAL ESTIMATED DISCLOSURE REPORTING COSTS IN 2018

[Note: Numbers may not add due to rounding]

	Minimum estimated cost	Maximum estimated cost	Average estimated cost
Facilities with a Health IT System	\$261,000	\$5,212,000	\$2,736,000
Facilities without a Health IT System	21,700	434,300	228,000
Total Costs .....	.....	.....	2,964,000
Average Number of Facilities .....	.....	.....	19,548

TABLE 6—TOTAL ESTIMATED DISCLOSURE NOTIFICATION COSTS IN 2018

[Note: Numbers may not add due to rounding]

	Minimum estimated cost	Maximum estimated cost	Average estimated cost
Email Notification	\$7,100	\$143,000	\$75,000
First Class Mail Notification	7,700	154,000	81,000
Total Costs .....	.....	.....	156,000

iv. IT Updates

SAMHSA, in collaboration with ONC and federal and community stakeholders, has developed Consent2Share which is an open source

tool for consent management and data segmentation that is designed to integrate with existing EHR and HIE systems. SAMHSA plans to release shortly an updated version of Consent2Share with improved

functionality and ability to meet list of disclosures requirements.

The Consent2Share architecture has a front-end, patient facing system known as Patient Consent Management and a backend control system known as

Access Control Services.

Communications with EHR vendors indicated that the cost to facilities of purchasing and installing additional functionality to existing electronic medical records applications, such as Consent2Share, typically range from \$2,500 to \$5,000. Because the add-on systems for part 2 programs may be more complex than standard patient monitoring systems, we estimated that the cost of adding the new functionality would be approximately \$8,000 per facility. We also assumed that this would be a one-time expense, rather than a recurring cost, for each provider. SAMHSA acknowledges that there may be fluctuation in costs among affected entities from the average cost. However, though costs could possibly be higher for some entities, information shared by commenters was largely anecdotal and it is unclear how such data could be broadly extrapolated to a wide range of entities.

Furthermore, national estimates indicated that no more than 50 percent of substance use disorder treatment facilities have an operational “computerized administrative information system.”^[19] We, therefore, estimated that only half of the 12,034 part 2 programs (*i.e.*, 6,017 facilities) would have operational health IT systems that would require modifications to account for the changes to 42 CFR part 2. With 6,017 part 2 programs with operational information systems, we estimated that each facility would need to spend \$8,000 to modify their health IT system, which would lead to a total burden for updating health IT systems of \$48.1 million. Updating health IT systems would be a one-time cost, and maintenance costs should be part of general health IT maintenance costs in later years. The final rule does not require that part 2 programs adopt health IT systems so there are no health IT costs associated with substance use disorder treatment facilities that continue to use paper records.

C. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers are small entities, either by nonprofit status or by having revenues of less than \$7.5 million to \$38.5 million in any one year. Individuals and states are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and

the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small entities. While the changes in the regulations will apply to all part 2 programs, the impact on these entities would be quite small. Specifically, as described in the Overall Impact section, the cost to part 2 programs associated with updates to 42 CFR part 2 in the first year that the final rule is in effect will be \$76.1 million, a figure that due to a number of one-time updates, is the highest for any of the 10 years estimated. The per-entity economic impact in the first year will be approximately \$6,300 ($\$76,100,000 \div 12,034$), a figure that is unlikely to represent 3 percent of revenues for 5 percent of impacted small entities. Consequently, it has been determined that the final rule will not have a significant economic impact on small entities.

In addition, Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of Section 603 of the RFA. For purposes of Section 1102(b) of the Act, we defined a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for Section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

D. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will have no consequential effect on state, local, or tribal governments or on the private sector.

E. Federalism (Executive Order 13132)

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. Since this rule does not impose any

costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

SAMHSA is modernizing 42 CFR part 2. With respect to our revisions to the part 2 regulations, we do not believe that this final rule will have a significant impact as it gives more flexibility to individuals and entities covered by 42 CFR part 2 but also adds privacy protections within the consent requirements for the patient. We are revising the part 2 regulations in response to concerns that 42 CFR part 2 was outdated and burdensome.

Executive Order 13132 on Federalism (August 4, 1999) establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. We have reviewed this final rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it will not have substantial direct effects on the rights, roles, and responsibilities of states, local or tribal governments.

Conclusion

SAMHSA is enacting changes to modernize 42 CFR part 2. With respect to our revisions to the regulations, we do not believe that this final rule will have a significant impact as it gives more flexibility to individuals and entities covered by 42 CFR part 2 but also increases privacy protections within the consent requirements and adds an additional confidentiality safeguard for patients. This final rule does not reach the threshold for requiring a regulatory impact analysis by Executive Orders 12866 and 13563 and thus is not considered an economically significant rule. This rule will not have a significant economic impact on a substantial number of small entities. This rule will not have a significant impact on the operations of a substantial number of small rural hospitals. Since this rule does not impose any costs on state or local governments, the requirements of Executive Order 13132 on federalism are not applicable.

Footnotes

1. *Trends in Health Information Exchanges* (Trends in Health Information Exchanges) <https://innovations.ahrq.gov/perspectives/trends-health-information-exchanges#3>.

2. Muhlestein, D. (2015). Growth and Dispersion of Accountable Care Organizations in 2015. *Health Affairs Blog*, 19.

3. National Committee for Quality Assurance. A Victory Lap . . . For Patients.

Blog, May 15, 2015. <http://blog.ncqa.org/a-victory-lap-for-patients/>.

4. Kilbridge, P. (2003). The cost of HIPAA compliance. *New England Journal of Medicine*, 348(15), 1423–1477.

5. Williams, A.R., Herman, D.C., Moriarty, J.P., Beebe, T.J., Bruggeman, S.K., Klavetter, E.W. & Bartz, J.K. (2008). HIPAA costs and patient perceptions of privacy safeguards at Mayo Clinic. *Joint Commission Journal on Quality and Patient Safety*, 34 (1), 27–35.

6. 65 FR 82462, 82770 (Dec. 28, 2000) (Standards for Privacy of Individually Identifiable Health Information).

7. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, [accessed May 2, 2015] Outpatient Mental Health and Substance Abuse Centers (NAICS code 621420), Standard Occupations Classification code (211011) [www.bls.gov/oes/].

8. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, [accessed May 2, 2014] Psychiatric and Substance Abuse Hospitals (NAICS code 622200), Standard Occupations Classification code (211011) [www.bls.gov/oes/].

9. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, [accessed September 23, 2014] Offices of Mental Health Practitioners (except Physicians) (NAICS code 621330), Standard Occupations Classification code (211011) [www.bls.gov/oes/].

10. These estimates are not HHS estimates nor are they HHS-endorsed cost estimates of HIPAA implementation and compliance.

11. Calculated using the Consumer Price Index.

12. North Carolina NC Administrative Code [accessed September 23, 2014]. [<http://reports.oah.state.nc.us/ncac/title%2010a%20-%20health%20and%20human%20services/chapter%2013%20-%20nc%20medical%20care%20commission/subchapter%20b/10a%20ncac%2013b%20.5203.pdf>].

13. Commonwealth of Pennsylvania—Department of Health Staffing Requirements for Drug and Alcohol Treatment Activities [accessed September 23, 2014]. [<http://www.pacode.com/secure/data/028/chapter704/s704.12.html>].

14. Williams, A.R., Herman, D.C., Moriarty, J.P., Beebe, T.J., Bruggeman, S.K., Klavetter, E.W. & Bartz, J.K. (2008). HIPAA costs and patient perceptions of privacy safeguards at Mayo Clinic. *Joint Commission Journal on Quality and Patient Safety*, 34 (1), 27–35.

15. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, Standard Occupations Classification code (29–2071) [www.bls.gov/oes/].

16. IBID.

17. For facilities that maintain paper records, consent forms would indicate who has been given access to the record. By contrast, our understanding of health IT audit logs is that they include a record of all instances in which a record has been accessed. The audit log will include a record of who accessed the system, the date the record was accessed, and what operations were performed. The audit logs, therefore,

will include considerably more data than what we would anticipate finding in paper records. Unless the audit log has an electronic filtering system, we are assuming that a health information technician will need to manually review all records in an audit log in order to compile the necessary information for a list of disclosures.

18. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, [accessed June 3, 2015], Standard Occupations Classification code (31–9092) [www.bls.gov/oes/].

19. McLellan, A.T., Kathleen Meyers, K., Contemporary addiction treatment: A review of systems problems for adults and adolescents, *Biological Psychiatry*, Volume 56, Issue 10, 15 November 2004, Pages 764–770, ISSN 0006–3223, <http://dx.doi.org/10.1016/j.biopsych.2004.06.018>.

List of Subjects in 42 CFR Part 2

Alcohol abuse, Alcoholism, Drug abuse, Grant programs-health, Health records, Privacy, Reporting, and Recordkeeping requirements.

■ For the reasons stated in the preamble of this final rule, SAMHSA revises 42 CFR part 2 to read as follows:

PART 2—CONFIDENTIALITY OF SUBSTANCE USE DISORDER PATIENT RECORDS

Subpart A—Introduction

Sec.

- 2.1 Statutory authority for confidentiality of substance use disorder patient records.
- 2.2 Purpose and effect.
- 2.3 Criminal penalty for violation.
- 2.4 Reports of violations.

Subpart B—General Provisions

Sec.

- 2.11 Definitions.
- 2.12 Applicability.
- 2.13 Confidentiality restrictions and safeguards.
- 2.14 Minor patients.
- 2.15 Incompetent and deceased patients.
- 2.16 Security for records.
- 2.17 Undercover agents and informants.
- 2.18 Restrictions on the use of identification cards.
- 2.19 Disposition of records by discontinued programs.
- 2.20 Relationship to state laws.
- 2.21 Relationship to federal statutes protecting research subjects against compulsory disclosure of their identity.
- 2.22 Notice to patients of federal confidentiality requirements.
- 2.23 Patient access and restrictions on use.

Subpart C—Disclosures with Patient Consent

Sec.

- 2.31 Consent requirements.
- 2.32 Prohibition on re-disclosure.
- 2.33 Disclosures permitted with written consent.
- 2.34 Disclosures to prevent multiple enrollments.
- 2.35 Disclosures to elements of the criminal justice system which have referred patients.

Subpart D—Disclosures without Patient Consent

Sec.

- 2.51 Medical emergencies.
- 2.52 Research.
- 2.53 Audit and evaluation.

Subpart E—Court Orders Authorizing Disclosure and Use

Sec.

- 2.61 Legal effect of order.
- 2.62 Order not applicable to records disclosed without consent to researchers, auditors and evaluators.
- 2.63 Confidential communications.
- 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.
- 2.65 Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.
- 2.66 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a part 2 program or the person holding the records.
- 2.67 Orders authorizing the use of undercover agents and informants to criminally investigate employees or agents of a part 2 program.

Authority: 42 U.S.C. 290dd–2.

Subpart A—Introduction

§ 2.1 Statutory authority for confidentiality of substance use disorder patient records.

Title 42, United States Code, Section 290dd–2(g) authorizes the Secretary to prescribe regulations. Such regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this statute, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

§ 2.2 Purpose and effect.

(a) *Purpose.* Pursuant to 42 U.S.C. 290dd–2(g), the regulations in this part impose restrictions upon the disclosure and use of substance use disorder patient records which are maintained in connection with the performance of any part 2 program. The regulations in this part include the following subparts:

(1) Subpart B of this part: General Provisions, including definitions, applicability, and general restrictions;

(2) Subpart C of this part: Disclosures with Patient Consent, including disclosures which require patient consent and the consent form requirements;

(3) Subpart D of this part: Disclosures without Patient Consent, including disclosures which do not require patient

consent or an authorizing court order; and

(4) Subpart E of this part: Court Orders Authorizing Disclosure and Use, including disclosures and uses of patient records which may be made with an authorizing court order and the procedures and criteria for the entry and scope of those orders.

(b) *Effect.* (1) The regulations in this part prohibit the disclosure and use of patient records unless certain circumstances exist. If any circumstance exists under which disclosure is permitted, that circumstance acts to remove the prohibition on disclosure but it does not compel disclosure. Thus, the regulations do not require disclosure under any circumstances.

(2) The regulations in this part are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment.

(3) Because there is a criminal penalty for violating the regulations, they are to be construed strictly in favor of the potential violator in the same manner as a criminal statute (see *M. Kraus & Brothers v. United States*, 327 U.S. 614, 621–22, 66 S. Ct. 705, 707–08 (1946)).

§ 2.3 Criminal penalty for violation.

Under 42 U.S.C. 290dd–2(f), any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined in accordance with Title 18 of the U.S. Code.

§ 2.4 Reports of violations.

(a) The report of any violation of the regulations in this part may be directed to the United States Attorney for the judicial district in which the violation occurs.

(b) The report of any violation of the regulations in this part by an opioid treatment program may be directed to the United States Attorney for the judicial district in which the violation occurs as well as to the Substance Abuse and Mental Health Services Administration (SAMHSA) office responsible for opioid treatment program oversight.

Subpart B—General Provisions

§ 2.11 Definitions.

For purposes of the regulations in this part:

Central registry means an organization which obtains from two or more member programs patient identifying information about individuals applying for withdrawal management or maintenance treatment for the purpose of avoiding an individual's concurrent enrollment in more than one treatment program.

Diagnosis means any reference to an individual's substance use disorder or to a condition which is identified as having been caused by that substance use disorder which is made for the purpose of treatment or referral for treatment.

Disclose means to communicate any information identifying a patient as being or having been diagnosed with a substance use disorder, having or having had a substance use disorder, or being or having been referred for treatment of a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person.

Federally assisted—see § 2.12(b).

Informant means an individual:

(1) Who is a patient or employee of a part 2 program or who becomes a patient or employee of a part 2 program at the request of a law enforcement agency or official; and

(2) Who at the request of a law enforcement agency or official observes one or more patients or employees of the part 2 program for the purpose of reporting the information obtained to the law enforcement agency or official.

Maintenance treatment means long-term pharmacotherapy for individuals with substance use disorders that reduces the pathological pursuit of reward and/or relief and supports remission of substance use disorder-related symptoms.

Member program means a withdrawal management or maintenance treatment program which reports patient identifying information to a central registry and which is in the same state as that central registry or is in a state that participates in data sharing with the central registry of the program in question.

Minor, as used in the regulations in this part, means an individual who has not attained the age of majority specified in the applicable state law, or if no age of majority is specified in the applicable state law, the age of 18 years.

Part 2 program means a federally assisted program (federally assisted as defined in § 2.12(b) and program as defined in this section). See § 2.12(e)(1) for examples.

Part 2 program director means:

(1) In the case of a part 2 program that is an individual, that individual.

(2) In the case of a part 2 program that is an entity, the individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer of the part 2 program.

Patient means any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program. *Patient* includes any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program. This definition includes both current and former patients.

Patient identifying information means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient, as defined in this section, can be determined with reasonable accuracy either directly or by reference to other information. The term does not include a number assigned to a patient by a part 2 program, for internal use only by the part 2 program, if that number does not consist of or contain numbers (such as a social security, or driver's license number) that could be used to identify a patient with reasonable accuracy from sources external to the part 2 program.

Person means an individual, partnership, corporation, federal, state or local government agency, or any other legal entity, (also referred to as "individual or entity").

Program means:

(1) An individual or entity (other than a general medical facility) who holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment; or

(2) An identified unit within a general medical facility that holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment; or

(3) Medical personnel or other staff in a general medical facility whose primary function is the provision of substance use disorder diagnosis, treatment, or referral for treatment and who are identified as such providers.

Qualified service organization means an individual or entity who:

(1) Provides services to a part 2 program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, accounting, population health management, medical staffing, or other professional services, or services to prevent or treat child

abuse or neglect, including training on nutrition and child care and individual and group therapy, and

(2) Has entered into a written agreement with a part 2 program under which that individual or entity:

(i) Acknowledges that in receiving, storing, processing, or otherwise dealing with any patient records from the part 2 program, it is fully bound by the regulations in this part; and

(ii) If necessary, will resist in judicial proceedings any efforts to obtain access to patient identifying information related to substance use disorder diagnosis, treatment, or referral for treatment except as permitted by the regulations in this part.

Records means any information, whether recorded or not, created by, received, or acquired by a part 2 program relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts). For the purpose of the regulations in this part, records include both paper and electronic records.

Substance use disorder means a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems such as impaired control, social impairment, risky use, and pharmacological tolerance and withdrawal. For the purposes of the regulations in this part, this definition does not include tobacco or caffeine use.

Third-party payer means an individual or entity who pays and/or agrees to pay for diagnosis or treatment furnished to a patient on the basis of a contractual relationship with the patient or a member of the patient's family or on the basis of the patient's eligibility for federal, state, or local governmental benefits.

Treating provider relationship means that, regardless of whether there has been an actual in-person encounter:

(1) A patient is, agrees to, or is legally required to be diagnosed, evaluated, and/or treated, or agrees to accept consultation, for any condition by an individual or entity, and;

(2) The individual or entity undertakes or agrees to undertake diagnosis, evaluation, and/or treatment of the patient, or consultation with the patient, for any condition.

Treatment means the care of a patient suffering from a substance use disorder, a condition which is identified as having been caused by the substance use disorder, or both, in order to reduce or eliminate the adverse effects upon the patient.

Undercover agent means any federal, state, or local law enforcement agency or official who enrolls in or becomes an employee of a part 2 program for the purpose of investigating a suspected violation of law or who pursues that purpose after enrolling or becoming employed for other purposes.

Withdrawal management means the use of pharmacotherapies to treat or attenuate the problematic signs and symptoms arising when heavy and/or prolonged substance use is reduced or discontinued.

§ 2.12 Applicability.

(a) *General*—(1) *Restrictions on disclosure*. The restrictions on disclosure in the regulations in this part apply to any information, whether or not recorded, which:

(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

(ii) Is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

(2) *Restriction on use*. The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd–2(c)) applies to any information, whether or not recorded, which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

(b) *Federal assistance*. A program is considered to be federally assisted if:

(1) It is conducted in whole or in part, whether directly or by contract or otherwise by any department or agency

of the United States (but see paragraphs (c)(1) and (2) of this section relating to the Department of Veterans Affairs and the Armed Forces);

(2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States including but not limited to:

(i) Participating provider in the Medicare program;

(ii) Authorization to conduct maintenance treatment or withdrawal management; or

(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of substance use disorders; (3) It is supported by funds provided by any department or agency of the United States by being:

(i) A recipient of federal financial assistance in any form, including financial assistance which does not directly pay for the substance use disorder diagnosis, treatment, or referral for treatment; or

(ii) Conducted by a state or local government unit which, through general or special revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the substance use disorder program; or

(4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

(c) *Exceptions*—(1) *Department of Veterans Affairs*. These regulations do not apply to information on substance use disorder patients maintained in connection with the Department of Veterans Affairs' provision of hospital care, nursing home care, domiciliary care, and medical services under Title 38, U.S.C. Those records are governed by 38 U.S.C. 7332 and regulations issued under that authority by the Secretary of Veterans Affairs.

(2) *Armed Forces*. The regulations in this part apply to any information described in paragraph (a) of this section which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except:

(i) Any interchange of that information within the Armed Forces; and

(ii) Any interchange of that information between the Armed Forces and those components of the Department of Veterans Affairs furnishing health care to veterans.

(3) *Communication within a part 2 program or between a part 2 program and an entity having direct administrative control over that part 2 program.* The restrictions on disclosure in the regulations in this part do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of patients with substance use disorders if the communications are:

(i) Within a part 2 program; or
(ii) Between a part 2 program and an entity that has direct administrative control over the program.

(4) *Qualified service organizations.* The restrictions on disclosure in the regulations in this part do not apply to communications between a part 2 program and a qualified service organization of information needed by the qualified service organization to provide services to the program.

(5) *Crimes on part 2 program premises or against part 2 program personnel.* The restrictions on disclosure and use in the regulations in this part do not apply to communications from part 2 program personnel to law enforcement agencies or officials which:

(i) Are directly related to a patient's commission of a crime on the premises of the part 2 program or against part 2 program personnel or to a threat to commit such a crime; and

(ii) Are limited to the circumstances of the incident, including the patient status of the individual committing or threatening to commit the crime, that individual's name and address, and that individual's last known whereabouts.

(6) *Reports of suspected child abuse and neglect.* The restrictions on disclosure and use in the regulations in this part do not apply to the reporting under state law of incidents of suspected child abuse and neglect to the appropriate state or local authorities. However, the restrictions continue to apply to the original substance use disorder patient records maintained by the part 2 program including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected child abuse and neglect.

(d) *Applicability to recipients of information—* (1) *Restriction on use of information.* The restriction on the use of any information subject to the regulations in this part to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any person who obtains that information from a part 2 program,

regardless of the status of the person obtaining the information or whether the information was obtained in accordance with the regulations in this part. This restriction on use bars, among other things, the introduction of that information as evidence in a criminal proceeding and any other use of the information to investigate or prosecute a patient with respect to a suspected crime. Information obtained by undercover agents or informants (see § 2.17) or through patient access (see § 2.23) is subject to the restriction on use.

(2) *Restrictions on disclosures—*(i) *Third-party payers, administrative entities, and others.* The restrictions on disclosure in the regulations in this part apply to:

(A) Third-party payers with regard to records disclosed to them by part 2 programs or under § 2.31(a)(4)(iii)(A);

(B) Entities having direct administrative control over part 2 programs with regard to information that is subject to the regulations in this part communicated to them by the part 2 program under paragraph (c)(3) of this section; and

(C) Individuals or entities who receive patient records directly from a part 2 program or other lawful holder of patient identifying information and who are notified of the prohibition on re-disclosure in accordance with § 2.32.

(ii) [Reserved]

(e) *Explanation of applicability—*(1) *Coverage.* These regulations cover any information (including information on referral and intake) about patients receiving diagnosis, treatment, or referral for treatment for a substance use disorder created by a part 2 program. Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as providing, and provide substance use disorder diagnosis, treatment, or referral for treatment. However, the regulations in this part would not apply, for example, to emergency room personnel who refer a patient to the intensive care unit for an apparent overdose, unless the primary function of such personnel is the provision of substance use disorder diagnosis, treatment, or referral for treatment and they are identified as providing such services or the emergency room has promoted itself to the community as a provider of such services.

(2) *Federal assistance to program required.* If a patient's substance use disorder diagnosis, treatment, or referral

for treatment is not provided by a part 2 program, that patient's record is not covered by the regulations in this part. Thus, it is possible for an individual patient to benefit from federal support and not be covered by the confidentiality regulations because the program in which the patient is enrolled is not federally assisted as defined in paragraph (b) of this section. For example, if a federal court placed an individual in a private for-profit program and made a payment to the program on behalf of that individual, that patient's record would not be covered by the regulations in this part unless the program itself received federal assistance as defined by paragraph (b) of this section.

(3) *Information to which restrictions are applicable.* Whether a restriction applies to use or disclosure affects the type of information which may be disclosed. The restrictions on disclosure apply to any information which would identify a patient as having or having had a substance use disorder. The restriction on use of information to bring criminal charges against a patient for a crime applies to any information obtained by the part 2 program for the purpose of diagnosis, treatment, or referral for treatment of patients with substance use disorders. (Note that restrictions on use and disclosure apply to recipients of information under paragraph (d) of this section.)

(4) *How type of diagnosis affects coverage.* These regulations cover any record of a diagnosis identifying a patient as having or having had a substance use disorder which is initially prepared by a part 2 provider in connection with the treatment or referral for treatment of a patient with a substance use disorder. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by the regulations in this part. The following are not covered by the regulations in this part:

(i) Diagnosis which is made solely for the purpose of providing evidence for use by law enforcement agencies or officials; or

(ii) A diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved does not have a substance use disorder (*e.g.*, involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

§2.13 Confidentiality restrictions and safeguards.

(a) *General.* The patient records subject to the regulations in this part may be disclosed or used only as permitted by the regulations in this part

and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or local authority. Any disclosure made under the regulations in this part must be limited to that information which is necessary to carry out the purpose of the disclosure.

(b) *Unconditional compliance required.* The restrictions on disclosure and use in the regulations in this part apply whether or not the part 2 program or other lawful holder of the patient identifying information believes that the person seeking the information already has it, has other means of obtaining it, is a law enforcement agency or official or other government official, has obtained a subpoena, or asserts any other justification for a disclosure or use which is not permitted by the regulations in this part.

(c) *Acknowledging the presence of patients: Responding to requests.* (1) The presence of an identified patient in a health care facility or component of a health care facility which is publicly identified as a place where only substance use disorder diagnosis, treatment, or referral for treatment is provided may be acknowledged only if the patient's written consent is obtained in accordance with subpart C of this part or if an authorizing court order is entered in accordance with subpart E of this part. The regulations permit acknowledgement of the presence of an identified patient in a health care facility or part of a health care facility if the health care facility is not publicly identified as only a substance use disorder diagnosis, treatment, or referral for treatment facility, and if the acknowledgement does not reveal that the patient has a substance use disorder.

(2) Any answer to a request for a disclosure of patient records which is not permissible under the regulations in this part must be made in a way that will not affirmatively reveal that an identified individual has been, or is being, diagnosed or treated for a substance use disorder. An inquiring party may be provided a copy of the regulations in this part and advised that they restrict the disclosure of substance use disorder patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient.

(d) *List of disclosures.* Upon request, patients who have consented to disclose their patient identifying information using a general designation pursuant to § 2.31(a)(4)(iii)(B)(3) must be provided a list of entities to which their information has been disclosed pursuant to the general designation.

(1) Under this paragraph (d), patient requests:

(i) Must be made in writing; and
(ii) Are limited to disclosures made within the past two years;

(2) Under this paragraph (d), the entity named on the consent form that discloses information pursuant to a patient's general designation (the entity that serves as an intermediary, as described in § 2.31(a)(4)(iii)(B)) must:

(i) Respond in 30 or fewer days of receipt of the written request; and
(ii) Provide, for each disclosure, the name(s) of the entity(-ies) to which the disclosure was made, the date of the disclosure, and a brief description of the patient identifying information disclosed.

(3) The part 2 program is not responsible for compliance with this paragraph (d); the entity that serves as an intermediary, as described in § 2.31(a)(4)(iii)(B), is responsible for compliance with the list of disclosures requirement.

§ 2.14 Minor patients.

(a) *State law not requiring parental consent to treatment.* If a minor patient acting alone has the legal capacity under the applicable state law to apply for and obtain substance use disorder treatment, any written consent for disclosure authorized under subpart C of this part may be given only by the minor patient. This restriction includes, but is not limited to, any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement. These regulations do not prohibit a part 2 program from refusing to provide treatment until the minor patient consents to the disclosure necessary to obtain reimbursement, but refusal to provide treatment may be prohibited under a state or local law requiring the program to furnish the service irrespective of ability to pay.

(b) *State law requiring parental consent to treatment.* (1) Where state law requires consent of a parent, guardian, or other individual for a minor to obtain treatment for a substance use disorder, any written consent for disclosure authorized under subpart C of this part must be given by both the minor and their parent, guardian, or other individual authorized under state law to act in the minor's behalf.

(2) Where state law requires parental consent to treatment, the fact of a minor's application for treatment may be communicated to the minor's parent, guardian, or other individual authorized under state law to act in the minor's behalf only if:

(i) The minor has given written consent to the disclosure in accordance with subpart C of this part; or

(ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the part 2 program director under paragraph (c) of this section.

(c) *Minor applicant for services lacks capacity for rational choice.* Facts relevant to reducing a substantial threat to the life or physical well-being of the minor applicant or any other individual may be disclosed to the parent, guardian, or other individual authorized under state law to act in the minor's behalf if the part 2 program director judges that:

(1) A minor applicant for services lacks capacity because of extreme youth or mental or physical condition to make a rational decision on whether to consent to a disclosure under subpart C of this part to their parent, guardian, or other individual authorized under state law to act in the minor's behalf; and

(2) The minor applicant's situation poses a substantial threat to the life or physical well-being of the minor applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other individual authorized under state law to act in the minor's behalf.

§ 2.15 Incompetent and deceased patients.

(a) *Incompetent patients other than minors—*(1) *Adjudication of incompetence.* In the case of a patient who has been adjudicated as lacking the capacity, for any reason other than insufficient age, to their own affairs, any consent which is required under the regulations in this part may be given by the guardian or other individual authorized under state law to act in the patient's behalf.

(2) *No adjudication of incompetency.* In the case of a patient, other than a minor or one who has been adjudicated incompetent, that for any period suffers from a medical condition that prevents knowing or effective action on their own behalf, the part 2 program director may exercise the right of the patient to consent to a disclosure under subpart C of this part for the sole purpose of obtaining payment for services from a third-party payer.

(b) *Deceased patients—*(1) *Vital statistics.* These regulations do not restrict the disclosure of patient identifying information relating to the cause of death of a patient under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death.

(2) *Consent by personal representative.* Any other disclosure of information identifying a deceased patient as having a substance use disorder is subject to the regulations in this part. If a written consent to the disclosure is required, that consent may be given by an executor, administrator, or other personal representative appointed under applicable state law. If there is no such applicable state law appointment, the consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family.

§ 2.16 Security for records.

(a) The part 2 program or other lawful holder of patient identifying information must have in place formal policies and procedures to reasonably protect against unauthorized uses and disclosures of patient identifying information and to protect against reasonably anticipated threats or hazards to the security of patient identifying information. These formal policies and procedures must address:

- (1) Paper records, including:
 - (i) Transferring and removing such records;
 - (ii) Destroying such records, including sanitizing the hard copy media associated with the paper printouts, to render the patient identifying information non-retrievable;
 - (iii) Maintaining such records in a secure room, locked file cabinet, safe, or other similar container, or storage facility when not in use;
 - (iv) Using and accessing workstations, secure rooms, locked file cabinets, safes, or other similar containers, and storage facilities that use or store such information; and
 - (v) Rendering patient identifying information non-identifiable in a manner that creates a very low risk of re-identification (e.g., removing direct identifiers).

(2) Electronic records, including:

- (i) Creating, receiving, maintaining, and transmitting such records;
- (ii) Destroying such records, including sanitizing the electronic media on which such records are stored, to render the patient identifying information non-retrievable;
- (iii) Using and accessing electronic records or other electronic media containing patient identifying information; and
- (iv) Rendering the patient identifying information non-identifiable in a manner that creates a very low risk of re-identification (e.g., removing direct identifiers).

(b) [Reserved]

§ 2.17 Undercover agents and informants.

(a) *Restrictions on placement.* Except as specifically authorized by a court order granted under § 2.67, no part 2 program may knowingly employ, or enroll as a patient, any undercover agent or informant.

(b) *Restriction on use of information.* No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is placed in a part 2 program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient.

§ 2.18 Restrictions on the use of identification cards.

No person may require any patient to carry in their immediate possession while away from the part 2 program premises any card or other object which would identify the patient as having a substance use disorder. This section does not prohibit a person from requiring patients to use or carry cards or other identification objects on the premises of a part 2 program.

§ 2.19 Disposition of records by discontinued programs.

(a) *General.* If a part 2 program discontinues operations or is taken over or acquired by another program, it must remove patient identifying information from its records or destroy its records, including sanitizing any associated hard copy or electronic media, to render the patient identifying information non-retrievable in a manner consistent with the policies and procedures established under § 2.16, unless:

(1) The patient who is the subject of the records gives written consent (meeting the requirements of § 2.31) to a transfer of the records to the acquiring program or to any other program designated in the consent (the manner of obtaining this consent must minimize the likelihood of a disclosure of patient identifying information to a third party); or

(2) There is a legal requirement that the records be kept for a period specified by law which does not expire until after the discontinuation or acquisition of the part 2 program.

(b) *Special procedure where retention period required by law.* If paragraph (a)(2) of this section applies:

- (1) Records, which are paper, must be:
 - (i) Sealed in envelopes or other containers labeled as follows: "Records of [insert name of program] required to be maintained under [insert citation to statute, regulation, court order or other legal authority requiring that records be kept] until a date not later than [insert appropriate date]";

(A) All hard copy media from which the paper records were produced, such as printer and facsimile ribbons, drums, etc., must be sanitized to render the data non-retrievable; and

(B) [Reserved]

(ii) Held under the restrictions of the regulations in this part by a responsible person who must, as soon as practicable after the end of the required retention period specified on the label, destroy the records and sanitize any associated hard copy media to render the patient identifying information non-retrievable in a manner consistent with the discontinued program's or acquiring program's policies and procedures established under § 2.16.

(2) Records, which are electronic, must be:

(i) Transferred to a portable electronic device with implemented encryption to encrypt the data at rest so that there is a low probability of assigning meaning without the use of a confidential process or key and implemented access controls for the confidential process or key; or

(ii) Transferred, along with a backup copy, to separate electronic media, so that both the records and the backup copy have implemented encryption to encrypt the data at rest so that there is a low probability of assigning meaning without the use of a confidential process or key and implemented access controls for the confidential process or key; and

(iii) Within one year of the discontinuation or acquisition of the program, all electronic media on which the patient records or patient identifying information resided prior to being transferred to the device specified in (i) above or the original and backup electronic media specified in (ii) above, including email and other electronic communications, must be sanitized to render the patient identifying information non-retrievable in a manner consistent with the discontinued program's or acquiring program's policies and procedures established under § 2.16; and

(iv) The portable electronic device or the original and backup electronic media must be:

(A) Sealed in a container along with any equipment needed to read or access the information, and labeled as follows: "Records of [insert name of program] required to be maintained under [insert citation to statute, regulation, court order or other legal authority requiring that records be kept] until a date not later than [insert appropriate date];" and

(B) Held under the restrictions of the regulations in this part by a responsible person who must store the container in a manner that will protect the

information (e.g., climate controlled environment); and

(v) The responsible person must be included on the access control list and be provided a means for decrypting the data. The responsible person must store the decryption tools on a device or at a location separate from the data they are used to encrypt or decrypt; and

(vi) As soon as practicable after the end of the required retention period specified on the label, the portable electronic device or the original and backup electronic media must be sanitized to render the patient identifying information non-retrievable consistent with the policies established under § 2.16.

§ 2.20 Relationship to state laws.

The statute authorizing the regulations in this part (42 U.S.C. 290dd-2) does not preempt the field of law which they cover to the exclusion of all state laws in that field. If a disclosure permitted under the regulations in this part is prohibited under state law, neither the regulations in this part nor the authorizing statute may be construed to authorize any violation of that state law. However, no state law may either authorize or compel any disclosure prohibited by the regulations in this part.

§ 2.21 Relationship to federal statutes protecting research subjects against compulsory disclosure of their identity.

(a) *Research privilege description.* There may be concurrent coverage of patient identifying information by the regulations in this part and by administrative action taken under section 502(c) of the Controlled Substances Act (21 U.S.C. 872(c) and the implementing regulations at 21 CFR part 1316); or section 301(d) of the Public Health Service Act (42 U.S.C. 241(d) and the implementing regulations at 42 CFR part 2a). These research privilege statutes confer on the Secretary of Health and Human Services and on the Attorney General, respectively, the power to authorize researchers conducting certain types of research to withhold from all persons not connected with the research the names and other identifying information concerning individuals who are the subjects of the research.

(b) *Effect of concurrent coverage.* These regulations restrict the disclosure and use of information about patients, while administrative action taken under the research privilege statutes and implementing regulations protects a person engaged in applicable research from being compelled to disclose any identifying characteristics of the

individuals who are the subjects of that research. The issuance under subpart E of this part of a court order authorizing a disclosure of information about a patient does not affect an exercise of authority under these research privilege statutes.

§ 2.22 Notice to patients of federal confidentiality requirements.

(a) *Notice required.* At the time of admission to a part 2 program or, in the case that a patient does not have capacity upon admission to understand his or her medical status, as soon thereafter as the patient attains such capacity, each part 2 program shall:

(1) Communicate to the patient that federal law and regulations protect the confidentiality of substance use disorder patient records; and

(2) Give to the patient a summary in writing of the federal law and regulations.

(b) *Required elements of written summary.* The written summary of the federal law and regulations must include:

(1) A general description of the limited circumstances under which a part 2 program may acknowledge that an individual is present or disclose outside the part 2 program information identifying a patient as having or having had a substance use disorder;

(2) A statement that violation of the federal law and regulations by a part 2 program is a crime and that suspected violations may be reported to appropriate authorities consistent with § 2.4, along with contact information;

(3) A statement that information related to a patient's commission of a crime on the premises of the part 2 program or against personnel of the part 2 program is not protected;

(4) A statement that reports of suspected child abuse and neglect made under state law to appropriate state or local authorities are not protected; and

(5) A citation to the federal law and regulations.

(c) *Program options.* The part 2 program must devise a notice to comply with the requirement to provide the patient with a summary in writing of the federal law and regulations. In this written summary, the part 2 program also may include information concerning state law and any of the part 2 program's policies that are not inconsistent with state and federal law on the subject of confidentiality of substance use disorder patient records.

§ 2.23 Patient access and restrictions on use.

(a) *Patient access not prohibited.* These regulations do not prohibit a part

2 program from giving a patient access to their own records, including the opportunity to inspect and copy any records that the part 2 program maintains about the patient. The part 2 program is not required to obtain a patient's written consent or other authorization under the regulations in this part in order to provide such access to the patient.

(b) *Restriction on use of information.* Information obtained by patient access to his or her patient record is subject to the restriction on use of this information to initiate or substantiate any criminal charges against the patient or to conduct any criminal investigation of the patient as provided for under § 2.12(d)(1).

Subpart C—Disclosures With Patient Consent

§ 2.31 Consent requirements.

(a) *Required elements for written consent.* A written consent to a disclosure under the regulations in this part may be paper or electronic and must include:

(1) The name of the patient.

(2) The specific name(s) or general designation(s) of the part 2 program(s), entity(ies), or individual(s) permitted to make the disclosure.

(3) How much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed.

(4)(i) The name(s) of the individual(s) to whom a disclosure is to be made; or

(ii) *Entities with a treating provider relationship with the patient.* If the recipient entity has a treating provider relationship with the patient whose information is being disclosed, such as a hospital, a health care clinic, or a private practice, the name of that entity; or

(iii) *Entities without a treating provider relationship with the patient.*

(A) If the recipient entity does not have a treating provider relationship with the patient whose information is being disclosed and is a third-party payer, the name of the entity; or

(B) If the recipient entity does not have a treating provider relationship with the patient whose information is being disclosed and is not covered by paragraph (a)(4)(iii)(A) of this section, such as an entity that facilitates the exchange of health information or a research institution, the name(s) of the entity(-ies); and

(1) The name(s) of an individual participant(s); or

(2) The name(s) of an entity participant(s) that has a treating provider relationship with the patient whose information is being disclosed; or

(3) A general designation of an individual or entity participant(s) or class of participants that must be limited to a participant(s) who has a treating provider relationship with the patient whose information is being disclosed.

(i) When using a general designation, a statement must be included on the consent form that the patient (or other individual authorized to sign in lieu of the patient), confirms their understanding that, upon their request and consistent with this part, they must be provided a list of entities to which their information has been disclosed pursuant to the general designation (see § 2.13(d)).

(ii) [Reserved]

(5) The purpose of the disclosure. In accordance with § 2.13(a), the disclosure must be limited to that information which is necessary to carry out the stated purpose.

(6) A statement that the consent is subject to revocation at any time except to the extent that the part 2 program or other lawful holder of patient identifying information that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer

(7) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must ensure that the consent will last no longer than reasonably necessary to serve the purpose for which it is provided.

(8) The signature of the patient and, when required for a patient who is a minor, the signature of an individual authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of an individual authorized to sign under § 2.15. Electronic signatures are permitted to the extent that they are not prohibited by any applicable law.

(9) The date on which the consent is signed.

(b) *Expired, deficient, or false consent.* A disclosure may not be made on the basis of a consent which:

- (1) Has expired;
- (2) On its face substantially fails to conform to any of the requirements set forth in paragraph (a) of this section;
- (3) Is known to have been revoked; or
- (4) Is known, or through reasonable diligence could be known, by the individual or entity holding the records to be materially false.

§ 2.32 Prohibition on re-disclosure.

(a) *Notice to accompany disclosure.* Each disclosure made with the patient's

written consent must be accompanied by the following written statement: This information has been disclosed to you from records protected by federal confidentiality rules (42 CFR part 2). The federal rules prohibit you from making any further disclosure of information in this record that identifies a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is *NOT* sufficient for this purpose (see § 2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at §§ 2.12(c)(5) and 2.65.

(b) [Reserved]

§ 2.33 Disclosures permitted with written consent.

If a patient consents to a disclosure of their records under § 2.31, a program may disclose those records in accordance with that consent to any person identified in the consent, except that disclosures to central registries and in connection with criminal justice referrals must meet the requirements of §§ 2.34 and 2.35, respectively.

§ 2.34 Disclosures to prevent multiple enrollments.

(a) *Restrictions on disclosure.* A part 2 program, as defined in § 2.11, may disclose patient records to a central registry or to any withdrawal management or maintenance treatment program not more than 200 miles away for the purpose of preventing the multiple enrollment of a patient only if:

- (1) The disclosure is made when:
 - (i) The patient is accepted for treatment;
 - (ii) The type or dosage of the drug is changed; or
 - (iii) The treatment is interrupted, resumed or terminated.
- (2) The disclosure is limited to:
 - (i) Patient identifying information;
 - (ii) Type and dosage of the drug; and
 - (iii) Relevant dates.
- (3) The disclosure is made with the patient's written consent meeting the requirements of § 2.31, except that:

(i) The consent must list the name and address of each central registry and each known withdrawal management or maintenance treatment program to which a disclosure will be made; and

(ii) The consent may authorize a disclosure to any withdrawal management or maintenance treatment program established within 200 miles of the program, but does not need to individually name all programs.

(b) *Use of information limited to prevention of multiple enrollments.* A central registry and any withdrawal management or maintenance treatment program to which information is disclosed to prevent multiple enrollments may not re-disclose or use patient identifying information for any purpose other than the prevention of multiple enrollments unless authorized by a court order under subpart E of this part.

(c) *Permitted disclosure by a central registry to prevent a multiple enrollment.* When a member program asks a central registry if an identified patient is enrolled in another member program and the registry determines that the patient is so enrolled, the registry may disclose:

(1) The name, address, and telephone number of the member program(s) in which the patient is already enrolled to the inquiring member program; and

(2) The name, address, and telephone number of the inquiring member program to the member program(s) in which the patient is already enrolled. The member programs may communicate as necessary to verify that no error has been made and to prevent or eliminate any multiple enrollments.

(d) *Permitted disclosure by a withdrawal management or maintenance treatment program to prevent a multiple enrollment.* A withdrawal management or maintenance treatment program which has received a disclosure under this section and has determined that the patient is already enrolled may communicate as necessary with the program making the disclosure to verify that no error has been made and to prevent or eliminate any multiple enrollments.

§ 2.35 Disclosures to elements of the criminal justice system which have referred patients.

(a) A part 2 program may disclose information about a patient to those individuals within the criminal justice system who have made participation in the part 2 program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody if:

(1) The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress

(e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or post-trial release, probation or parole officers responsible for supervision of the patient); and

(2) The patient has signed a written consent meeting the requirements of § 2.31 (except paragraph (a)(8) which is inconsistent with the revocation provisions of paragraph (c) of this section) and the requirements of paragraphs (b) and (c) of this section.

(b) *Duration of consent.* The written consent must state the period during which it remains in effect. This period must be reasonable, taking into account:

(1) The anticipated length of the treatment;

(2) The type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and

(3) Such other factors as the part 2 program, the patient, and the individual(s) within the criminal justice system who will receive the disclosure consider pertinent.

(c) *Revocation of consent.* The written consent must state that it is revocable upon the passage of a specified amount of time or the occurrence of a specified, ascertainable event. The time or occurrence upon which consent becomes revocable may be no later than the final disposition of the conditional release or other action in connection with which consent was given.

(d) *Restrictions on re-disclosure and use.* An individual within the criminal justice system who receives patient information under this section may re-disclose and use it only to carry out that individual's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

Subpart D—Disclosures Without Patient Consent

§ 2.51 Medical emergencies.

(a) *General rule.* Under the procedures required by paragraph (c) of this section, patient identifying information may be disclosed to medical personnel to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained.

(b) *Special rule.* Patient identifying information may be disclosed to medical personnel of the Food and Drug Administration (FDA) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of a product under FDA

jurisdiction, and that the information will be used for the exclusive purpose of notifying patients or their physicians of potential dangers.

(c) *Procedures.* Immediately following disclosure, the part 2 program shall document, in writing, the disclosure in the patient's records, including:

(1) The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;

(2) The name of the individual making the disclosure;

(3) The date and time of the disclosure; and

(4) The nature of the emergency (or error, if the report was to FDA).

§ 2.52 Research.

(a) Notwithstanding other provisions of this part, including paragraph (b)(2) of this section, patient identifying information may be disclosed by the part 2 program or other lawful holder of part 2 data, for the purpose of conducting scientific research if the individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer or their designee makes a determination that the recipient of the patient identifying information:

(1) If a HIPAA-covered entity or business associate, has obtained and documented authorization from the patient, or a waiver or alteration of authorization, consistent with the HIPAA Privacy Rule at 45 CFR 164.508 or 164.512(i), as applicable; or

(2) If subject to the HHS regulations regarding the protection of human subjects (45 CFR part 46), either provides documentation that the researcher is in compliance with the requirements of the HHS regulations, including the requirements related to informed consent or a waiver of consent (45 CFR 46.111 and 46.116) or that the research qualifies for exemption under the HHS regulations (45 CFR 46.101(b) and any successor regulations; or

(3) If both a HIPAA covered entity or business associate and subject to the HHS regulations regarding the protection of human subjects, has met the requirements of paragraphs (a)(1) and (2) of this section; and

(4) If neither a HIPAA covered entity or business associate or subject to the HHS regulations regarding the protection of human subjects, this section does not apply.

(b) Any individual or entity conducting scientific research using patient identifying information obtained under paragraph (a) of this section:

(1) Is fully bound by the regulations in this part and, if necessary, will resist

in judicial proceedings any efforts to obtain access to patient records except as permitted by the regulations in this part.

(2) Must not re-disclose patient identifying information except back to the individual or entity from whom that patient identifying information was obtained or as permitted under paragraph (c) of this section.

(3) May include part 2 data in research reports only in aggregate form in which patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized means to identify a patient, directly or indirectly, as having or having had a substance use disorder.

(4) Must maintain and destroy patient identifying information in accordance with the security policies and procedures established under § 2.16.

(5) Must retain records in compliance with applicable federal, state, and local record retention laws.

(c) *Data linkages—(1) Researchers.* Any individual or entity conducting scientific research using patient identifying information obtained under paragraph (a) of this section that requests linkages to data sets from a data repository(-ies) holding patient identifying information must:

(i) Have the request reviewed and approved by an Institutional Review Board (IRB) registered with the Department of Health and Human Services, Office for Human Research Protections in accordance with 45 CFR part 46 to ensure that patient privacy is considered and the need for identifiable data is justified. Upon request, the researcher may be required to provide evidence of the IRB approval of the research project that contains the data linkage component.

(ii) Ensure that patient identifying information obtained under paragraph (a) of this section is not provided to law enforcement agencies or officials.

(2) *Data repositories.* For purposes of this section, a data repository is fully bound by the provisions of part 2 upon receipt of the patient identifying data and must:

(i) After providing the researcher with the linked data, destroy or delete the linked data from its records, including sanitizing any associated hard copy or electronic media, to render the patient identifying information non-retrievable in a manner consistent with the policies and procedures established under § 2.16 Security for records.

(ii) Ensure that patient identifying information obtained under paragraph (a) of this section is not provided to law enforcement agencies or officials.

(2) Except as provided in paragraph (c) of this section, a researcher may not redisclose patient identifying information for data linkages purposes.

§ 2.53 Audit and evaluation.

(a) *Records not copied or removed.* If patient records are not downloaded, copied or removed from the part 2 program premises or forwarded electronically to another electronic system or device, patient identifying information, as defined in § 2.11, may be disclosed in the course of a review of records on the part 2 program premises to any individual or entity who agrees in writing to comply with the limitations on re-disclosure and use in paragraph (d) of this section and who:

(1) Performs the audit or evaluation on behalf of:

(i) Any federal, state, or local government agency which provides financial assistance to the part 2 program or is authorized by law to regulate its activities; or

(ii) Any individual or entity who provides financial assistance to the part 2 program, which is a third-party payer covering patients in the part 2 program, or which is a quality improvement organization performing a utilization or quality control review; or

(2) Is determined by the part 2 program to be qualified to conduct an audit or evaluation of the part 2 program.

(b) *Copying, removing, downloading, or forwarding patient records.* Records containing patient identifying information, as defined in § 2.11, may be copied or removed from a part 2 program premises or downloaded or forwarded to another electronic system or device from the part 2 program's electronic records by any individual or entity who:

(1) Agrees in writing to:

(i) Maintain and destroy the patient identifying information in a manner consistent with the policies and procedures established under § 2.16;

(ii) Retain records in compliance with applicable federal, state, and local record retention laws; and

(iii) Comply with the limitations on disclosure and use in paragraph (d) of this section; and

(2) Performs the audit or evaluation on behalf of:

(i) Any federal, state, or local government agency which provides financial assistance to the part 2 program or is authorized by law to regulate its activities; or

(ii) Any individual or entity who provides financial assistance to the part 2 program, which is a third-party payer covering patients in the part 2 program,

or which is a quality improvement organization performing a utilization or quality control review.

(c) *Medicare, Medicaid, Children's Health Insurance Program (CHIP), or related audit or evaluation.* (1) Patient identifying information, as defined in § 2.11, may be disclosed under paragraph (c) of this section to any individual or entity for the purpose of conducting a Medicare, Medicaid, or CHIP audit or evaluation, including an audit or evaluation necessary to meet the requirements for a Centers for Medicare & Medicaid Services (CMS)-regulated accountable care organization (CMS-regulated ACO) or similar CMS-regulated organization (including a CMS-regulated Qualified Entity (QE)), if the individual or entity agrees in writing to comply with the following:

(i) Maintain and destroy the patient identifying information in a manner consistent with the policies and procedures established under § 2.16;

(ii) Retain records in compliance with applicable federal, state, and local record retention laws; and

(iii) Comply with the limitations on disclosure and use in paragraph (d) of this section.

(2) A Medicare, Medicaid, or CHIP audit or evaluation under this section includes a civil or administrative investigation of a part 2 program by any federal, state, or local government agency with oversight responsibilities for Medicare, Medicaid, or CHIP and includes administrative enforcement, against the part 2 program by the government agency, of any remedy authorized by law to be imposed as a result of the findings of the investigation.

(3) An audit or evaluation necessary to meet the requirements for a CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must be conducted in accordance with the following:

(i) A CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must:

(A) Have in place administrative and/or clinical systems; and

(B) Have in place a leadership and management structure, including a governing body and chief executive officer with responsibility for oversight of the organization's management and for ensuring compliance with and adherence to the terms and conditions of the Participation Agreement or similar documentation with CMS; and

(ii) A CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must have a signed Participation Agreement or similar documentation with CMS, which

provides that the CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE):

(A) Is subject to periodic evaluations by CMS or its agents, or is required by CMS to evaluate participants in the CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) relative to CMS-defined or approved quality and/or cost measures;

(B) Must designate an executive who has the authority to legally bind the organization to ensure compliance with 42 U.S.C. 290dd-2 and this part and the terms and conditions of the Participation Agreement in order to receive patient identifying information from CMS or its agents;

(C) Agrees to comply with all applicable provisions of 42 U.S.C. 290dd-2 and this part;

(D) Must ensure that any audit or evaluation involving patient identifying information occurs in a confidential and controlled setting approved by the designated executive;

(E) Must ensure that any communications or reports or other documents resulting from an audit or evaluation under this section do not allow for the direct or indirect identification (e.g., through the use of codes) of a patient as having or having had a substance use disorder; and

(F) Must establish policies and procedures to protect the confidentiality of the patient identifying information consistent with this part, the terms and conditions of the Participation Agreement, and the requirements set forth in paragraph (c)(1) of this section.

(4) Program, as defined in § 2.11, includes an employee of, or provider of medical services under the program when the employee or provider is the subject of a civil investigation or administrative remedy, as those terms are used in paragraph (c)(2) of this section.

(5) If a disclosure to an individual or entity is authorized under this section for a Medicare, Medicaid, or CHIP audit or evaluation, including a civil investigation or administrative remedy, as those terms are used in paragraph (c)(2) of this section, then a quality improvement organization which obtains the information under paragraph (a) or (b) of this section may disclose the information to that individual or entity but only for the purpose of conducting a Medicare, Medicaid, or CHIP audit or evaluation.

(6) The provisions of this paragraph do not authorize the part 2 program, the federal, state, or local government agency, or any other individual or entity to disclose or use patient identifying

information obtained during the audit or evaluation for any purposes other than those necessary to complete the audit or evaluation as specified in paragraph (c) of this section.

(d) *Limitations on disclosure and use.* Except as provided in paragraph (c) of this section, patient identifying information disclosed under this section may be disclosed only back to the program from which it was obtained and used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities, as authorized by a court order entered under § 2.66.

Subpart E—Court Orders Authorizing Disclosure and Use

§ 2.61 Legal effect of order.

(a) *Effect.* An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by 42 U.S.C. 290dd–2 and the regulations in this part. Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under the regulations in this part.

(b) *Examples.* (1) A person holding records subject to the regulations in this part receives a subpoena for those records. The person may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under the regulations in this part.

(2) An authorizing court order is entered under the regulations in this part, but the person holding the records does not want to make the disclosure. If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, that person may refuse to make the disclosure. Upon the entry of a valid subpoena or other compulsory process the person holding the records must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions of the regulations in this part.

§ 2.62 Order not applicable to records disclosed without consent to researchers, auditors and evaluators.

A court order under the regulations in this part may not authorize qualified personnel, who have received patient identifying information without consent for the purpose of conducting research, audit or evaluation, to disclose that

information or use it to conduct any criminal investigation or prosecution of a patient. However, a court order under § 2.66 may authorize disclosure and use of records to investigate or prosecute qualified personnel holding the records.

§ 2.63 Confidential communications.

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

(b) [Reserved]

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) *Application.* An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which the applicant asserts that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given written consent (meeting the requirements of the regulations in this part) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) *Notice.* The patient and the person holding the records from whom disclosure is sought must be provided:

(1) Adequate notice in a manner which does not disclose patient

identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in § 2.64(d).

(c) *Review of evidence: Conduct of hearing.* Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of the regulations in this part. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) *Criteria for entry of order.* An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) *Content of order.* An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

§ 2.65 Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.

(a) *Application.* An order authorizing the disclosure or use of patient records to investigate or prosecute a patient in connection with a criminal proceeding may be applied for by the person holding the records or by any law enforcement or prosecutorial officials who are responsible for conducting investigative or prosecutorial activities with respect to the enforcement of criminal laws. The application may be

filed separately, as part of an application for a subpoena or other compulsory process, or in a pending criminal action. An application must use a fictitious name such as John Doe, to refer to any patient and may not contain or otherwise disclose patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny.

(b) *Notice and hearing.* Unless an order under § 2.66 is sought in addition to an order under this section, the person holding the records must be provided:

(1) Adequate notice (in a manner which will not disclose patient identifying information to other persons) of an application by a law enforcement agency or official;

(2) An opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in § 2.65(d); and

(3) An opportunity to be represented by counsel independent of counsel for an applicant who is a law enforcement agency or official.

(c) *Review of evidence: Conduct of hearings.* Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient, or the person holding the records. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) *Criteria.* A court may authorize the disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient only if the court finds that all of the following criteria are met:

(1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

(2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.

(3) Other ways of obtaining the information are not available or would not be effective.

(4) The potential injury to the patient, to the physician-patient relationship and to the ability of the part 2 program to provide services to other patients is outweighed by the public interest and the need for the disclosure.

(5) If the applicant is a law enforcement agency or official, that:

(i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and

(ii) Any person holding the records which is an entity within federal, state, or local government has in fact been represented by counsel independent of the applicant.

(e) *Content of order.* Any order authorizing a disclosure or use of patient records under this section must:

(1) Limit disclosure and use to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of the extremely serious crime or suspected crime specified in the application; and

(3) Include such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.

§ 2.66 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a part 2 program or the person holding the records.

(a) *Application.* (1) An order authorizing the disclosure or use of patient records to investigate or prosecute a part 2 program or the person holding the records (or employees or agents of that part 2 program or person holding the records) in connection with a criminal or administrative matter may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

(2) The application may be filed separately or as part of a pending civil or criminal action against a part 2 program or the person holding the records (or agents or employees of the part 2 program or person holding the records) in which the applicant asserts that the patient records are needed to provide material evidence. The application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has provided written consent (meeting the requirements of § 2.31) to that disclosure.

(b) *Notice not required.* An application under this section may, in

the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c).

(c) *Requirements for order.* An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64.

(d) *Limitations on disclosure and use of patient identifying information.* (1) An order entered under this section must require the deletion of patient identifying information from any documents made available to the public.

(2) No information obtained under this section may be used to conduct any investigation or prosecution of a patient in connection with a criminal matter, or be used as the basis for an application for an order under § 2.65.

§ 2.67 Orders authorizing the use of undercover agents and informants to investigate employees or agents of a part 2 program in connection with a criminal matter.

(a) *Application.* A court order authorizing the placement of an undercover agent or informant in a part 2 program as an employee or patient may be applied for by any law enforcement or prosecutorial agency which has reason to believe that employees or agents of the part 2 program are engaged in criminal misconduct.

(b) *Notice.* The part 2 program director must be given adequate notice of the application and an opportunity to appear and be heard (for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.67(c)), unless the application asserts that:

(1) The part 2 program director is involved in the suspected criminal activities to be investigated by the undercover agent or informant; or

(2) The part 2 program director will intentionally or unintentionally disclose the proposed placement of an undercover agent or informant to the employees or agents of the program who are suspected of criminal activities.

(c) *Criteria.* An order under this section may be entered only if the court determines that good cause exists. To

make this determination the court must find all of the following:

(1) There is reason to believe that an employee or agent of the part 2 program is engaged in criminal activity;

(2) Other ways of obtaining evidence of the suspected criminal activity are not available or would not be effective; and

(3) The public interest and need for the placement of an undercover agent or informant in the part 2 program outweigh the potential injury to patients of the part 2 program, physician-patient relationships and the treatment services.

(d) *Content of order.* An order authorizing the placement of an undercover agent or informant in a part 2 program must:

(1) Specifically authorize the placement of an undercover agent or an informant;

(2) Limit the total period of the placement to six months;

(3) Prohibit the undercover agent or informant from disclosing any patient identifying information obtained from the placement except as necessary to investigate or prosecute employees or agents of the part 2 program in connection with the suspected criminal activity; and

(4) Include any other measures which are appropriate to limit any potential disruption of the part 2 program by the placement and any potential for a real or apparent breach of patient confidentiality; for example, sealing from public scrutiny the record of any

proceeding for which disclosure of a patient's record has been ordered.

(e) *Limitation on use of information.* No information obtained by an undercover agent or informant placed in a part 2 program under this section may be used to investigate or prosecute any patient in connection with a criminal matter or as the basis for an application for an order under § 2.65.

Dated: December 20, 2016.

Kana Enomoto,

Acting Deputy Assistant Secretary for Mental Health and Substance Use.

Sylvia M. Burwell,

Secretary.

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Part VIII

The President

Proclamation 9563—Boundary Enlargement of the California Coastal National Monument

Proclamation 9564—Boundary Enlargement of the Cascade-Siskiyou National Monument

Proclamation 9565—Establishment of the Birmingham Civil Rights National Monument

Proclamation 9566—Establishment of the Freedom Riders National Monument

Notice of January 13, 2017—Continuation of the National Emergency With Respect to Terrorists Who Threaten To Disrupt the Middle East Peace Process

Presidential Documents

Title 3—

Proclamation 9563 of January 12, 2017

The President

Boundary Enlargement of the California Coastal National Monument

By The President of the United States of America

A Proclamation

Through Proclamation 7264 of January 11, 2000, President Clinton established the California Coastal National Monument (monument) to protect the biological treasures situated on thousands of unappropriated or unreserved islands, rocks, exposed reefs, and pinnacles owned or controlled by the Government of the United States within 12 nautical miles of the shoreline of the State of California. Presidential Proclamation 9089, issued on March 11, 2014, expanded the monument to include the Point Arena-Stornetta Public Lands, a landscape of coastal bluffs and shelves, tide pools, onshore dunes, coastal prairies, and riverbanks, and the mouth and estuary of the Garcia River. In addition to providing vital habitat for wildlife, these coastal lands were critical for the native peoples who first lived along the California Coast, and they continue to be treasured by modern generations.

Six other spectacular areas along the California Coast contain significant scientific or historic resources that are closely tied to the values of the monument. Like the protections afforded by prior proclamations, protection of Trinidad Head, Waluplh-Lighthouse Ranch, Lost Coast Headlands, Cotoni-Coast Dairies, Piedras Blancas, and Orange County Rocks and Islands would protect and preserve objects of historic or scientific interest on the California Coast.

Trinidad Head

About 30 miles north of Eureka lies the majestic and culturally important promontory known as Trinidad Head. The tip of Trinidad Head encompasses several prominent historic sites along with the rocky ledges that provide their setting, such as the Trinidad Head Light Station, which first operated in 1871 and is still active today. Accompanied by a small wooden bell house, it sits atop sheer cliffs overlooking crashing waves and rugged sea stacks. The importance of this location predated its first use as a lighthouse. Nearly 100 years earlier, on June 9, 1775, representatives of the local Yurok community first made contact with two Spanish ships there. A granite cross installed in 1913 sits in a clearing above the lighthouse, commemorating the spot where the Spanish erected a wooden cross two days later to claim the area for King Charles III. Today, the area is culturally and spiritually significant to the Cher-Ae Heights Indian Community of the Trinidad Rancheria, the Yurok Tribe, and the Tsurai Ancestral Society.

Coastal bluff scrub vegetation, including coyote brush, California wax myrtle, salal, blue blossom, ocean spray, and evergreen huckleberry, surrounds these historic features. Scattered stands of Sitka spruce, Douglas fir, and red alder stand out among these native shrubs and herbs. Coast Indian paintbrush grows in rocky outcroppings near the bell house, adding splashes of crimson to the landscape. Visitors to Trinidad Head enjoy observing the Trinidad seabird colony, which makes its home on the rocks and islands off the coast of Trinidad Head and contains over 75,000 birds, including several species of cormorant, the common murre, and occasionally tufted puffins.

Waluplh-Lighthouse Ranch

Perched on the edge of Table Bluff, 12 miles south of Eureka, Waluplh-Lighthouse Ranch has spectacular panoramic views of the Pacific Ocean, Eel River Delta, and the south spit of Humboldt Bay. In addition to outstanding scenery, visitors to Waluplh-Lighthouse Ranch can view migratory raptors, songbirds, and the endangered marbled murrelet.

Waluplh-Lighthouse Ranch is part of the ancestral home and current cultural traditions of the Wiyot Tribe, who gave it the name Waluplh. With its expansive views, the area served as a lookout point for the Tribe, as well as a crossroads for trails connecting inland areas with Humboldt Bay to the north and the bottomlands surrounding the mouth of the Eel River to the south. Beginning in the late 1800s, Waluplh-Lighthouse Ranch was developed as a Coast Guard facility, and during World War II, it served as a coastal lookout post and the base for a mounted beach patrol. There are no longer any buildings on the property, so visitors now enjoy its panoramic views surrounded by open space.

Lost Coast Headlands

Thirteen miles south of Waluplh-Lighthouse Ranch, the Lost Coast Headlands present a majestic coastline, encompassing rolling hills and dramatically eroding bluffs, punctuated by freshwater creeks, ponds, and pockets of forests. Underlying the Lost Coast Headlands are layers of highly erodible sedimentary rock known as the Wildcat Group. This geology has weathered over the years, leading to deeply carved and incised bluffs along the beach made up of multi-hued layers of gray clay, golden sandstone, and brown siltstone. The eroding of the bluffs over time exposes fossils of scallops, clams, and snails, providing a glimpse of the marine fauna that lived in the area during the Pleistocene Epoch 2.6 million to 11,700 years ago.

Coastal scrub vegetation and open grasslands blanket the area's rolling hills. Coyote brush and California blackberry dominate, and in the grasslands, small patches of native Pacific reed grass meadow remain. Pockets of Douglas fir, Sitka spruce, and grand fir shadow the eroded draws. These diverse habitats support an array of wildlife species, including black-tailed deer, bobcat, brush rabbit, and Douglas squirrel. While more elusive, gray fox, coyote, and mountain lion also pass through the area, and a careful observer may notice signs of their presence. A variety of small birds dart about its grasslands and scrub, while raptors such as American kestrels, northern harriers, peregrine falcons, and Cooper's hawks scan for prey overhead. Quiet visitors may hear hairy woodpeckers in the forested draws. Foraging shorebirds and gulls, along with the occasional harbor seal, can be observed on the narrow beaches.

Buffered by red alder and willow, Guthrie and Fleener creeks wind their way through the Lost Coast Headlands on their way to the sea. Both perennial streams provide habitat for three-spined stickleback, a small native fish. Sculpin, Pacific lamprey, and the threatened Northern California steelhead have also been observed in Guthrie Creek, and both creeks are potential habitat for the threatened coho salmon. During the summer, the mouth of Guthrie Creek widens into a lagoon that can provide shelter for estuary-dependent fish and invertebrates. The area also features three small, freshwater ponds that provide habitat for the threatened California red-legged frog and a variety of waterfowl, including green-winged teals.

While few signs of it remain, the northernmost point of the Lost Coast Headlands was once the site of the Centerville Beach Naval Facility, established in 1958 to monitor Soviet submarines during the Cold War. For more than 100 years, several families who settled nearby grazed livestock in the area.

Cotoni-Coast Dairies

Near Davenport in Santa Cruz County, Cotoni-Coast Dairies extends from the steep slopes of the Santa Cruz Mountains to the marine coastal terraces overlooking the Pacific Ocean. Sitting atop the soft Santa Cruz Mudstone

Formation and the hard, silica-rich Monterey Formation, the area's bedrock supports a diversity of soils and vegetation that have sustained wildlife and people alike for millennia.

Dating back at least 10,000 years, an ancestral group known to archaeologists as the Costanoan or Coastal People (also called the Ohlone) lived in this region, and the Cotoni, a tribelet of this group, lived in the Cotoni-Coast Dairies area. Lithic scatter sites and shell middens demonstrate that inhabitants moved between the coastal ecological zones and upland environments, making use of the landscape's diverse resources. Europeans first made contact with the Cotoni in the 1600s and 1700s. Most of the Costanoan people were converted to Christianity, many forcibly, during California's Mission period in the late 1700s and 1800s, and by the early 1900s, much of the ancient cultural heritage of the Coastal People was left only to memory.

Six perennial streams form the heart of Cotoni-Coast Dairies' ecosystem, flowing from the coastal mountains down to the Pacific Ocean. Molino Creek, Ferrari Creek, San Vicente Creek, Liddell Creek, Yellow Bank Creek, and Laguna Creek have each carved steep canyons on their path to the sea. Vibrant riparian areas follow along the six stream corridors, with red alder and arroyo willow forests dominating the vegetative community. A seventh stream, Scott Creek, flows along a small portion of the area's northern boundary. Most of the area's wetlands can be found within these riparian corridors, though others exist in meadows and floodplains.

Beyond supporting riparian and wetland communities, Cotoni-Coast Dairies' waterways provide important habitat for anadromous and freshwater fish. All of the streams are thought to have historically supported salmon populations. Today, the threatened steelhead and coho salmon can be found on spawning runs in San Vicente Creek, while steelhead are also found in Liddell Creek and Laguna Creek. The endangered tidewater goby may also be found in the tidally influenced portion of Laguna Creek. The threatened California red-legged frog uses many of the waterways and water sources here, along with a wide range of other amphibians and reptiles.

Grasslands, scrublands, woodlands, and forests surround the riparian corridors in Cotoni-Coast Dairies. Purple needlegrass and other native species, such as California oatgrass and blue wildrye, characterize the coastal prairie grassland community. The intermixed wildflowers in the community provide visitors a colorful display in the spring and early summer. Occasional freshwater seeps amid the grasslands support sedges, California buttercup, brown-headed rush, and other species.

California sagebrush and coyote brush scrub communities blanket the area's bluffs and hillside slopes. Native trees, including Douglas fir and coast live oak, dominate forests, which also include stands of coastal trees such as madrone, California bay, Monterey pine, and knobcone pine. Visitors are drawn to stands of coast redwood, which thrive on the north-facing slopes in some watersheds, accompanied by redwood sorrel, elk clover, and other understory species.

The diversity of the uplands vegetation in Cotoni-Coast Dairies supports a rich wildlife community including a vast and varied mammalian population. Among the many species inhabiting Cotoni-Coast Dairies are California voles, dusky-footed woodrats, black-tailed jackrabbits, mule deer, and gray fox. Evidence also suggests that both bobcats and mountain lions hunt here.

Visitors to Cotoni-Coast Dairies may be able to catch a glimpse of a variety of avian species, including black swifts, orange crowned warblers, American kestrels, Cooper's hawks, white-tailed kites, and peregrine falcons. In the riparian areas, one may encounter Wilson's warblers, downy woodpeckers, and tree swallows, among others. Various bat species, including the Townsend's big-eared bat, can be seen darting overhead at dusk.

Piedras Blancas

Only 40 miles north of San Luis Obispo, the large white coastal rocks for which Piedras Blancas was named have served as a landmark for centuries to explorers and traders along the central coast of California. Sitting at a cultural interface between Northern Chumash and Playanos Salinan peoples, Piedras Blancas was and still remains important to Native Americans. The human history of the area stretches back at least 3,000 years, and archaeologists have found stone tools, debris from tool knapping, discrete quarrying locations, and shell midden deposits that help tell that history. Native peoples largely used the area as a source of raw stone and for the manufacture of stone tools.

In 1542, the Spanish explorer Juan Rodriquez Cabrillo noted the value of this area as a maritime guidepost, and the land he sighted from his ship was later claimed by the Spanish, followed by the Governor of Mexico, and subsequently became part of the United States. A lighthouse built in the 1870s still stands today, albeit without the three upper levels that were removed after being damaged by an earthquake in 1948. The lighthouse, with its ornate brick and cast-iron structure, is listed in the National Register of Historic Places along with its surrounding buildings, such as the 1906 fog-signal and oil house. Visitors to Piedras Blancas today are treated to unmatched scenic vistas of the rugged mountain peaks of the Santa Lucia Range and the deep blue waters of the Pacific Ocean. Dramatic geologic features, such as the namesake white rocks, along with the area's characteristic fog, contribute to a dynamic visual landscape.

The bedrock in the area consists of both sedimentary and volcanic rocks of the Franciscan Formation. This Formation represents Jurassic age material from the Pacific Plate that scraped off and attached to the continental margin of North America. Atop the bedrock lie Monterey Formation rocks, topped with marine terrace deposits. Rain percolates through the rock surface and sub-surface and emerges dramatically as ephemeral springs from cliff faces.

California sea lions, harbor seals, and northern elephant seals all spend time on the shores and within the waters of this area. Visitors may observe colonies of massive elephant seals loafing in the sun at Piedras Blancas, where females can be seen nursing their pups, and males occasionally battle for dominance. For decades, scientists have used this land to conduct annual censuses of the threatened southern sea otter and other marine mammals. From the mainland of Piedras Blancas, visitors can also be treated to regular visits by migrating gray and humpback whales, and occasionally blue, minke, and killer whales as well, in addition to bottlenose dolphins.

Marine birds perched on or soaring over the Piedras Blancas rocks include Brandt's cormorants, black oystercatchers, peregrine falcons, and brown pelicans. In a remarkable spring display, Pacific loons can be seen migrating offshore of Piedras Blancas by the tens of thousands. In the rocky intertidal zone found along these shores, scientists have documented mussels, ochre starfish, barnacles, sea anemones, and black and red abalones.

The lighthouse's windswept onshore point is also a sanctuary for plants and wildlife. Over 70 types of native plants, including members from the agave, cashew, sunflower, carnation, morning glory, gourd, iris, and poppy families, establish a foothold in the fine sand and fine sandy loam soils. Together this diversity of vegetation can be characterized as northern coastal bluff scrub. If visitors time their visit, they will be treated to a dazzling array of blooms from species such as seaside poppy, seaside daisy, coastal bush lupine, hedge nettle, dune buckwheat, and compact cobwebby thistle. This native vegetation supports many wildlife species, including brush rabbits, California voles, dusky-footed woodrats, and bobcats. Black-bellied slender salamanders, threatened red-legged frogs, western terrestrial garter snakes, and other reptiles and amphibians thrive in the Piedras Blancas area.

Orange County Rocks and Islands

This area consists of a series of offshore rocks, pinnacles, exposed reefs, and small islands off the Orange County coastline, where visitors onshore

are treated to dramatic crashing waves, unique geology, and an abundance of marine-dependent wildlife. These rocks and islands lie within the current monument boundary but were not previously reserved as part of the monument. These offshore rocks, many in pocket coves, contribute to the rugged beauty of the Orange County coastline and themselves include objects of scientific and historic interest. The features also provide important connectivity from south to north for shore birds and sea birds, as well as for California sea lions and harbor seals.

Cormorants, brown pelicans, gulls, and a variety of other shore birds and sea birds can be seen roosting, resting, and feeding on the jagged rocks and small islands. These rocks and islands are also haul-out areas for marine mammals, including California sea lions, harbor seals, and the occasional northern elephant seal.

Rich in vital nutrients, this offshore zone of swirling currents supports a variety of habitats and organisms. The tide pools around these rocks and islands are home to a diversity of hardy intertidal seaweeds and animal species uniquely adapted for survival within the alternating and equally harsh environs of pounding surf and baking sun.

The protection of Trinidad Head, Waluplh-Lighthouse Ranch, Lost Coast Headlands, Cotoni-Coast Dairies, Piedras Blancas, and Orange County Rocks and Islands as part of the California Coastal National Monument will preserve their cultural, prehistoric, and historic legacy and maintain their diverse array of natural and scientific resources, ensuring that the historic and scientific value of these areas, and their numerous objects of historic or scientific interest, remain for the benefit of all Americans.

WHEREAS, section 320301 of title 54, United States Code (known as the "Antiquities Act"), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, it is in the public interest to preserve the objects of scientific and historic interest on the public lands of Trinidad Head, Waluplh-Lighthouse Ranch, Lost Coast Headlands, Cotoni-Coast Dairies, Piedras Blancas, and Orange County Rocks and Islands;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be part of the California Coastal National Monument and, for the purpose of protecting those objects, reserve as part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying maps, which are attached hereto and form a part of this proclamation. The Orange County Rocks and Islands shall be managed as part of the original offshore area of the monument, and the remainder of the lands shall be known as the Trinidad Head, Waluplh-Lighthouse Ranch, Lost Coast Headlands, Cotoni-Coast Dairies, and Piedras Blancas units of the monument, respectively. These reserved Federal lands and interests in lands encompass approximately 6,230 acres. The boundaries described on the accompanying maps are confined to the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries described on the accompanying maps are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal

leasing, other than by exchange that furthers the protective purposes of the monument.

The enlargement of the boundary is subject to valid existing rights. If the Federal Government subsequently acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying maps, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

The Secretary of the Interior (Secretary) shall manage the area being added to the monument through the Bureau of Land Management (BLM) as a unit of the National Landscape Conservation System, pursuant to applicable legal authorities, to protect the objects identified above.

The Cotoni-Coast Dairies unit of the monument shall become available for public access upon completion of a management plan by the BLM, consistent with the care and management of the objects identified above.

Consistent with the care and management of the objects identified above, and except for emergency or authorized administrative purposes, motorized vehicle use in areas being added to the monument shall be permitted only on designated roads, and non-motorized mechanized vehicle use shall be permitted only on designated roads and trails.

Nothing in this proclamation shall be construed to interfere with the operation or maintenance, or the replacement or modification within the existing authorization boundary, of existing weather station, navigation, transportation, utility, pipeline, or telecommunications facilities located on the lands added to the monument in a manner consistent with the care and management of the objects to be protected. Other rights-of-way shall be authorized only if they are necessary for the care and management of the objects to be protected.

Nothing in this proclamation shall be deemed to enlarge or diminish the rights or jurisdiction of any Indian tribe. The Secretary shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and traditional cultural properties in the monument and provide access by members of Indian tribes for traditional cultural and customary uses, consistent with the American Indian Religious Freedom Act (42 U.S.C. 1996) and Executive Order 13007 of May 24, 1996 (Indian Sacred Sites).

Laws, regulations, and policies followed by the BLM in issuing and administering grazing permits or leases on lands under its jurisdiction shall continue to apply with regard to the lands added to the monument, consistent with the care and management of the objects identified above.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of California or the United States over submerged or other lands within the territorial waters off the coast of California, nor shall it otherwise enlarge or diminish the jurisdiction or authority of the State of California, including its jurisdiction and authority with respect to fish and wildlife management.

Nothing in this proclamation shall affect the rights or obligations of any State or Federal oil or gas lessee within the territorial waters off the California Coast.

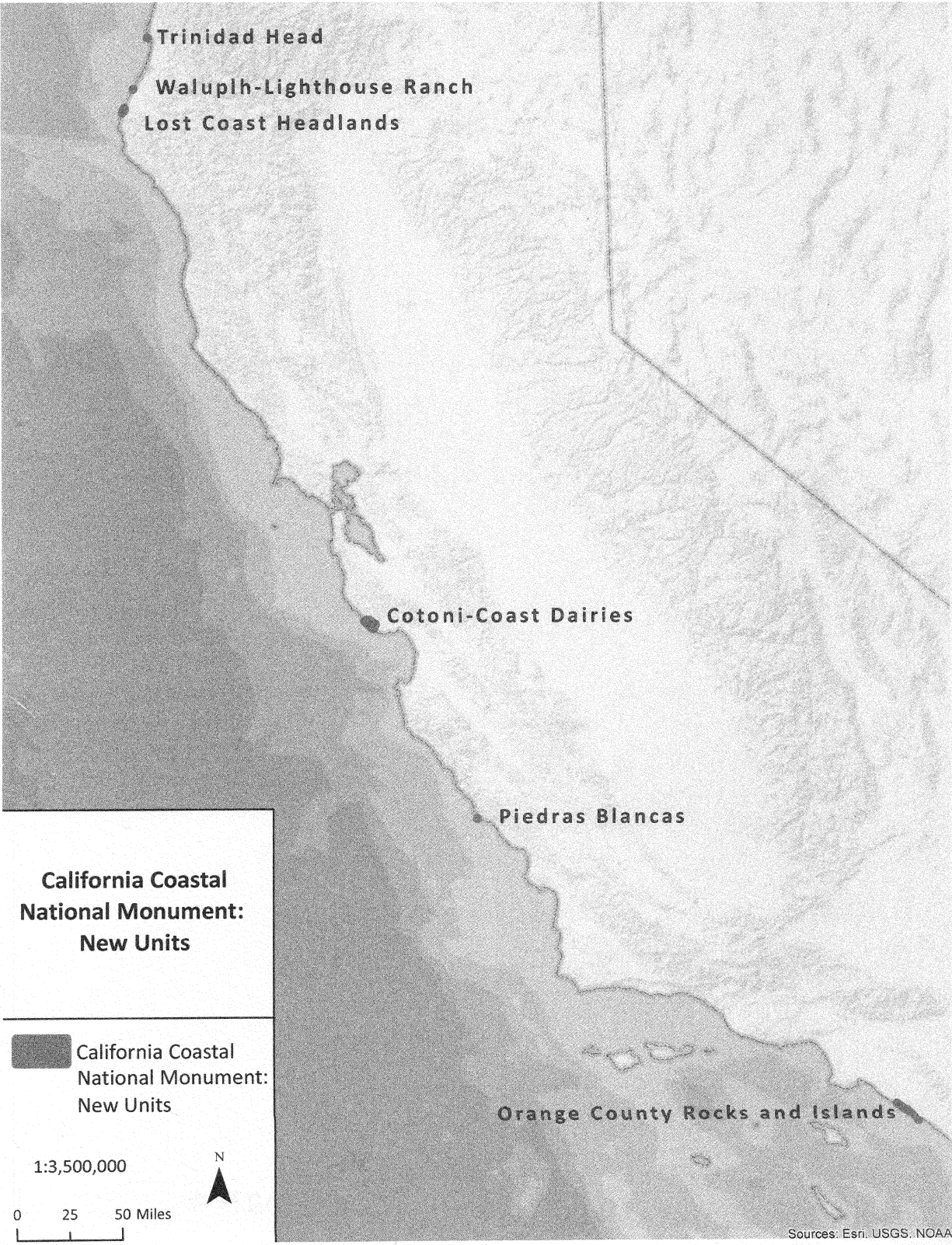
Nothing in this proclamation shall be construed to alter the authority or responsibility of any party with respect to emergency response activities within the monument, including wildland fire response.

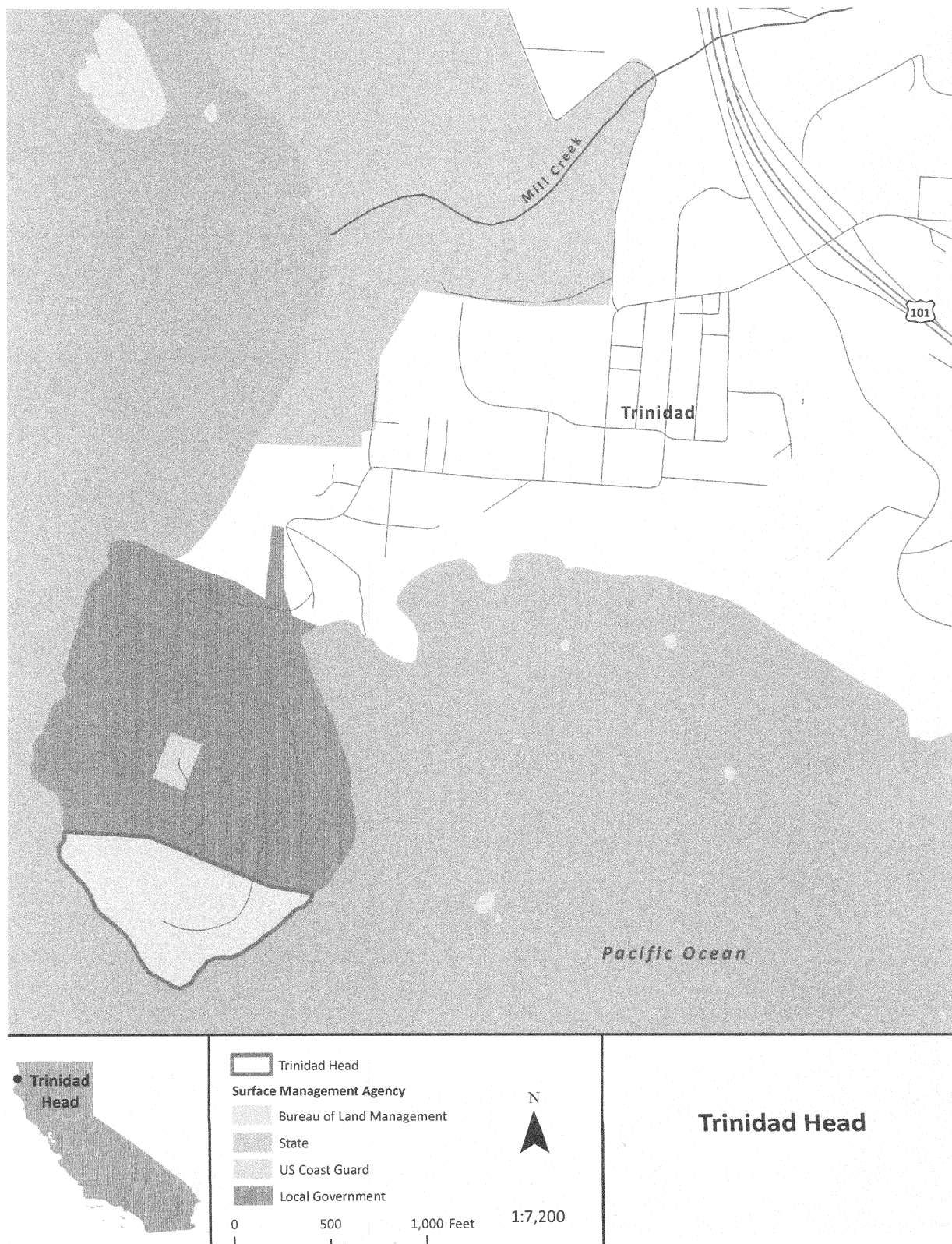
Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

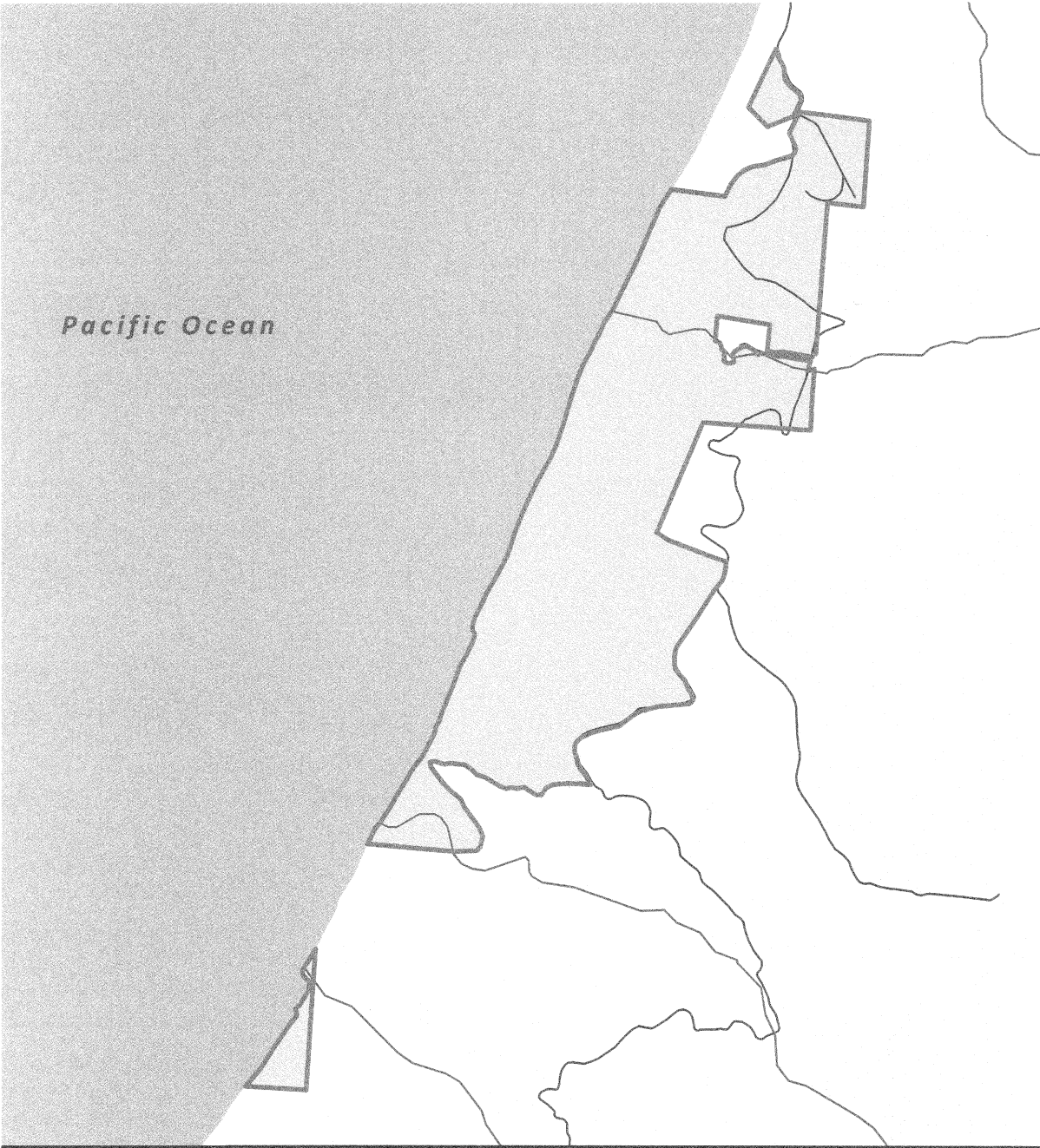
Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of the monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of January, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-first.

A handwritten signature in black ink, appearing to be "Donald Trump", with a large circular flourish and a horizontal line extending to the right.





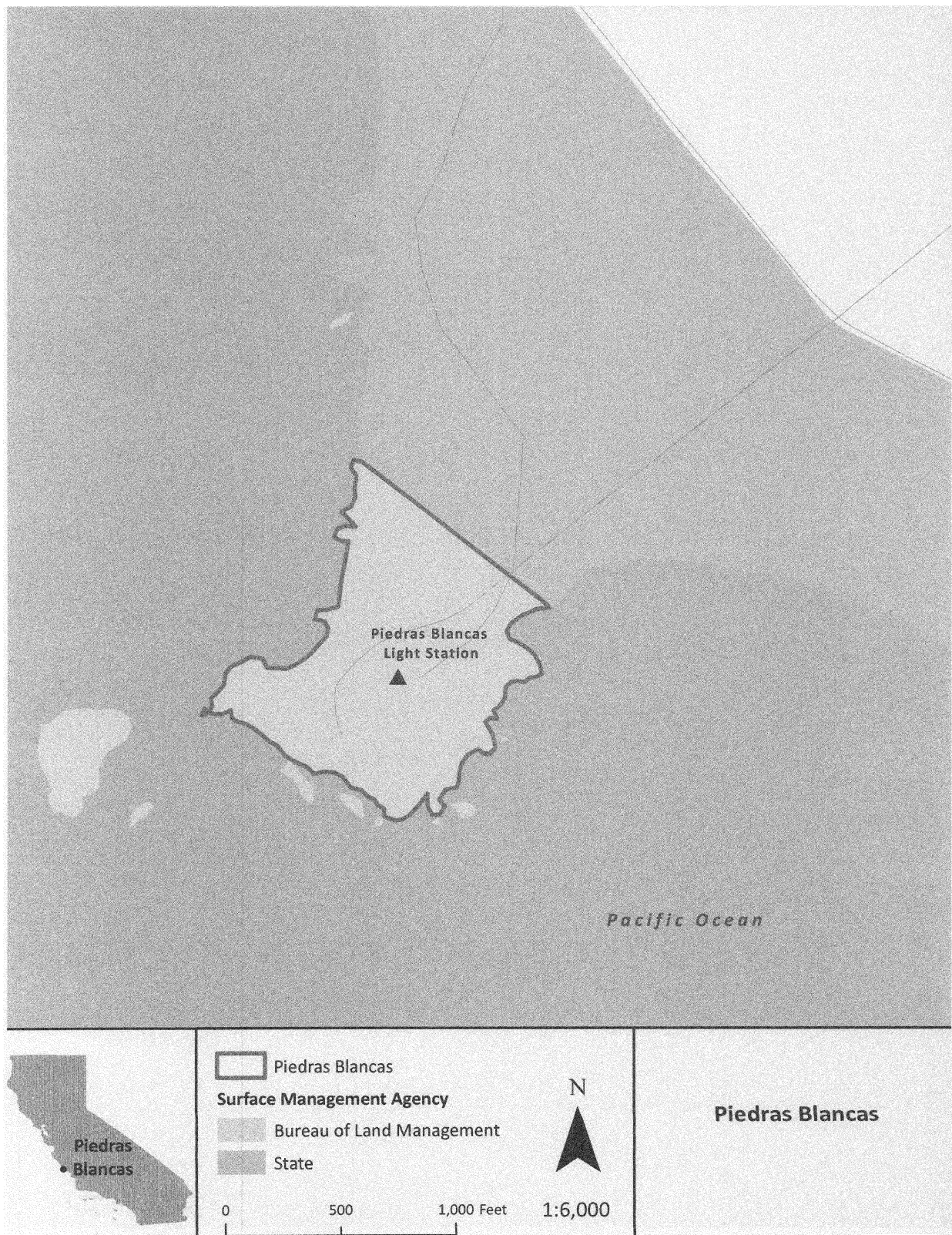


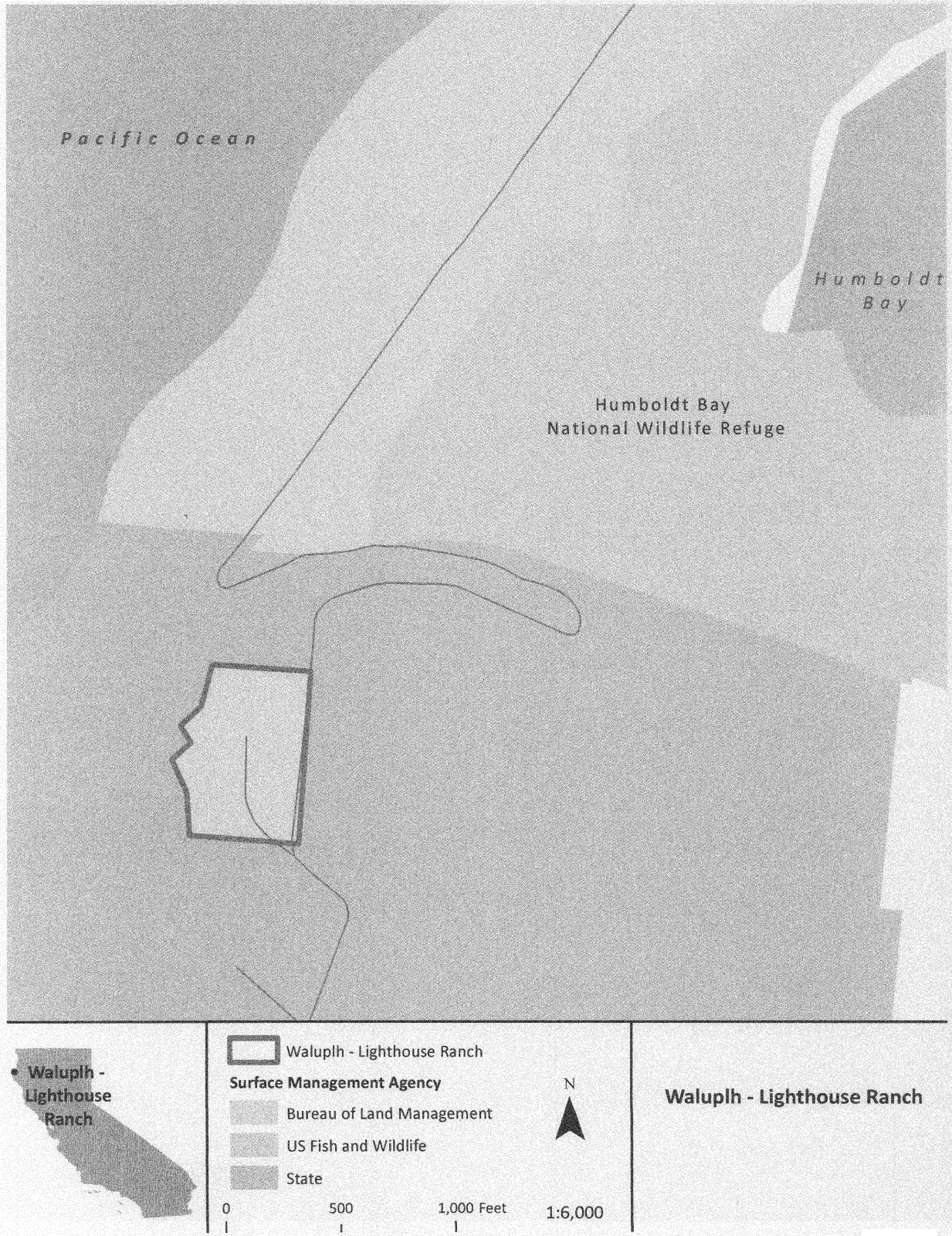
Lost Coast Headlands
Surface Management Agency
Bureau of Land Management

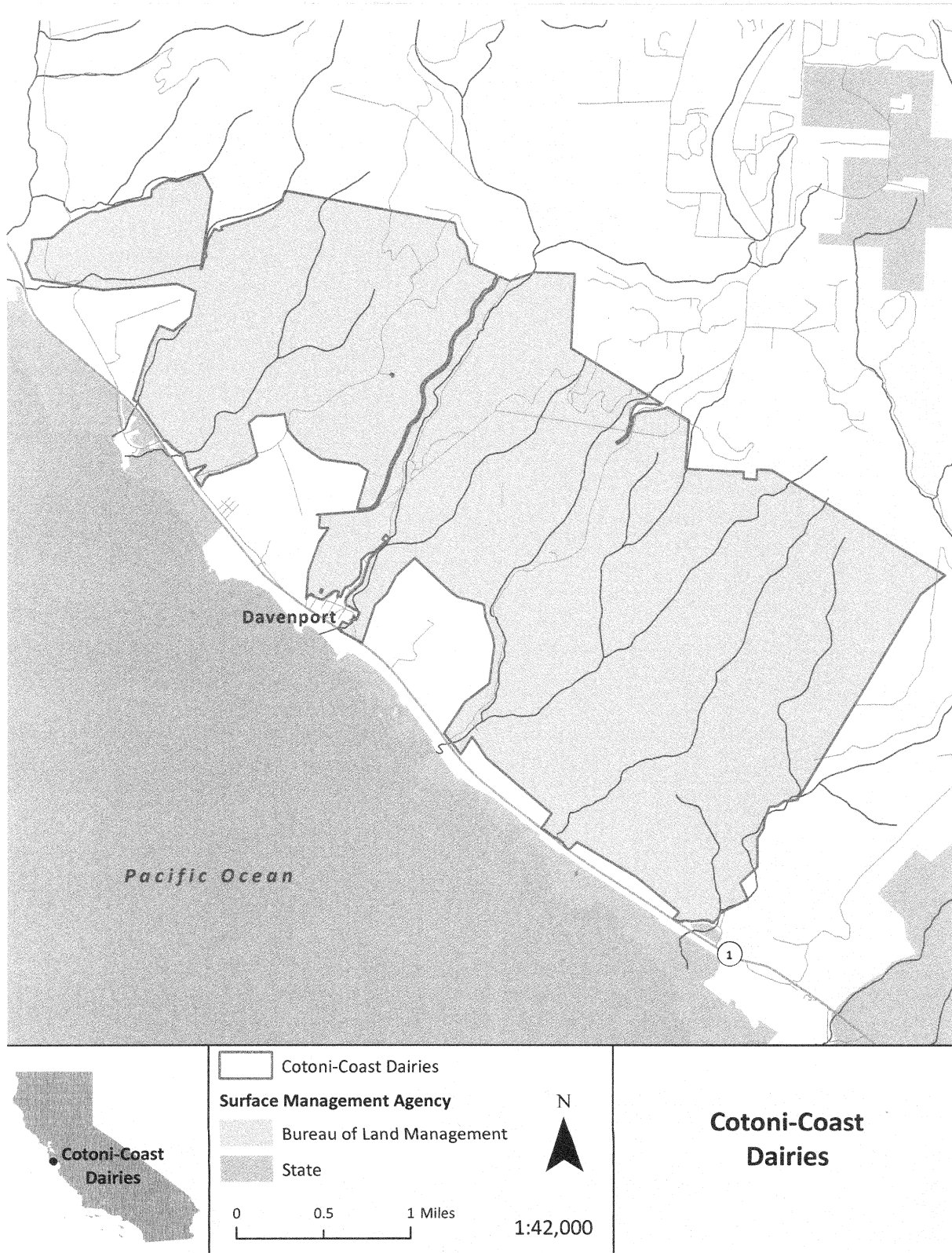


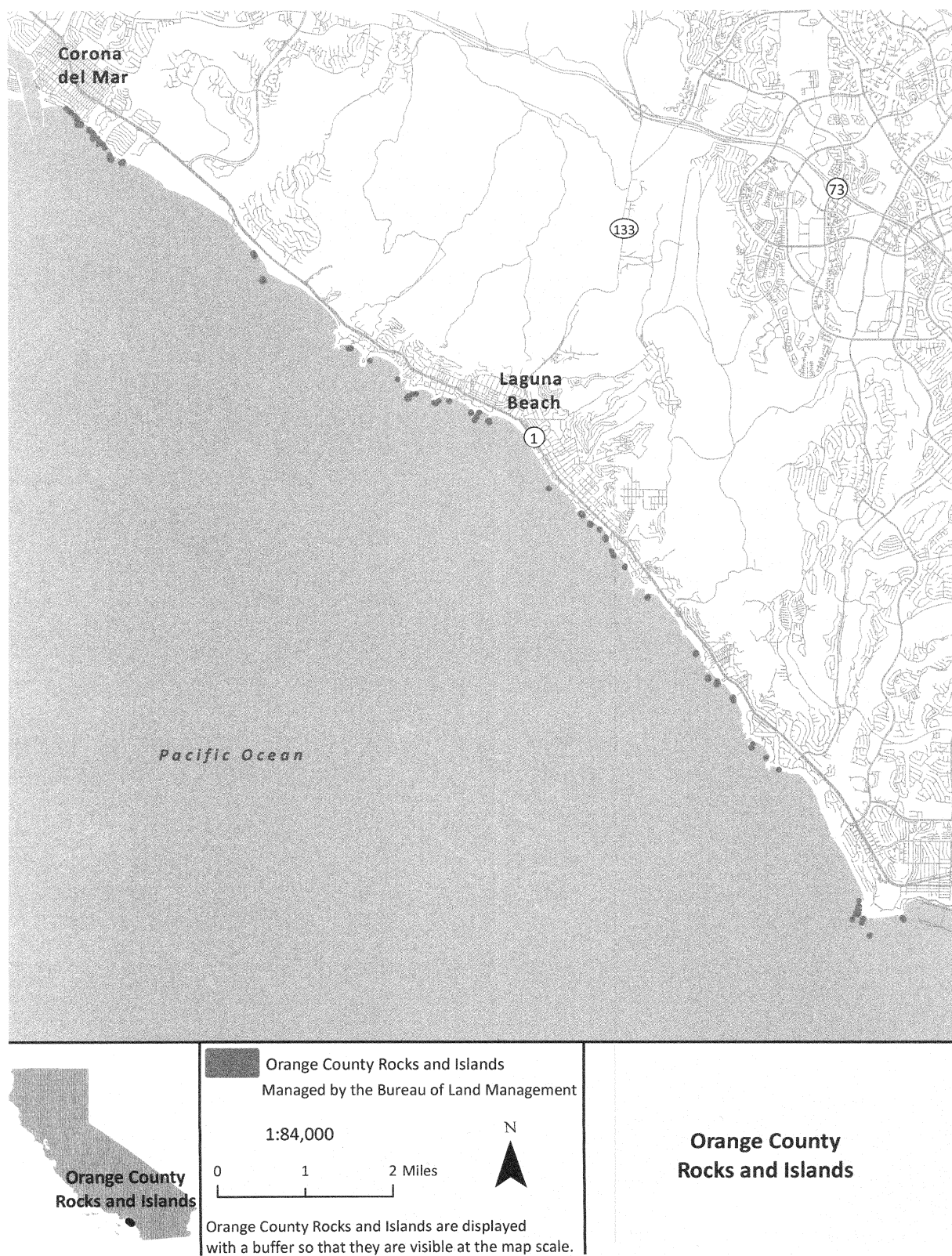
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Lost Coast Headlands









Presidential Documents

Proclamation 9564 of January 12, 2017

Boundary Enlargement of the Cascade-Siskiyou National Monument

By the President of the United States of America

A Proclamation

Through Proclamation 7318 of June 9, 2000, President Bill Clinton established the Cascade-Siskiyou National Monument (monument) to protect the ecological wonders and biological diversity at the interface of the Cascade, Klamath, and Siskiyou ecoregions. The area, home to an incredible variety of species and habitats, represents a rich mosaic of forests, grasslands, shrublands, and wet meadows. The many rare and endemic plant and animal species found here are a testament to Cascade-Siskiyou's unique ecosystems and biotic communities.

As President Clinton noted in Proclamation 7318, the ecological integrity of the ecosystems that harbor this diverse array of species is vital to their continued existence. Since 2000, scientific studies of the area have reinforced that the environmental processes supporting the biodiversity of the monument require habitat connectivity corridors for species migration and dispersal. Additionally, they require a range of habitats that can be resistant and resilient to large-scale disturbance such as fire, insects and disease, invasive species, drought, or floods, events likely to be exacerbated by climate change. Expanding the monument to include Horseshoe Ranch, the Jenny Creek watershed, the Grizzly Peak area, Lost Lake, the Rogue Valley foothills, the Southern Cascades area, and the area surrounding Surveyor Mountain will create a Cascade-Siskiyou landscape that provides vital habitat connectivity, watershed protection, and landscape-scale resilience for the area's critically important natural resources. Such an expansion will bolster protection of the resources within the original boundaries of the monument and will also protect the important biological and historic resources within the expansion area.

The ancient Siskiyou and Klamath Mountains meet the volcanic Cascade Mountains near the border of California and Oregon, creating an intersection of three ecoregions in Jackson and Klamath Counties in Oregon and Siskiyou County in California. Towering rock peaks covered in alpine forests rise above mixed woodlands, open glades, dense chaparral, meadows filled with stunning wildflowers, and swiftly-flowing streams.

Native American occupancy of this remarkably diverse landscape dates back thousands of years, and Euro-American settlers also passed through the expansion area. The Applegate Trail, a branch of the California National Historic Trail, passes through both the existing monument and the expansion area following old routes used by trappers and miners, who themselves made use of trails developed by Native Americans. Today, visitors to the Applegate Trail can walk paths worn by wagon trains of settlers seeking a new life in the west. The trail, a less hazardous alternative to the Oregon Trail, began to see regular wagon traffic in 1846 and helped thousands of settlers traverse the area more safely on their way north to the Willamette Valley or south to California in search of gold—one of the largest mass migrations in American history. Soon thereafter, early ranchers, loggers, and homesteaders began to occupy the area, leaving traces of their presence,

which provide potential for future research into the era of westward expansion in southwestern Oregon. A historic ranch can be seen in the Horseshoe Ranch Wildlife Area, in the northernmost reaches of California.

The Cascade-Siskiyou landscape is formed by the convergence of the Klamath, the Siskiyou, and the Cascade mountain ranges. The Siskiyou Mountains, which contain Oregon's oldest rocks dating to 425 million years, have an east-west orientation that connects the newer Cascade Mountains with the ancient Klamath Mountains. The tectonic action that formed the Klamath and Siskiyou Mountains occurred over 130 million years ago, while the Cascades were formed by more recent volcanism. The Rogue Valley foothills contain Eocene and Miocene formations of black andesite lava along with younger High Cascade olivine basalt. In the Grizzly Peak area, the 25 million-year geologic history includes basaltic lava flows known as the Roxy Formation, along with the formation of a large strato-volcano, Mount Grizzly. Old Baldy, another extinct volcanic cone, rises above the surrounding forest in the far northeast of the expansion area.

Cascade-Siskiyou's biodiversity, which provides habitat for a dazzling array of species, is internationally recognized and has been studied extensively by ecologists, evolutionary biologists, botanists, entomologists, and wildlife biologists. Ranging from high slopes of Shasta red fir to lower elevations with Douglas fir, ponderosa pine, incense cedar, and oak savannas, the topography and elevation gradient of the area has helped create stunningly diverse ecosystems. From ancient and mixed-aged conifer and hardwood forests to chaparral, oak woodlands, wet meadows, shrublands, fens, and open native perennial grasslands, the landscape harbors extraordinarily varied and diverse plant communities. Among these are threatened and endangered plant species and habitat for numerous other rare and endemic species.

Grizzly Peak and the surrounding Rogue Valley foothills in the northwest part of the expansion area are home to rare populations of plant species such as rock buckwheat, Baker's globemallow, and tall bugbane. More than 275 species of flowering plants, including Siberian spring beauty, bluehead gilia, Detling's silverpuffs, bushy blazingstar, southern Oregon buttercup, Oregon geranium, mountain lady slipper, Egg Lake monkeyflower, green-flowered ginger, and *Coronis fritillaria* can be found here. Ferns such as the fragile fern, lace fern, and western sword fern contribute to the lush green landscape.

Ancient sugar pine and ponderosa pine thrive in the Lost Lake Research Natural Area in the north, along with white fir and Douglas fir, with patches of Oregon white oak and California black oak. Occasional giant chinquapin, Pacific yew, and bigleaf maple contribute to the diversity of tree species here. Shrubs such as western serviceberry, oceanspray, Cascade barberry, and birchleaf mountain mahogany grow throughout the area, along with herbaceous species including pale bellflower, broadleaf starflower, pipsissewa, and Alaska oniongrass. Creamy stonecrop, a flowering succulent, thrives on rocky hillsides. Patches of abundant ferns include coffee cliffbrake and arrowleaf sword fern. Moon Prairie contains a late successional stand of Douglas fir and white fir with Pacific yew, ponderosa pine, and sugar pine.

Old Baldy's high-elevation forests in the northeast include Shasta red fir, mountain hemlock, Pacific silver fir, and western white pine along with Southern Oregon Cascades chaparral. Nearby, Tunnel Creek is a high-altitude lodgepole pine swamp with bog blueberry and numerous sensitive sedge species such as capitate sedge, lesser bladderwort, slender sedge, *tomentypnum* moss, and Newberry's gentian.

The eastern portion of the expansion, in the area surrounding Surveyor Mountain, is home to high desert species such as bitterbrush and sagebrush, along with late successional dry coniferous forests containing lodgepole pine, dry currant, and western white pine.

The Horseshoe Ranch Wildlife Area in Siskiyou County, California, offers particularly significant ecological connectivity and integrity. The area contains a broad meadow ecosystem punctuated by Oregon white oak and western juniper woodlands alongside high desert species such as gray rabbitbrush and antelope bitterbrush. The area is also home to the scarlet fritillary, Greene's mariposa lily, Bellinger's meadowfoam, and California's only population of the endangered Gentner's fritillary.

The incredible biodiversity of plant communities in the expansion is mirrored by equally stunning animal diversity, supported by the wide variety of intact habitats and undisturbed corridors allowing animal migration and movement. Perhaps most notably, the Cascade-Siskiyou landscape, including the Upper Jenny Creek Watershed and the Southern Cascades, provides vitally important habitat connectivity for the threatened northern spotted owl. Other raptors, including the bald eagle, golden eagle, white-tailed kite, peregrine falcon, merlin, great gray owl, sharp-shinned hawk, Cooper's hawk, osprey, American kestrel, northern goshawk, flammulated owl, and prairie falcon, soar above the meadows, mountains, and forests as they seek their prey.

Ornithologists and birdwatchers alike come to the Cascade-Siskiyou landscape for the variety of birds found here. Tricolored blackbird, grasshopper sparrow, bufflehead, black swift, Lewis's woodpecker, purple martin, blue grouse, common nighthawk, dusky flycatcher, lazuli bunting, mountain quail, olive-sided flycatcher, Pacific-slope flycatcher, pileated woodpecker, ruffed grouse, rufous hummingbird, varied thrush, Vaux's swift, western meadowlark, western tanager, white-headed woodpecker, and Wilson's warbler are among the many species of terrestrial birds that make their homes in the expansion area. The Oregon vesper sparrow, among the most imperiled bird species in the region, has been documented in the meadows of the upper Jenny Creek Watershed.

Shore and marsh birds, including the Tule goose, yellow rail, snowy egret, harlequin duck, Franklin's gull, red-necked grebe, sandhill crane, pintail, common goldeneye, bufflehead, greater yellowlegs, and least sandpiper, also inhabit the expansion area's lakes, ponds, and streams.

Diverse species of mammals, including the black-tailed deer, elk, pygmy rabbit, American pika, and northern flying squirrel, depend upon the extraordinary ecosystems found in the area. Beavers and river otters inhabit the landscape's streams and rivers, while Horseshoe Ranch Wildlife Area has been identified as a critical big game winter range. Bat species including the pallid bat, Townsend's big-eared bat, and fringed myotis hunt insects beginning at dusk. The expansion area encompasses known habitat for endangered gray wolves, including a portion of the area of known activity for the Keno wolves. Other carnivores such as the Pacific fisher, cougar, American badger, black bear, coyote, and American marten can be seen and studied in the expansion area.

The landscape also contains many hydrologic features that capture the interest of visitors. Rivers and streams cascade through the mountains, and waterfalls such as Jenny Creek Falls provide aquatic habitat along with scenic beauty. The upper headwaters of the Jenny Creek watershed are vital to the ecological integrity of the watershed as a whole, creating clear cold water that provides essential habitat for fish living at the margin of their environmental tolerances. Fens and wetlands, along with riparian wetlands and wet montane meadows, can be found in the eastern portion of the expansion area. Lost Lake, in the northernmost portion of the expansion area, contains a large lake that serves as Western pond turtle habitat, along with another upstream waterfall.

The expansion area includes habitat for populations of the endemic Jenny Creek sucker and Jenny Creek redband trout, as well as habitat for the Klamath largescale sucker, the endangered shortnose sucker, and the endangered Lost River sucker. The watershed also contains potential habitat for

the threatened coho salmon. Numerous species of aquatic plants grow in the area's streams, lakes, and ponds.

Amphibians such as black salamander, Pacific giant salamander, foothill yellow-legged frog, Cascade frog, the threatened Oregon spotted frog, and the endemic Siskiyou Mountains salamander thrive here thanks to the connectivity between terrestrial and aquatic habitats. Reptiles found in the expansion area include the western pond turtle, northern alligator lizard, desert striped whipsnake, and northern Pacific rattlesnake.

The Cascade-Siskiyou landscape's remarkable biodiversity includes the astounding diversity of invertebrates found in the expansion, including freshwater mollusks like the Oregon shoulderband, travelling sideband, modoc rim sideband, Klamath tailedrop, chase sideband, Fall Creek pebblesnail, Keene Creek pebblesnail, and Siskiyou hesperian. The area has been identified by evolutionary biologists as a center of endemism and diversity for springsnails, and researchers have discovered four new species of mygalomorph spiders in the expansion. Pollinators such as Franklin's bumblebee, western bumblebee, and butterflies including Johnson's hairstreak, gray blue butterfly, mardon skipper, and Oregon branded skipper are critical to the ecosystems' success. Other insects found here include the Siskiyou short-horned grasshopper and numerous species of caddisfly.

The Cascade-Siskiyou landscape has long been a focus for scientific studies of ecology, evolutionary biology, wildlife biology, entomology, and botany. The expansion area provides an invaluable resource to scientists and conservationists wishing to research and sustain the functioning of the landscape's ecosystems into the future.

The expansion area includes numerous objects of scientific or historic interest. This enlargement of the Cascade-Siskiyou National Monument will maintain its diverse array of natural and scientific resources and preserve its cultural and historic legacy, ensuring that the scientific and historic values of this area remain for the benefit of all Americans.

WHEREAS, section 320301 of title 54, United States Code (known as the "Antiquities Act"), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, it is in the public interest to preserve the objects of scientific and historic interest on these public lands as an enlargement of the boundary of the Cascade-Siskiyou National Monument;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be part of the Cascade Siskiyou National Monument and, for the purpose of protecting those objects, reserve as part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached hereto and forms a part of this proclamation. These reserved Federal lands and interests in lands encompass approximately 48,000 acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

Nothing in this proclamation shall change the management of the areas protected under Proclamation 7318. Terms used in this proclamation shall have the same meaning as those defined in Proclamation 7318.

All Federal lands and interests in lands within the boundaries described on the accompanying map are hereby appropriated and withdrawn from

all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

The enlargement of the boundary is subject to valid existing rights. If the Federal Government subsequently acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

The Secretary of the Interior (Secretary) shall manage the area being added to the monument through the Bureau of Land Management as a unit of the National Landscape Conservation System, under the same laws and regulations that apply to the rest of the monument, except that the Secretary may issue a travel management plan that authorizes snowmobile and non-motorized mechanized use off of roads in the area being added by this proclamation, so long as such use is consistent with the care and management of the objects identified above.

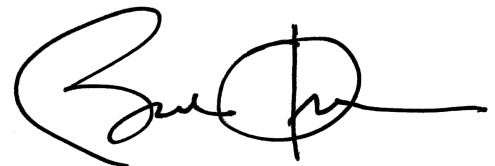
Nothing in this proclamation shall preclude low-level overflights of military aircraft, the designation of new units of special use airspace, or the use or establishment of military flight training routes over the lands reserved by this proclamation consistent with the care and management of the objects identified above.

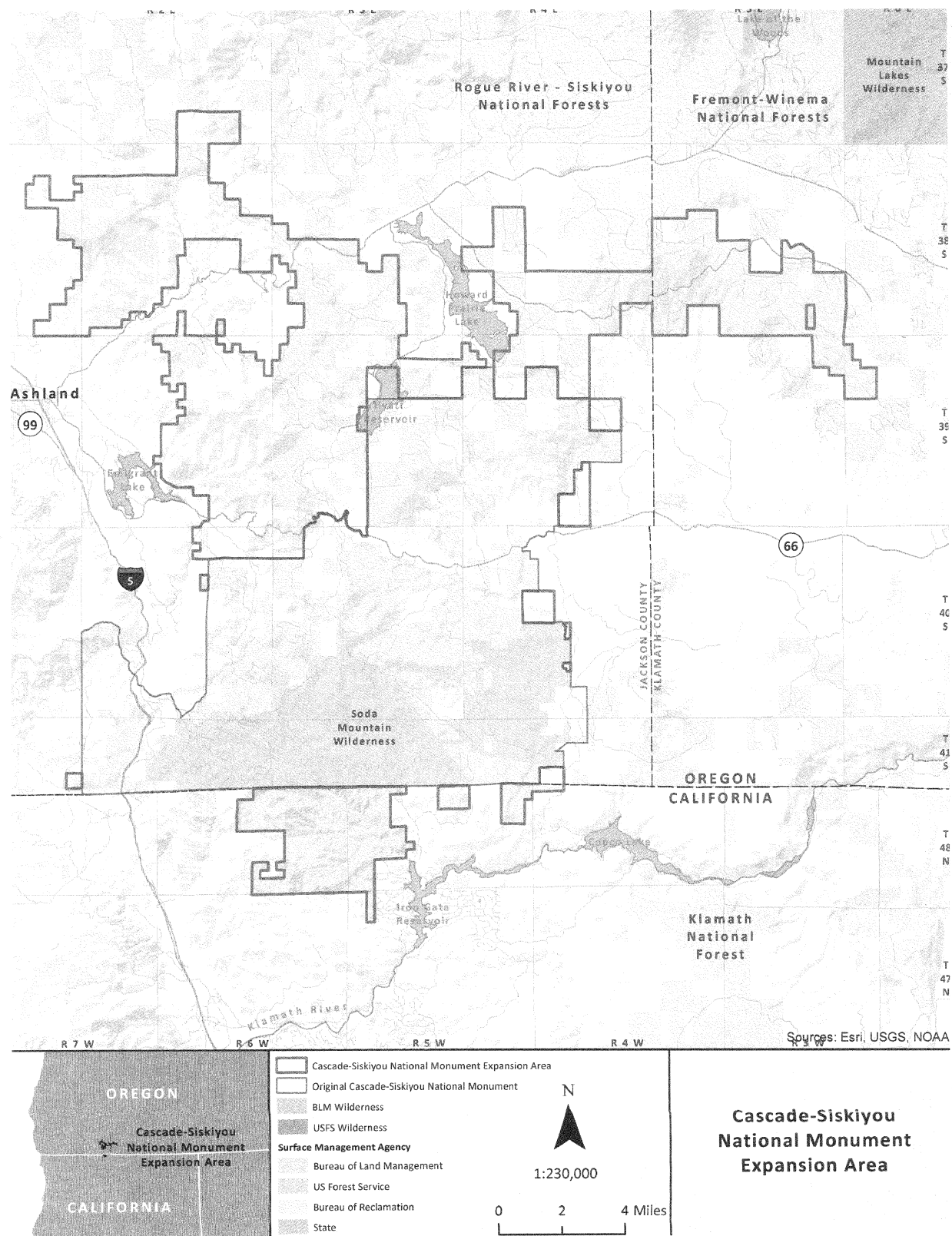
Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Oregon or the State of California with respect to fish and wildlife management.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of January, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-first.





Presidential Documents

Proclamation 9565 of January 12, 2017

Establishment of the Birmingham Civil Rights National Monument

By the President of the United States of America

A Proclamation

The A.G. Gaston Motel (Gaston Motel), located in Birmingham, Alabama, within walking distance of the Sixteenth Street Baptist Church, Kelly Ingram Park, and other landmarks of the American civil rights movement (movement), served as the headquarters for a civil rights campaign in the spring of 1963. The direct action campaign—known as “Project C” for confrontation—challenged unfair laws designed to limit the freedoms of African Americans and ensure racial inequality. Throughout the campaign, Dr. Martin Luther King, Jr., and Reverend Ralph David Abernathy of the Southern Christian Leadership Conference (SCLC), Reverend Fred L. Shuttlesworth of the Alabama Christian Movement for Human Rights (ACMHR), and other movement leaders rented rooms at the Gaston Motel and held regular strategy sessions there. They also staged marches and held press conferences on the premises. Project C succeeded in focusing the world’s attention on racial injustice in America and creating momentum for Federal civil rights legislation that would be enacted in 1964.

The Gaston Motel, the highest quality accommodation in Birmingham in 1963 that accepted African Americans, was itself the product of segregation. Arthur George (A.G.) Gaston, a successful African American businessman whose enterprises addressed the needs of his segregated community, opened the motel in 1954 to provide “something fine that . . . will be appreciated by our people.” In the era of segregation, African Americans faced inconveniences, indignities, and personal risk in their travels. The conveniences and comforts of the Gaston Motel were a rarity for them. The motel hosted many travelers over the years, including business and professional people; celebrities performing in the city; participants in religious, social, and political conferences; and in April–May 1963, the movement leaders, the press, and others who would bring Project C to the world stage. During Project C, King and Abernathy occupied the motel’s main suite, Room 30, located on the second floor above the office and lobby, and they and their colleagues held most of their strategy sessions in the suite’s sitting room.

The events at the Gaston Motel drew attention to State and local laws and customs that—a century after the Civil War—promoted racial inequality. In January 1963, incoming Alabama Governor George Wallace declared, “Segregation now! Segregation tomorrow! Segregation forever!” Birmingham, Alabama’s largest city, was a bastion of segregation, enforced by law, custom, and violence. The city required the separation of races at parks, pools, playgrounds, hotels, restaurants, theaters, on buses, in taxicabs, and elsewhere. Zoning ordinances determined where African Americans could purchase property, and a line of demarcation created a virtual wall around the Fourth Avenue business district that served the African American community. Racial discrimination pervaded housing and employment. Violence was frequently used to intimidate those who dared to challenge segregation. From 1945 to 1963, Birmingham witnessed 60 bombings of African American homes, businesses, and churches, earning the city the nickname “Bombingham.”

By early 1963, civil rights activism was also well established in Birmingham. Civil rights leaders had been spurred into action in 1956 when the State of Alabama effectively outlawed the National Association for the Advancement of Colored People (NAACP). A sheriff served Shuttlesworth, Membership Chairman of the NAACP's Alabama chapter, with an injunction at the organization's regional headquarters in Birmingham's Masonic Temple, where many African American professionals and organizations had their offices. In swift response, Shuttlesworth formed the ACMHR in June 1956, and established its headquarters at his church, Bethel Baptist. Shuttlesworth and the ACMHR spearheaded a church-led civil rights movement in Birmingham: they held mass meetings every Monday night, pursued litigation, and initiated direct action campaigns. The ACMHR and Shuttlesworth established ties with other civil rights organizations, and developed reputations as serious forces in the civil rights movement. As the primary Birmingham contact during the 1961 Freedom Rides, Shuttlesworth and his deacons rescued multiple Freedom Riders, sheltering them at Bethel Baptist Church and its parsonage. Shuttlesworth also worked to cultivate other local protest efforts. In 1962, he supported students from Miles College as they launched a boycott of downtown stores that treated African Americans as second class citizens. A year later some of the same students would participate in Project C.

Shuttlesworth encouraged the SCLC to come to Birmingham. By early 1963, King and his colleagues decided that the intransigence of Birmingham's segregationist power structure, and the strength of its indigenous civil rights movement, created the necessary tension for a campaign that could capture the Nation's—and the Kennedy Administration's—attention, and pressure city leaders to desegregate. In the words of King, "As Birmingham goes, so goes the South."

The plan of the Birmingham campaign was to attack Birmingham's segregated business practices during the busy and lucrative Easter shopping season through nonviolent direct action, including boycotts, marches, and sit-ins. On April 3, 1963, Shuttlesworth distributed a pamphlet entitled "Birmingham Manifesto" to announce the campaign to the press and encourage others to join the cause. Sit-ins at downtown stores began on April 3, as did nightly mass meetings. The first march of the campaign was on April 6, 1963. Participants gathered in the courtyard of the Gaston Motel and started to march toward City Hall, but the police department under the command of Commissioner of Public Safety T. Eugene "Bull" Connor stopped them within three blocks, arrested them, and sent them to jail. The next day, Birmingham police, assisted by their canine corps, again quickly stopped the march from St. Paul United Methodist Church toward City Hall, containing the protesters in Kelly Ingram Park.

Over the next few days, as the possibility of violence increased, some local African American leaders, including A.G. Gaston, questioned Project C. In response, King created a 25-person advisory committee to allow discussion of the leaders' different viewpoints. The advisory committee met daily at the Gaston Motel and reviewed each day's plan.

On April 10, the city obtained an injunction against the marches and other demonstrations from a State court, and served it on King, Abernathy, and Shuttlesworth in the Gaston Motel restaurant at 1:00 a.m. on April 11. During the Good Friday march on April 12, King, Abernathy, and others were arrested. King was placed in solitary confinement, drawing the attention of the Kennedy Administration, which began to monitor developments in Birmingham. While jailed, King wrote his famous "Letter from a Birmingham Jail." His letter was a response to a statement published in the local newspaper by eight moderate white clergymen who supported integration but opposed the direct action campaign as "unwise and untimely." They believed that negotiations and legal processes were the appropriate means to end segregation, and without directly naming him, portrayed King as an outsider

trying to stir up civil unrest. In response, King wrote, "I am in Birmingham because injustice is here."

While King was in jail, the campaign lost momentum. Upon King's release, James Bevel, a young SCLC staffer, proposed what would become known as the "Children's Crusade," a highly controversial strategy aimed at capturing the Nation's attention. On May 2—dubbed D-Day—hundreds of African American teenagers prepared to march from the Sixteenth Street Baptist Church to City Hall. With a crowd of bystanders present, police began arresting young protesters in Kelly Ingram Park. Overwhelmed by the number of protesters, estimated at 1,000, Commissioner Connor called for school buses to transport those arrested to jail. On May 3—Double-D Day—Connor readied his forces for another mass march by stationing police, canine units, and firemen at Kelly Ingram Park. As the young protesters entered the park, authorities ordered them to evacuate the area; when they did not leave, firemen trained their water cannons on them. The high-pressure jets of water knocked them to the ground and tore at their clothing. Connor next deployed the canine corps to disperse the crowd. Police directed six German shepherds towards the crowd and commanded them to attack. Reporters documented the violence, and the next day the country was confronted with dramatic scenes of brutal police aggression against civil rights protesters. These vivid examples of segregation and racial injustice shocked the conscience of the Nation and the world.

The marches and demonstrations continued. Fearing civil unrest and irreparable damage to the city's reputation, on May 8 the Birmingham business community and local leaders agreed to release the peaceful protesters, integrate lunch counters, and begin to hire African Americans. On May 10, 1963, the Gaston Motel served as the site to announce this compromise between local white leaders and civil rights advocates. The motel was bombed around midnight. The bomb blasted a door-sized hole into the reception area below King's second story suite and damaged the water main and electrical lines. King was not in Birmingham at the time. His brother, A.D. King, whose own home in Birmingham had been bombed earlier in the day, worked to calm outraged African Americans and avoid an escalation of violence.

Despite the negotiated peace, African Americans in Birmingham continued to face hostile resistance to integration. That fall, Governor Wallace, in violation of a Federal court order, directed State troopers to prevent desegregation of Alabama public schools. When a Federal court issued injunctions against the troopers, the Governor called out the National Guard. To counter that action, President John F. Kennedy federalized and withdrew the National Guard, thereby allowing desegregation. In response, on September 15, 1963, white supremacists planted a bomb at the Sixteenth Street Baptist Church. Addie Mae Collins, Carole Robertson, and Cynthia Wesley, all of whom were 14, and Denise McNair, 11, were killed. The explosion injured 22 others and left significant damage to the church. King traveled to Birmingham to deliver the eulogy for the little girls. This act of domestic terrorism again shocked the conscience of the Nation and the world.

Public outrage over the events in Birmingham produced political pressure that helped to ensure passage of the Civil Rights Act of 1964, which President Lyndon Johnson signed into law on July 2, 1964. Later that year, the U.S. Supreme Court affirmed the constitutionality of the public accommodation provisions (Title II) of the Act. Several Southern politicians announced that laws must be respected, and across the South outward signs of segregation began to disappear.

Partially as a result of the Federal legislation outlawing discrimination in public accommodations, business at the Gaston Motel suffered. African Americans had more choices in motels and dining. When King returned to Birmingham for an SCLC conference in 1964, he and three dozen colleagues checked into the Parliament House, then considered Birmingham's finest hotel. A.G. Gaston modernized and expanded his motel in 1968, adding

a large supper club and other amenities, but business continued to fall through the 1970s. In 1982, Gaston announced that the motel would be converted into housing for the elderly and handicapped. The use of the property for this purpose ceased in 1996, and the former Gaston Motel has sat vacant ever since.

Although some people continued to resist integration following the events of the early 1960s, the passage of the Civil Rights Act of 1964, and its enforcement by the Department of Justice, had the effect of eliminating official segregation of public accommodations. Today, the Gaston Motel, the Birmingham Civil Rights Historic District in which the motel is located, the Bethel Baptist Church, and other associated resources all stand as a testament to the heroism of those who worked so hard to advance the cause of freedom.

Thus, the sites of these events contain objects of historic interest from a critical period in American history.

WHEREAS, section 320301 of title 54, United States Code (known as the “Antiquities Act”), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, the Birmingham Civil Rights Historic District (Historic District) was listed in the National Register of Historic Places (NRHP) in 2006, as a nationally significant property associated with the climax of the civil rights struggle during the 1956–63 period; and the Historic District contains three key areas and the streets that connect them, covering 36 acres throughout the city; and the Gaston Motel, located in the African American commercial and cultural area known as Northside, is deemed a “major significant resource” in the Historic District;

WHEREAS, many other Birmingham places have been listed and recognized for their historic roles in the Birmingham civil rights story, including by designation as National Historic Landmarks;

WHEREAS, the City of Birmingham has donated to the National Trust for Historic Preservation fee and easement interests in the Gaston Motel, totaling approximately 0.23 acres in fee and 0.65 acres in a historic preservation easement;

WHEREAS, the National Trust for Historic Preservation has relinquished and conveyed all of these lands and interests in lands associated with the Gaston Motel to the Federal Government for the purpose of establishing a unit of the National Park System;

WHEREAS, the designation of a national monument to be administered by the National Park Service would recognize the historic significance of the Gaston Motel in the Birmingham civil rights story and provide a national platform for telling that story;

WHEREAS, the City of Birmingham and the National Park Service intend to cooperate in the preservation, operation, and maintenance of the Gaston Motel, and interpretation and education related to the civil rights struggle in Birmingham;

WHEREAS, it is in the public interest to preserve and protect the Gaston Motel in Birmingham, Alabama and the historic objects associated with it within a portion of the Historic District;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the

Federal Government to be the Birmingham Civil Rights National Monument (monument) and, for the purpose of protecting those objects, reserve as a part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation. The reserved Federal lands and interests in lands encompass approximately 0.88 acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries described on the accompanying map are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

The establishment of the monument is subject to valid existing rights. If the Federal Government acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

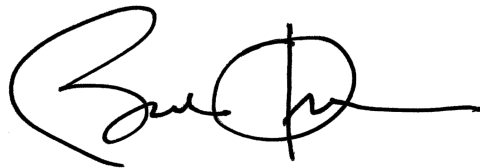
The Secretary of the Interior (Secretary) shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation. The Secretary shall prepare a management plan, with full public involvement and in coordination with the City of Birmingham, within 3 years of the date of this proclamation. The management plan shall ensure that the monument fulfills the following purposes for the benefit of present and future generations: (1) to preserve and protect the objects of historic interest associated with the monument, and (2) to interpret the objects, resources, and values related to the civil rights movement. The management plan shall, among other things, set forth the desired relationship of the monument to other related resources, programs, and organizations, both within and outside the National Park System.

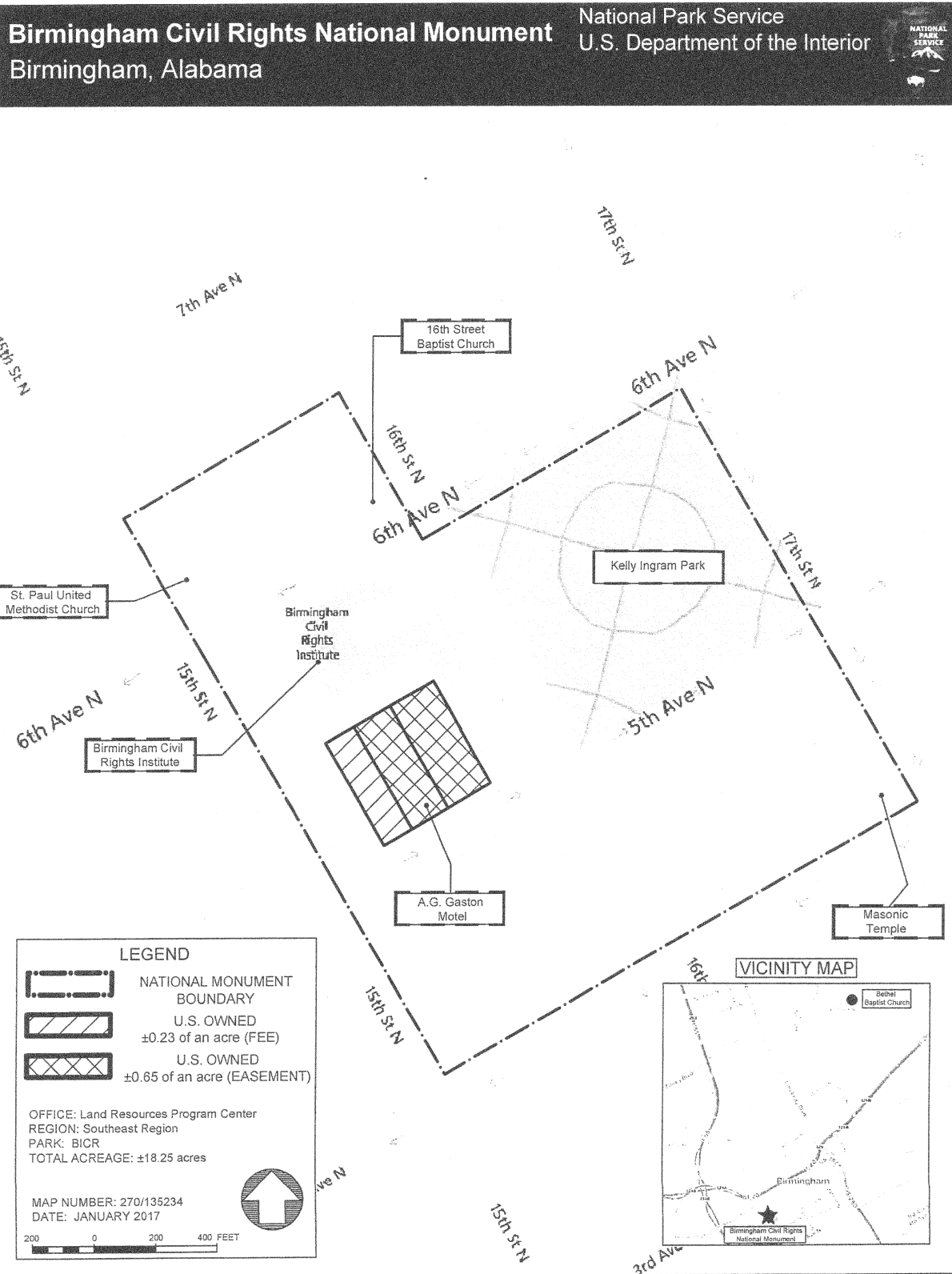
The National Park Service is directed to use applicable authorities to seek to enter into agreements with others, including the City of Birmingham, the Birmingham Civil Rights Institute, the Sixteenth Street Baptist Church, and the Bethel Baptist Church, to address common interests and promote management efficiencies, including provision of visitor services, interpretation and education, establishment and care of museum collections, and preservation of historic objects.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of January, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-first.

A handwritten signature in black ink, appearing to be "Donald Trump", with a large circular flourish and a horizontal line extending to the right.



[FR Doc. 2017-01342

Filed 1-17-17; 11:15 a.m.]

Billing code 4310-10-C

Presidential Documents

Proclamation 9566 of January 12, 2017

Establishment of the Freedom Riders National Monument

By the President of the United States of America

A Proclamation

An interracial group of “Freedom Riders” set out in May 1961 on a journey from Washington, DC, to New Orleans through the Deep South. In organizing the 1961 Freedom Rides, the Congress of Racial Equality (CORE) was building upon earlier efforts of other civil rights organizations, including the 1947 “Journey of Reconciliation,” an integrated bus ride through the segregated Upper South. The purpose of the 1961 Freedom Rides was to test if bus station facilities in the Deep South were complying with U.S. Supreme Court decisions. *Brown v. Board of Education of Topeka* (1954) had reversed the infamous “separate but equal” doctrine in public education, and *Morgan v. Virginia* (1946) and *Boynton v. Virginia* (1960) had struck down Virginia laws compelling segregation in interstate travel.

These rulings were the result of successful litigation brought by the National Association for the Advancement of Colored People, which laid the groundwork for direct action campaigns by civil rights organizations like CORE, the Southern Christian Leadership Conference, and the Student Nonviolent Coordinating Committee (SNCC). These organizations had gathered strength, and by the 1950s had launched mass movements that demonstrated the power of nonviolent protest. At the same time, reaction to the decision in *Brown v. Board of Education* had heightened racial tensions in the country, especially in the Deep South. White Citizens’ Councils, made up of politicians, businessmen, and civic leaders committed to resisting integration, formed throughout the South. In 1956, over 100 members of Congress signed the “Southern Manifesto,” which criticized the *Brown* decision and called for resistance to its implementation. This campaign of massive resistance launched by white segregationists reinforced their determination to assure continued separation of the races in public spaces.

Against this background, on May 4, 1961, in Washington, DC, eleven Freedom Riders split into two groups and boarded two buses, a Greyhound bus and a Trailways bus, bound for New Orleans. The Greyhound bus carrying the first of these groups left Atlanta, Georgia on Sunday, May 14, and pulled into a Greyhound bus station in Anniston, Alabama later that day. There, a segregationist mob, including members of the Ku Klux Klan, violently attacked the Freedom Riders. The attackers threw rocks at the bus, broke windows, and slashed tires. Belatedly, police officers arrived and cleared a path, allowing the bus to depart with a long line of vehicles in pursuit. Two cars pulled ahead of the bus and forced the bus to slow to a crawl. Six miles outside of town, the bus’s slashed tires gave out and the driver stopped on the shoulder of Highway 202. There, with the Freedom Riders onboard, one member of the mob threw a flaming bundle of rags through one of the windows that caused an explosion seconds later. The Freedom Riders struggled to escape as members of the mob attempted to trap them inside the burning bus. When they finally broke free, they received little aid for their injuries. Later that day, deacons dispatched by Reverend Fred L. Shuttlesworth of Birmingham’s Bethel Baptist Church rescued the Freedom Riders from the hostile mob at Anniston Hospital and drove them to Birmingham for shelter at the church. A freelance photojournalist captured the horrific scene of the attack in photographs,

which appeared on the front pages of newspapers across America the next day. The brutal portrayal of segregation in the South shocked many Americans and forced the issue of racial segregation in interstate travel to the forefront of the American conscience.

When the Trailways bus, which had departed Atlanta an hour after the Greyhound bus, arrived in Anniston, the Trailways station was mostly quiet. A group of Klansmen boarded the bus and forcibly segregated the Freedom Riders. With all aboard, the bus left on its two-hour trip to Birmingham during which the Klansmen continued to intimidate and harass the Freedom Riders. When the Trailways bus arrived in Birmingham, a mob of white men and women attacked the Freedom Riders, reporters, and bystanders with fists, iron pipes, baseball bats, and other weapons, while the police department under the charge of Commissioner of Public Safety T. Eugene "Bull" Connor was nowhere to be seen. After fifteen minutes of violence, the mob retreated and the police appeared.

Leaders of the Nashville Student Movement, including members of SNCC, firmly believed that they could not let violence prevail over nonviolence. They organized an interracial group of volunteers to travel to Birmingham and resume the Freedom Rides. Under police protection negotiated with help from the Kennedy Administration, on May 20, these SNCC Freedom Riders departed Birmingham en route to Montgomery, Alabama, where an angry white mob viciously attacked them. The next night, Dr. Martin Luther King, Jr.—who had not been involved in the planning of the Freedom Rides—joined Reverend Ralph David Abernathy and Reverend Shuttlesworth at a mass meeting in Abernathy's First Baptist Church in Montgomery. A white mob gathered outside the church, attacked African American onlookers, and held hostage the civil rights leaders and approximately 1,500 attendees inside the church. King remained in telephone communication with Attorney General Robert F. Kennedy while U.S. marshals attempted to repel the siege. Finally, Governor John Patterson was forced to declare martial law and send in the National Guard.

Media coverage of the Freedom Rides inspired many people to take action and join the effort to end racial inequality. Over the summer of 1961, the number of Freedom Riders grew to over 400, many of whom were arrested and jailed for their activism. The Freedom Rides of 1961 focused national attention on Southern segregationists' disregard for U.S. Supreme Court rulings and the violence that they used to enforce unconstitutional State and local segregation laws and practices. The Freedom Rides forced the Federal Government to take steps to ban segregation in interstate bus travel. On May 29, 1961, Attorney General Kennedy petitioned the Interstate Commerce Commission (ICC) to issue regulations banning segregation, and the ICC subsequently decreed that by November 1, 1961, bus carriers and terminals serving interstate travel had to be integrated.

As described above, the sites of these events contain objects of historic interest from a critical period of American history.

WHEREAS, section 320301 of title 54, United States Code (known as the "Antiquities Act"), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, the City of Anniston has donated to The Conservation Fund fee title to the former Greyhound bus station building in downtown Anniston, Alabama, approximately 0.17 acres of land;

WHEREAS, Calhoun County has donated to The Conservation Fund fee title to the site of the bus burning outside Anniston, Alabama, approximately 5.79 acres of land;

WHEREAS, The Conservation Fund has relinquished and conveyed all of these lands to the United States of America;

WHEREAS, it is in the public interest to preserve and protect the historic objects associated with the former Greyhound bus station in Anniston, Alabama, and the site of the bus burning outside Anniston in Calhoun County, Alabama;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be the Freedom Riders National Monument (monument) and, for the purpose of protecting those objects, reserve as a part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation. The reserved Federal lands and interests in lands encompass approximately 5.96 acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries described on the accompanying map are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

The establishment of the monument is subject to valid existing rights. If the Federal Government acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

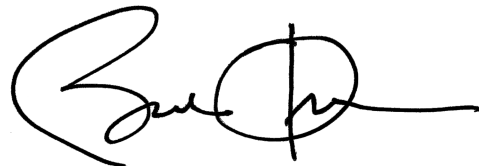
The Secretary of the Interior (Secretary) shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation. The Secretary shall use available authorities, as appropriate, to enter into agreements with others to address common interests and promote management needs and efficiencies.

The Secretary shall prepare a management plan, with full public involvement, within 3 years of the date of this proclamation. The management plan shall ensure that the monument fulfills the following purposes for the benefit of present and future generations: (1) to preserve and protect the objects of historic interest associated with the monument, and (2) to interpret the objects, resources, and values related to the civil rights movement. The management plan shall, among other things, set forth the desired relationship of the monument to other related resources, programs, and organizations, both within and outside the National Park System.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

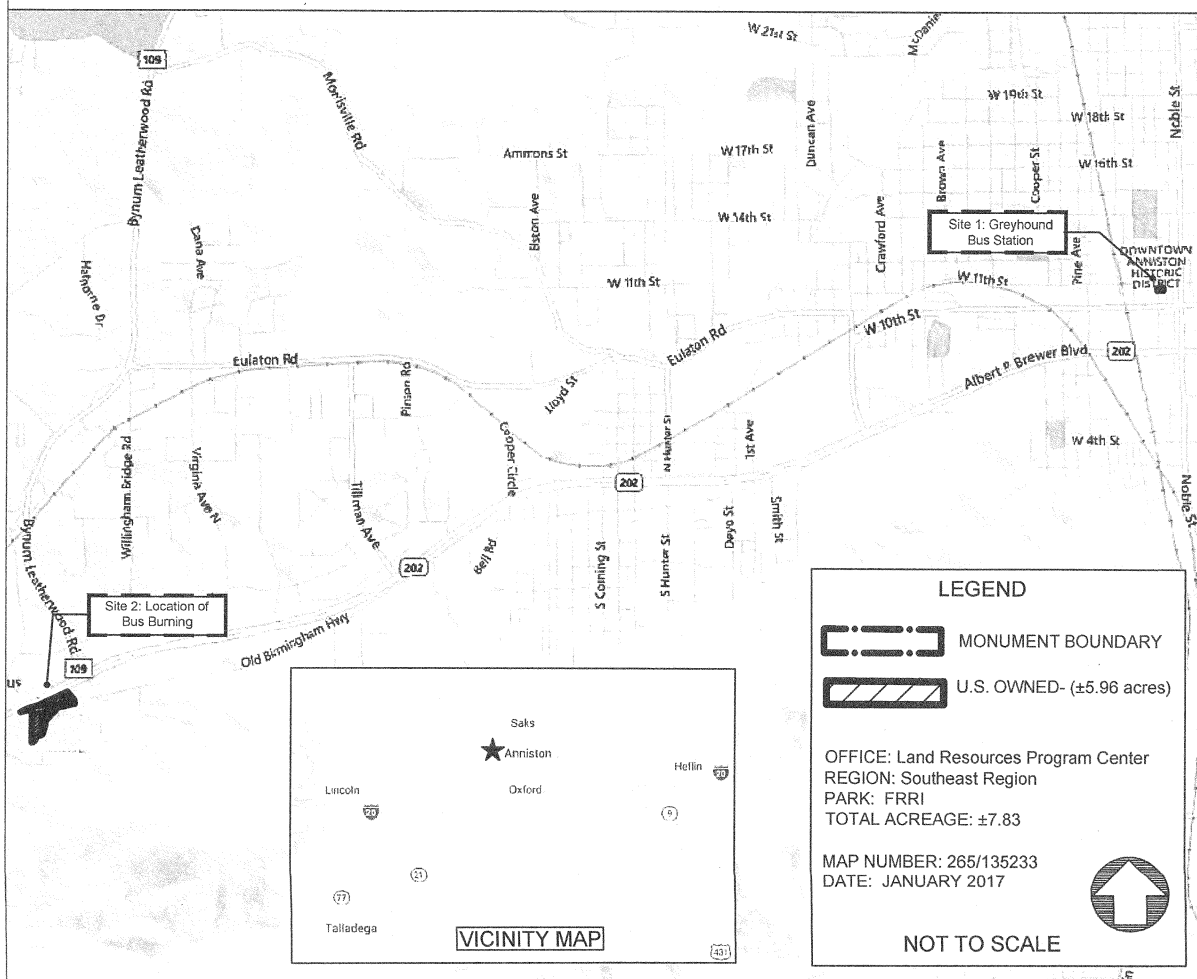
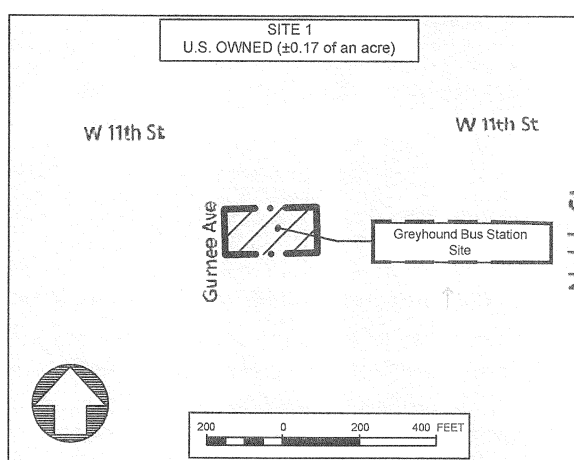
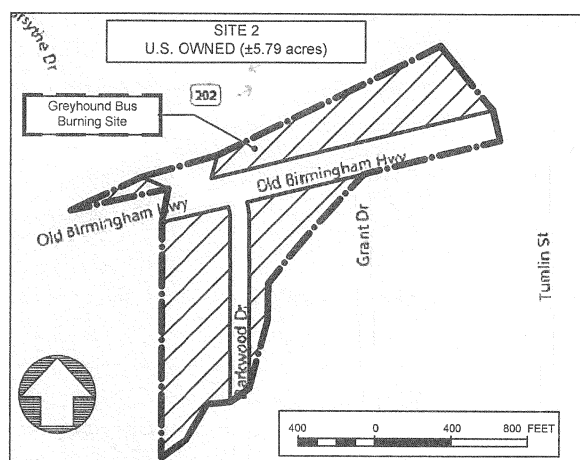
Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of January, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-first.

A handwritten signature in black ink, appearing to be "Donald Trump", with a large circular flourish and a horizontal line extending to the right.

Freedom Riders National Monument Anniston, Alabama

National Park Service
U.S. Department of the Interior



Presidential Documents

Notice of January 13, 2017

Continuation of the National Emergency With Respect to Terrorists Who Threaten To Disrupt the Middle East Peace Process

On January 23, 1995, by Executive Order 12947, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process. On August 20, 1998, by Executive Order 13099, the President modified the Annex to Executive Order 12947 to identify four additional persons who threaten to disrupt the Middle East peace process. On February 16, 2005, by Executive Order 13372, the President clarified the steps taken in Executive Order 12947.

These terrorist activities continue to threaten the Middle East peace process and to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared on January 23, 1995, and the measures adopted to deal with that emergency must continue in effect beyond January 23, 2017. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to foreign terrorists who threaten to disrupt the Middle East peace process.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
January 13, 2017.

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Federal Register

Vol. 82, No. 11

Wednesday, January 18, 2017

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FEDERAL REGISTER PAGES AND DATE, JANUARY

1-710.....	3
711-1138.....	4
1139-1592.....	5
1593-2192.....	6
2193-2848.....	9
2849-3130.....	10
3131-3600.....	11
3601-4148.....	12
4149-4768.....	13
4769-5330.....	17
5331-6166.....	18

CFR PARTS AFFECTED DURING JANUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR	205.....	5431
Proclamations:	250.....	1231
9558.....	319.....	4798
9559.....	1255.....	5438, 5746
9560.....	1260.....	4203
9561.....	3201.....	4206
9562.....		
9563.....	8 CFR	
9564.....	103.....	5238
9565.....	212.....	5238
9566.....	235.....	4769
	274a.....	5238
Executive Orders:	1235.....	4771
11016 (amended by	Proposed Rules:	
13758).....	204.....	3211, 4738
12171 (amended by	216.....	3211, 4738
13760).....		
13067 (Revoked in	9 CFR	
part by 13761).....	201.....	2193
13412 (Revoked by		
13761).....	10 CFR	
13694 (amended by	429.....	1052, 1426
13757).....	430.....	1426, 1786
13757.....	431.....	1052, 5650
13758.....	435.....	2857
13759.....	Proposed Rules:	
13760.....	72.....	5445
13761.....	430.....	1608
Administrative Orders:	431.....	5446
Notices:		
Notice of January 13,	12 CFR	
2017.....	25.....	5354
	195.....	5354
5 CFR	228.....	5354
330.....	345.....	5354
332.....	1083.....	3601
337.....	Proposed Rules:	
339.....	1805.....	2251
2411.....		
2849.....	13 CFR	
9301.....	312.....	3131
Proposed Rules:		
532.....	14 CFR	
9401.....	Ch. I.....	3606
	1.....	2193
7 CFR	23.....	1163, 2193
210.....	25.....	2193
220.....	27.....	2193
271.....	29.....	2193
272.....	39...5, 7, 10, 12, 712, 716, 718,	
273.....	1170, 1172, 1175, 1179,	
274.....	1593, 1595, 3137, 3140,	
275.....	3143, 3146, 4773, 4775,	
276.....	4778, 5356, 5359, 5362,	
277.....	5365	
278.....	61.....	2193, 3149
279.....	68.....	3149
280.....	71.....	720, 1181, 2868, 2870,
281.....		2871, 2873, 3167, 4149
282.....	91.....	2193, 3149
283.....	97.....	3603, 3605
285.....	121.....	2193
Proposed Rules:		
65.....		

125.....2193	305.....1185	801.....2221, 5373	68.....4594
135.....2193	Proposed Rules:	825.....2221, 5373	81.....1603, 2239, 3172
Proposed Rules:	62.....4120	1614.....654, 3170	124.....2230
39.....48, 50, 52, 54, 734, 737,	121.....4226	1903.....5373	171.....952
1252, 1254, 1258, 1260,	23 CFR	1910.....2470	180.....1208, 2897, 2900, 5409
1262, 1265, 1267, 1269,	490.....5886, 5970	1915.....2470	300.....2760
1621, 1623, 1627, 3217,	Proposed Rules:	1926.....2470	704.....3641
5454, 5456	655.....770	2560.....5373	1700.....3173
71.....1276, 1279, 4221, 4222,	24 CFR	2575.....5373	Proposed Rules:
4798	15.....3619	2590.....5373	Ch. I.....3518
15 CFR	35.....4151	30 CFR	7.....2294
740.....2875	891.....3623	100.....5373	9.....2294
742.....2875, 4781	Proposed Rules:	Proposed Rules:	35.....2933
744.....722, 2883	982.....5458	57.....2284	52.....792, 1296, 2295, 2305,
750.....2875	983.....5458	70.....2284	2308, 3233, 3234
774.....2875	25 CFR	72.....2284	62.....3554
Proposed Rules:	Proposed Rules:	75.....2284, 2285	63.....4232
4.....56	30.....5473	250.....1284	81.....792, 2308, 3234
922.....2254, 2269	26 CFR	31 CFR	122.....4233
16 CFR	1.....2046, 2124, 5387, 5388	538.....4793	123.....4233
1500.....2193	31.....2046	Proposed Rules:	141.....4805
Proposed Rules:	301.....2046, 2124	40.....67	143.....4805
1015.....59	Proposed Rules:	32 CFR	320.....3388, 3512
17 CFR	1.....1629, 1645, 5476, 5477	154.....1192	372.....1651
201.....5367	27 CFR	286.....1192	702.....4825
18 CFR	16.....2892	706.....3623	710.....4255
375.....1183	18.....1108	Proposed Rules:	721.....80
388.....1183	19.....1108	2004.....3219	42 CFR
Proposed Rules:	24.....1108	33 CFR	2.....6052
35.....4464	25.....1108	110.....2893	10.....1210
37.....4464	26.....1108	165.....20, 3625, 4794	401.....4974
19 CFR	27.....1108	Ch. II.....1860	405.....4974
360.....1183	28.....1108	401.....4172	409.....4504
Proposed Rules:	30.....1108	Proposed Rules:	410.....4504
133.....4800	Proposed Rules:	100.....2291, 2930, 5480	414.....24
20 CFR	18.....780	117.....787	416.....24
404.....5844	19.....780	165.....789, 4229, 5482	418.....4504
416.....5844	24.....780	401.....1285	419.....24
655.....5373	25.....780	402.....1287	422.....4974
702.....5373	26.....780	36 CFR	423.....4974
725.....5373	27.....780	13.....3626	431.....24, 37
726.....5373	28.....780	1193.....5790	433.....24, 37
Proposed Rules:	30.....780	1194.....5790	438.....24, 37, 5415
725.....739	28 CFR	1195.....2810	440.....24, 37, 4504
21 CFR	16.....725	Proposed Rules:	457.....24, 37
201.....2193	31.....4783	1.....1647, 5485	478.....4974
801.....2193	29 CFR	2.....5485	482.....24
866.....3609	1.....2221	38 CFR	484.....4504
870.....4151	3.....2221	3.....4173	485.....4504
884.....1598	4.....2221	17.....4795	486.....24
888.....2217	5.....2221	Proposed Rules:	488.....24, 4504
1100.....2193	6.....2221	17.....1288	495.....24, 37
1308.....2218	500.....2221, 5373	39 CFR	510.....180
Proposed Rules:	501.....5373	20.....1206	512.....180
101.....4225	505.....2221	265.....2896	1000.....4100
117.....4803	516.....2221	Proposed Rules:	1001.....4100
1308.....2280	519.....2221	111.....2293, 4231	1002.....4100
22 CFR	520.....2221	501.....1294	1006.....4100
35.....3168	525.....2221	40 CFR	Proposed Rules:
103.....3168	530.....2221, 5373	19.....3633	2.....5485
120.....15	547.....2221	22.....2230	424.....3678
121.....2889	549.....2221	51.....3078, 5181	43 CFR
123.....15	553.....2221	52.....22, 792, 912, 1206, 1603,	3160.....2906
126.....15	570.....2221, 5373	2237, 2239, 3078, 3171,	44 CFR
127.....3168	575.....2221	3637, 3639	204.....40
138.....3168	578.....2221, 5373	61.....5142	206.....40
241.....2218	579.....5373	63.....5401	207.....40
	580.....2221		Proposed Rules:
			206.....4064
			45 CFR
			98.....3185
			1171.....44

1230.....1606	48 CFR	48.....4709	177.....5499
2554.....1606	2.....4709, 4716, 5490	49.....4709	178.....5499
	3.....4709, 4716, 4717	52.....4709, 4717, 4724, 5490	179.....5499
46 CFR	4.....4709, 4717, 5490	Ch. I.....4708, 4734	180.....5499
502.....46	5.....4709, 4724	504.....46	571.....3853
503.....2248	6.....4724	516.....2249	1300.....805
Proposed Rules:	7.....4709, 5490		
393.....3250	8.....4709	49 CFR	50 CFR
	9.....4709	360.....5292	17.....3186
47 CFR	11.....5490	365.....5292	229.....3655
0.....4185	12.....4709	366.....5292	635.....3209
1.....4185	14.....4709	368.....5292	648.....3676
Proposed Rules:	15.....4709	383.....2915	665.....5429
1.....3258, 4269	16.....4709	384.....2915	Proposed Rules:
2.....3258	17.....4709	385.....5292	17.....1296, 1657, 1665, 1677
15.....3258	18.....4724	387.....5292	217.....684
25.....3258	19.....4716, 4724	390.....5292	223.....3694, 4276
30.....3258	23.....5490	1002.....4796	224.....4276
54.....4275	27.....4709	Proposed Rules:	300.....5508
64.....4837	31.....4732	171.....5499	600.....4278
73.....3279	32.....4709	172.....5499	622.....810, 1308, 5512
101.....3258	36.....5490	173.....5499	660.....812
	39.....5490	174.....5499	665.....5517
	42.....4709, 5490		679.....2916

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion

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Last List January 11, 2017

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